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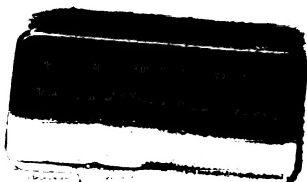
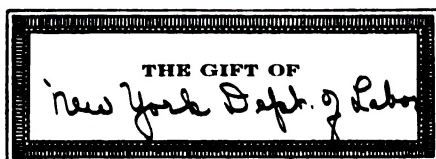
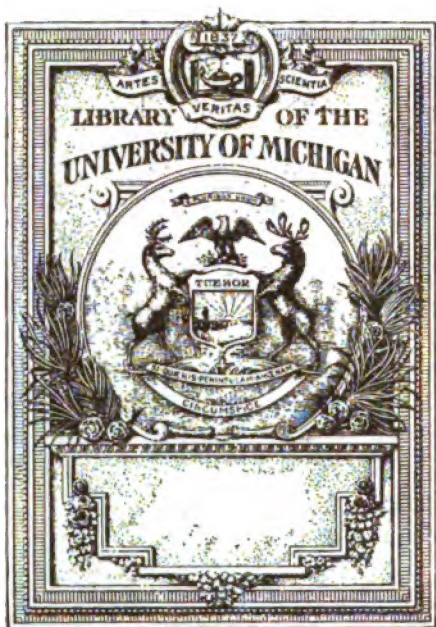
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STATE OF NEW YORK
DEPARTMENT OF LABOR
SPECIAL BULLETINS

Issued Under the Direction of
THE INDUSTRIAL COMMISSION

1918
Nos. 87-90

1919
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ALBANY
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SPECIAL BULLETINS OF 1918

- No. 87. Court Decisions on Workmen's Compensation Law, August,
1916-May, 1918 (Constitutionality and Coverage)
- " 88. New York Labor Laws Enacted in 1918
 - " 89. Health Hazards of the Cloth Sponging Industry
 - " 90. Simple and Inexpensive Respirator for Dust Protection

SPECIAL BULLETINS OF 1919

- " 91. Plan for Shop Safety and Health Organization
- " 92. Weekly Earnings of Women in Five Industries
- " 93. Industrial Replacement of Men by Women
- " 94. New York Labor Laws Enacted in 1919
- " 95. Court Decisions on Workmen's Compensation Law, August,
1916-June, 1919 (other than Constitutionality and
Coverage)
- " 96. Health Hazards of the Chemical Industry

NOTE.—Beginning with 1914 the former quarterly bulletin was superseded by the present series of separate bulletins on particular subjects. As each bulletin stands by itself, a volume arrangement is not followed in this series, but this title-page and list of bulletins is furnished for those desiring to bind the bulletins by years.

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STATE OF NEW YORK

DEPARTMENT OF LABOR

SPECIAL BULLETIN

Issued Under the Direction of

THE INDUSTRIAL COMMISSION

JOHN MITCHELL, Chairman

EDWARD P. LYON

JAMES M. LYNCH

LOUIS WIARD

HENRY D. SAYER

WILLIAM S. COFFEY, Secretary

No. 87: Part I

June, 1918

**COURT DECISIONS ON
WORKMEN'S COMPENSATION LAW
AUGUST, 1916—MAY, 1918**

Part I

Constitutionality and Coverage

Prepared by

THE BUREAU OF STATISTICS AND INFORMATION



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DEPARTMENT OF LABOR
SPECIAL BULLETIN

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JOHN MITCHELL, Chairman
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No. 87: Part I
JUNE, 1918

COURT DECISIONS ON
WORKMEN'S COMPENSATION LAW
AUGUST, 1916—MAY, 1918

Part I
Constitutionality and Coverage

Prepared by
THE BUREAU OF STATISTICS AND INFORMATION

NOTE

This Bulletin (No. 87) which will cover decisions in the period from August, 1916, to May, 1918, is being issued in two parts in order to make possible earlier publication of the material in this issue (Part I.) which relates to the subjects of "Constitutionality" and "Coverage." The part will shortly be followed by Part II which will cover subjects other than constitutionality and coverage.

[2]

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CONTENTS

	PAGE
1. Subject Index.....	5
2. Introduction.....	7
3. Constitutionality.....	11
4. Coverage.....	44
5. List of Cases.....	377

SUBJECT INDEX

	PAGE
Accident, definition of.....	46
Accidents due to disease.....	208
Accommodating another.....	151
Adjunctive or subsidiary work.....	112
Admiralty or maritime jurisdiction.....	320
Agricultural laborers.....	193
Anthrax as an accident.....	51, 210
Appendicitis, aggravated or resulting.....	211
Asleep, injury while.....	154
Assault cause of injury:	
By another than injured employee.....	139
By injured employee.....	141
Attorney-General's opinions:	
Admiralty law, effect of court decisions, etc.....	350
Constitutionality of special prison guard bill.....	42
Blood clot resulting from injury.....	212
Blood poisoning as result of accident.....	212
Boil, bunion or carbuncle, bunking as an accident.....	213
Brain injuries from accident.....	232
Buildings, etc., workers repairing.....	99, 166
Call of nature, injury while attending.....	160
Cancer, aggravated or resulting.....	213
Cases, table of.....	377
Casual employees, compensation of.....	99, 166
Casual tasks performed out of hours.....	149
Catching a ride along highway.....	160
Chorea or St. Vitus's dance, result of accident.....	213
Close cases under Workmen's Compensation Law, § 2.....	57
Coming to or leaving work, injury while.....	117
Constitutionality of Workmen's Compensation Law.....	11
Coverage.....	44
Delirium tremens, result of accident.....	213
Disease.....	208
Domestic servants.....	195
Elective compensation plan.....	88
Embolism resulting from accident.....	212
Employer's failure to secure compensation.....	261
Employment, taking oneself out of the.....	202
Employer acting as employee.....	186
Estoppel relative to rulings in admiralty cases.....	355, 363
Exclusiveness of compensation remedy.....	248
Experimental work, relative to pecuniary gain.....	186
Express messenger service as interstate commerce.....	304
Extra-territoriality.....	283
Eye disease, aggravated or resulting.....	214
Falling asleep, compensation for ensuing accident.....	154
Farm laborers.....	193
Fault as a bar to compensation.....	196
Federal Employer's Liability Act, exclusiveness of.....	290
Federal Safety Appliance Act, interstate commerce relative to.....	314
Fire, injury while watching a.....	153
Hazardous employment, interpretation.....	57
Hernia, aggravated or resulting.....	240
Heart diseases and injuries.....	216, 237
Hip disease and injury.....	219, 240
Hiring men, accident while.....	161
Horseplay.....	165
Idle moment, diversion involving accident during.....	163
Incidentalness of injuries.....	88

6 COURT DECISIONS ON WORKMEN'S COMPENSATION LAW

	PAGE
Independent contractors.....	53
Infection resulting.....	210
Instruments, using other than employer's.....	161
Insurance, employer's failure to take out.....	261
Intentional injury:	
Injured employee committing.....	200
Other than injured employee committing.....	139
Internal bodily injuries.....	232
Interstate and intrastate commerce.....	290
Intestines, injuries to.....	240
Intoxication as a bar to compensation.....	201
Introduction.....	7
Kidney diseases and injuries.....	219, 247
Law, violation as a bar to compensation.....	207
Laundry work, doing own.....	153
Leaving work, injury while.....	117
Machinery, etc., workers installing.....	99, 166
Mail of employer, posting or procuring.....	143
Malnutrition resulting from accident.....	219
Maritime or admiralty jurisdiction.....	320
Medical care and treatment, refusal as a bar to compensation.....	207
Mercurial poisoning.....	219
Negligence not a bar to compensation.....	196
Newspaper, accident while procuring a.....	152
Noon interval, injury during.....	134, 139
Occupation incidental.....	89
Officer acting as employee.....	186
Orders of employer, violation as a bar to compensation.....	203
Outside employees, salesmen and other.....	110
Pecuniary gain.....	166
Pleura, injuries to.....	248
Pneumonia, aggravated or resulting.....	220
Procuring supplies, accident while.....	161
Railroad accidents, compensation for.....	290
Relief of nature, accident while seeking.....	160
Risks, unusual, exposure to.....	165
Rules of employer, violation as a bar to compensation.....	203
Saint Vitus's dance, resulting.....	213
Salesmen and other outside employees.....	110
Servants, domestic.....	195
Slipping:	
On floor of work place.....	158
On public highway.....	156
Smoking during work hours.....	163
Social clubs, etc., pursuit of pecuniary gain.....	181
Stockholder acting as employee.....	186
Syphilis, aggravated by accident.....	220
Table of cases.....	377
Taking oneself out of the employment.....	202
Testicles, injuries to.....	248
Tetanus, resulting.....	223
Third party responsible.....	264
Thrombus resulting from accident.....	212
Tuberculosis, aggravated or resulting.....	224
Typhoid, aggravated by accident.....	230
Unintentional injury by another than injured employee.....	147
Uterine disease, aggravated by accident.....	232
Vehicle passing on highway, injury while jumping on.....	160
Vessels of other states or countries.....	304, 375
Washing up, injury while.....	158
Watchmen.....	89
Willful intention to injure as a bar to compensation.....	200
Work, subsidiary or adjunctive.....	112

INTRODUCTION

This Special Bulletin is in sequence to Special Bulletin Number Eighty-one issued in March, 1917. Bulletin Eighty-one presents the full texts of all New York court and Attorney-General opinions upon workmen's compensation down to August 1, 1916, and of several important court decisions of later date. This Bulletin presents all New York court decisions and Attorney-General opinions upon workmen's compensation subsequent to those of Bulletin Eighty-one, including later decisions upon the cases presented in Bulletin Eighty-one. Its analytical or topical plan is the same as that of Bulletin Eighty-one, but it is issued in two separate parts in order to secure expedition and to include decisions pending while it has been in press. Part one covers the subjects of Constitutionality and Coverage from August 1, 1916, to May 1, 1918; part two covers Treatment and Care, Awards, Insurance Contracts, Evidence and other subjects from August 1, 1916, and Constitutionality and Coverage from May 1, 1918, to date of its issue.

Part one contains the texts of the important decisions of the United States Supreme Court upon Constitutionality, Interstate Commerce and Admiralty, including the decisions in the Washington and Iowa constitutional cases. It calls attention to the acts of Congress and the New York Legislature offsetting the decisions in admiralty and to proposed Congressional acts intended to offset the decision in interstate commerce. Over four hundred appeals from the Commission to the New York courts, involving interstate commerce and admiralty, were pending when the Supreme Court of the United States handed down its decisions. Rehearing of these has been the task of the Commission.

According to the report of the Workmen's Compensation Bureau of the State Industrial Commission for the year ending June 30, 1917, 58,562 compensatable cases came before the Commission during the year, as compared with 50,861 and 40,855, respectively, in the two years preceding. Fifty-five thousand two hundred and twelve of the 58,562 in 1916-17 were disposed of finally by the Commission's deputies, leaving 3,350 for consideration by the Commission proper. The proportion of agreement

cases to claim cases was in the ratio of 70 to 44 as compared with a previous ratio of 70 to 30. Twenty per cent of the agreement cases necessitated public hearings.

According to the report of the Legal Bureau for the same year, appeals were taken from the Commission to the Appellate Division in 488 cases and from the Appellate Division of the Court of Appeals in 53 cases. The Appellate Division affirmed 102 awards and reversed 32; the Court of Appeals affirmed 28 and reversed 10. Well nigh half of the cases before the Appellate Division were withdrawn.

The Workmen's Compensation Law has been extensively amended by a general act originating with the Commission each year since its enactment. In addition to the re-enacting act, L. 1914, ch. 41, effective March 16, 1914, there have been eleven later amendatory acts, namely, L. 1914, ch. 316, effective April 14, 1914; L. 1915, ch. 167, effective April 1, 1915, ch. 168, effective April 1, 1915, ch. 615, effective May 12, 1915, and ch. 674, effective May 22, 1915; L. 1916, ch. 622, effective June 1, 1916; L. 1917, ch. 705, effective July 1, 1917; and L. 1918, ch. 249, effective April 17, 1918, ch. 633, effective May 13, 1918, ch. 634, effective May 13, 1918, and ch. 635, effective May 13, 1918. These transforming changes have extended the law's coverage remarkably and have rapidly put important court decisions out of date. The first precaution in studying any particular decision should be inquiry as to its status under amendments to the Compensation Law subsequent to its rendition. The decisions in this Bulletin show the progress of the courts in interpreting the amendments of 1916.

While the headlines to the texts of court decisions consist of but single references, the table of cases gives full histories. Stenographic notes of hearings on claims are voluminous. The manuscript records of all cases are on file in the Commission's archives. The Commission makes formal findings of fact and rulings of law for every case appealed to the Appellate Division. The stenographic notes of hearings, commission findings, arguments of opposing counsel and other documents relative to each appealed case are printed under one cover for the court's consideration. Some work is being done by way of collecting and preserving these appeal papers in series of bound volumes. Many of the Commission's rulings in cases not subjected to appeal as

well as in appeal cases have been published in the Monthly Bulletin of the State Industrial Commission which has been in course of publication since October, 1915, and in the bi-monthly State Department Reports of New York of which some fourteen bound volumes have been issued by the Miscellaneous Reporter's office. Reference to these two sources appear in this Bulletin under the abbreviations, Bul. and S. D. R., respectively. They duplicate each other in many cases, but now and then supplement each other. Sources for court decisions are indicated in the introduction to Bulletin Eighty-one.

Annually, upon adjournment of the Legislature, the Bureau of Statistics and Information of the Department of Labor issues an edition of the Workmen's Compensation Law with annotations to date, finding list of hazardous employments and general index.

CONSTITUTIONALITY

The Supreme Court of the United States sustained the Workmen's Compensation Law of New York, March 6, 1917, in *New York Central Railroad Co. v. White*. For the decision, it preferred this case to another pending New York case, *Southern Pacific Co. v. Jensen*, by which the Court of Appeals, the highest court of New York, had passed upon and upheld the act. The *White* case had followed the *Jensen* case in point of time in the New York courts and the award of compensation therein had been affirmed by them without opinion. From the point of view of the Supreme Court of the United States the *Jensen* case involved conflict between state and federal jurisdiction while the *White* case did not and was therefore capable of being decided solely upon constitutional merits.

In the main, the United States opinion in the *White* case and the New York opinion in the *Jensen* case make the same points. The Supreme Court of the United States takes occasion, however, to uphold liability without fault. In *Ives v. South Buffalo Railway Co.*, 201 N. Y. 271, Mar. 24, 1911, the Court of Appeals of New York repudiated such liability. The *Ives* decision declared the earlier Workmen's Compensation Law of New York unconstitutional.

Briefly summarized, the opinion of the Supreme Court of the United States in *New York Central Railroad Co. v. White* holds that (1) Employers' liability law is not beyond alteration; (2) Liability may be imposed though fault be entirely absent; (3) The Workmen's Compensation Law of New York is (a) a reasonable exercise of the police power, (b) not unreasonable on grounds of natural justice, (c) not violative of the Fourteenth Amendment to the Constitution of the United States as relates either to due process or to equal protection. The full text of the unanimous decision is as follows:

NEW YORK CENTRAL RAILROAD CO. v. WHITE, 243 U. S. 188, Mar. 6, 1917.

MR. JUSTICE PITNEY delivered the opinion of the court.

A proceeding was commenced by defendant in error before the Workmen's Compensation Commission of the State of New York, established by the

12 COURT DECISIONS ON WORKMEN'S COMPENSATION LAW

Workmen's Compensation Law of that State,¹ to recover compensation from the New York Central & Hudson River Railroad Company for the death of her husband, Jacob White, who lost his life September 2, 1914, through an accidental injury arising out of and in the course of his employment under that company. The Commission awarded compensation in accordance with the terms of the law; its award was affirmed, without opinion, by the Appellate Division of the Supreme Court for the Third Judicial Department, whose order was affirmed by the Court of Appeals, without opinion. 169 App. Div. 903; 216 N. Y. 653. Federal questions having been saved, the present writ of error was sued out by the New York Central Railroad Company, successor, through a consolidation of corporations, to the rights and liabilities of the employing company. The writ was directed to the Appellate Division, to which the record and proceedings had been remitted by the Court of Appeals. *Sioux Remedy Co. v. Cope*, 235 U. S. 197, 200.

The errors specified are based upon these contentions: (1) That the liability, if any, of the railroad company for the death of Jacob White is defined and limited exclusively by the provisions of the Federal Employers' Liability Act of April 22, 1906, c. 149, 35 Stat. 65; and (2) that to award compensation to defendant in error under the provisions of the Workmen's Compensation Law would deprive plaintiff in error of its property without due process of law, and deny to it the equal protection of the laws, in contravention of the Fourteenth Amendment.

The first point assumes that the deceased was employed in interstate commerce at the time he received the fatal injuries. According to the record, he was a night watchman, charged with the duty of guarding tools and materials intended to be used in the construction of a new station and new tracks upon a line of interstate railroad. The Commission found, upon evidence fully warranting the finding, that he was on duty at the time, and at a place not outside of the limits prescribed for the performance of his duties; that he was not engaged in interstate commerce; and that the injury received by him and resulting in his death was an accidental injury arising out of and in the course of his employment.

The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce does not bring the case within the federal act. The test is, "Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558. Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work, which is clearly distinguishable, as was pointed out in *Pederson v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152. And see *Chicago, Burlington & Quincy R. R. Co. v. Harrington*, 241 U. S. 177, 180; *Raymond v. Chicago, Milwaukee & St. Paul Ry. Co.*, this day decided, *ante*, 43. The first point, therefore, is without basis in fact.

We turn to the constitutional question. The Workmen's Compensation Law of New York establishes 42 groups of hazardous employments, defines "employee" as a person engaged in one of these employments upon the

¹ Chap. 816, Laws 1913, as re-enacted and amended by chap. 41, Laws 1914, and amended by chap. 316, Laws 1914.

premises or at the plant or in the course of his employment away from the plant of his employer, but excluding farm laborers and domestic servants; defines "employment" as including employment only in a trade, business, or occupation carried on by the employer for pecuniary gain, "injury" and "personal injury" as meaning only accidental injuries arising out of and in the course of employment, and such disease or infection as naturally and unavoidably may result therefrom; and requires every employer subject to its provisions to pay or provide compensation according to a prescribed schedule for the disability or death of his employee resulting from an accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where it results solely from the intoxication of the injured employee while on duty, in which cases neither the injured employee nor any dependent shall receive compensation. By section 11 the prescribed liability is made exclusive, except that, if an employer fail to secure the payment of compensation as provided in section 50, an injured employee, or his legal representative in case death results from the injury, may at his option elect to claim compensation under the act or to maintain an action in the courts for damages, and in such an action it shall not be necessary to plead or prove freedom from contributory negligence, nor may the defendant plead as a defense that the injury was caused by the negligence of a fellow servant, that the employee assumed the risk of his employment, or that the injury was due to contributory negligence. Compensation under the act is not regulated by the measure of damages applied in negligence suits, but in addition to providing medical, surgical, or other like treatment, it is based solely on loss of earning power, being graduated according to the average weekly wages of the injured employee and the character and duration of the disability, whether partial or total, temporary or permanent; while in case the injury causes death the compensation is known as a death benefit, and includes funeral expenses not exceeding one hundred dollars, payments to the surviving wife (or dependent husband) during widowhood (or dependent widowerhood) of a percentage of the average wages of the deceased, and if there be a surviving child or children under the age of eighteen years an additional percentage of such wages for each child until that age is reached. There are provisions invalidating agreements by employees to waive the right to compensation, prohibiting any assignment, release, or commutation of claims for compensation or benefits except as provided by the act, exempting them from the claims of creditors, and requiring that the compensation and benefits shall be paid only to employees or their dependents. Provision is made for the establishment of a Workmen's Compensation Commission¹ with administrative and judicial functions, including authority to pass upon claims to compensation on notice to the parties interested. The award or decision of the commission is made subject to an appeal, on questions of law only, to the Appellate Division of the Supreme Court for the Third Department, with an ultimate appeal to the Court of Appeals in cases where such an appeal would lie in civil actions. A fund is created, known

¹ By chap. 674, Laws 1915, §§ 2 and 8, this Commission was abolished and its functions were conferred upon the newly created Industrial Commission.

14 COURT DECISIONS ON WORKMEN'S COMPENSATION LAW

as "the state insurance fund," for the purpose of insuring employers against liability under the law and assuring to the persons entitled the compensation thereby provided. The fund is made up primarily of premiums received from employers, at rates fixed by the commission in view of the hazards of the different classes of employment, and the premiums are to be based upon the total payroll and number of employees in each class at the lowest rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve. Elaborate provisions are laid down for the administration of this fund. By section 50, each employer is required to secure compensation to his employees in one of the following ways: (1) by insuring and keeping insured the payment of such compensation in the state fund; or (2) through any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the State; or (3) "By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter." If an employer fails to comply with this section he is made liable to a penalty in an amount equal to the *pro rata* premium that would have been payable for insurance in the state fund during the period of non-compliance; besides which, his injured employees or their dependents are at liberty to maintain an action for damages in the courts, as prescribed by section 11.

In a previous year, the legislature enacted a compulsory compensation law applicable to a limited number of specially hazardous employments, and requiring the employer to pay compensation without regard to fault. Laws 1910, chapter 674. This was held by the Court of Appeals in *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, to be invalid because in conflict with the due process of law provisions of the state constitution and of the Fourteenth Amendment. Thereafter, and in the year 1913, a constitutional amendment was adopted, effective January 1, 1914, declaring:

"Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount for such compensation for death shall not exceed a fixed or determinable sum; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the

enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer."

In December, 1913, the legislature enacted the law now under consideration (Laws 1913, c. 816), and in 1914 re-enacted it (Laws 1914, c. 41) to take effect as to payment of compensation on July 1 in that year. The act was sustained by the Court of Appeals as not inconsistent with the Fourteenth Amendment in *Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514; and that decision was followed in the case at bar.

The scheme of the act is so wide a departure from common-law standards respecting the responsibility of employer to employee that doubts naturally have been raised respecting its constitutional validity. The adverse considerations urged or suggested in this case and in kindred cases submitted at the same time are: (a) that the employer's property is taken without due process of law, because he is subjected to a liability for compensation without regard to any neglect or default on his part or on the part of any other person for whom he is responsible, and in spite of the fact that the injury may be solely attributable to the fault of the employee; (b) that the employee's rights are interfered with, in that he is prevented from having compensation for injuries arising from the employer's fault commensurate with the damages actually sustained, and is limited to the measure of compensation prescribed by the act; and (c) that both employer and employee are deprived of their liberty to acquire property by being prevented from making such agreement as they choose respecting the terms of the employment.

In support of the legislation, it is said that the whole common-law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow-servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment; that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that under the present system the injured workman is left to bear the greater part of industrial accident loss, which because of his limited income he is unable to sustain, so that he and those dependent upon him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees.

In considering the constitutional question, it is necessary to view the matter from the standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed (*Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576); yet, as pointed out by the Court of Appeals in the *Jensen Case*, 215 N. Y. 526, the exemption from further liability is an essential part of the scheme, so that the statute if invalid as against the employee is invalid as against the employer.

The close relation of the rules governing responsibility as between employer and employee to the fundamental rights of liberty and property is of course recognized. But those rules, as guides of conduct, are not beyond alteration

by legislation in the public interest. No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit. *Munn v. Illinois*, 94 U. S. 113, 134; *Hurtado v. California*, 110 U. S. 516, 532; *Martin v. Pittsburg & Lake Erie R. R. Co.*, 203 U. S. 284, 294; *Second Employers' Liability Cases*, 223 U. S. 1, 50; *Chicago & Alton R. R. Co. v. Tranbarger*, 238 U. S. 67, 76. The common law bases the employer's liability for injuries to the employee upon the ground of negligence; but negligence is merely the disregard of some duty imposed by law; and the nature and extent of the duty may be modified by legislation, with corresponding change in the test of negligence. Indeed, liability may be imposed for the consequences of a failure to comply with a statutory duty, irrespective of negligence in the ordinary sense; safety appliance acts being a familiar instance. *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281, 295; *Texas & Pacific Ry. Co. v. Rigby*, 241 U. S. 33, 39, 43.

The fault may be that of the employer himself, or — most frequently — that of another for whose conduct he is made responsible according to the maxim *respondet superior*. In the latter case the employer may be entirely blameless, may have exercised the utmost human foresight to safeguard the employee; yet, if the *alter ego* while acting within the scope of his duties be negligent — in disobedience, it may be, of the employer's positive and specific command — the employer is answerable for the consequences. It cannot be that the rule embodied in the maxim is unalterable by legislation.

The immunity of the employer from responsibility to an employee for the negligence of a fellow employee is of comparatively recent origin, it being the product of the judicial conception that the probability of a fellow workman's negligence is one of the natural and ordinary risks of the occupation, assumed by the employee and presumably taken into account in the fixing of his wages. The earliest reported cases are *Murray v. South Carolina R. R. Co.* (1841), 1 McMull. (S. C.) 385, 398; *Farwell v. Boston & Worcester R. R. Corp.* (1842), 4 Metc. 49, 57; *Hutchinson v. York, Newcastle & Berwick Ry. Co.* (1850), 5 Exch. 343, 351, 19 L. J. Exch. 296, 299, 14 Jur. 837, 840; *Wigmore v. Jay* (1850), 5 Exch. 354, 19 L. J. Exch. 300, 14 Jur. 838, 841; *Bartonshill Coal Co. v. Reid* (1858), 3 Macq. H. L. Cas. 266, 284, 295. And see *Randall v. Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 483; *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, 647. The doctrine has prevailed generally throughout the United States, but with material differences in different jurisdictions respecting who should be deemed a fellow servant and who a vice-principal or *alter ego* of the master, turning sometimes upon refined distinctions as to grades and departments in the employment. See *Knutter v. N. Y. & N. J. Telephone Co.*, 67 N. J. L. 646, 650-653. It needs no argument to show that such a rule is subject to modification or abrogation by a State upon proper occasion.

The same may be said with respect to the general doctrine of assumption of risk. By the common law the employee assumes the risks normally incident to the occupation in which he voluntarily engages; other and extraordinary risks and those due to the employer's negligence he does not assume until made aware of them, or until they become so obvious that an ordinarily prudent man would observe and appreciate them, in either of which cases he does assume them, if he continue in the employment without obtaining from the employer an assurance that the matter will be remedied; but if he

receive such an assurance, then, pending performance of the promise, the employee does not in ordinary cases assume the special risk. *Seaboard Air Line Ry. v. Horton*, 233 U. S. 492, 504; 239 U. S. 596, 599. Plainly, these rules, as guides of conduct and tests of liability, are subject to change in the exercise of the sovereign authority of the State.

So, also, with respect to contributory negligence. Aside from injuries intentionally self-inflicted, for which the statute under consideration affords no compensation, it is plain that the rules of law upon the subject, in their bearing upon the employer's responsibility, are subject to legislative change; for contributory negligence, again, involves a default in some duty resting on the employee, and his duties are subject to modification.

It may be added, by way of reminder, that the entire matter of liability for death caused by wrongful act, both within and without the relation of employer and employee, is a modern statutory innovation, in which the States differ as to who may sue, for whose benefit, and the measure of damages.

But it is not necessary to extend the discussion. This court repeatedly has upheld the authority of the States to establish by legislation departures from the fellow-servant rule and other common-law rules affecting the employer's liability for personal injuries to the employee. *Missouri Pacific Ry. Co. v. Mackey*, 127 U. S. 205, 208; *Minneapolis & St. Louis Ry. Co. v. Herrick*, 127 U. S. 210; *Minnesota Iron Co. v. Kline*, 190 U. S. 593, 598; *Tallis v. Lake Erie & Western R. R. Co.*, 175 U. S. 348; *Louisville & Nashville R. R. Co. v. Melton*, 218 U. S. 36, 53; *Chicago, Indianapolis & Louisville Ry. Co. v. Hackett*, 228 U. S. 559; *Wilmington Star Mining Co. v. Fulton*, 205 U. S. 60, 73; *Missouri Pacific Ry. Co. v. Castle*, 224 U. S. 541, 544. A corresponding power on the part of Congress, when legislating within its appropriate sphere, was sustained in *Second Employers' Liability Cases*, 223 U. S. 1. And see *El Paso & Northeastern Ry. Co. v. Gutierrez*, 215 U. S. 87, 97; *Baltimore & Ohio R. R. Co. v. Interstate Commerce Commission*, 221 U. S. 612, 619.

It is true that in the case of the statutes thus sustained there were reasons rendering the particular departures appropriate. Nor is it necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guaranty of "due process of law," suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast industrial organization of the State of New York, for instance, with hundreds of thousands of plants and millions of wage-earners, each employer on the one hand having embarked his capital, and each employee on the other having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. In-

stead of assuming the entire consequences of all ordinary risks of the occupation, he assumed the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety. We have said enough to demonstrate that, in such an adjustment, the particular rules of the common law affecting the subject-matter are not placed by the Fourteenth Amendment beyond the reach of the law making power of the State; and thus we are brought to the question whether the method of compensation that is established as a substitute transcends the limits of permissible state action.

We will consider, first, the scheme of compensation, deferring for the present the question of the manner in which the employer is required to secure payment.

Briefly, the statute imposes liability upon the employer to make compensation for disability or death of the employee resulting from accidental personal injury arising out of and in the course of the employment, without regard to fault as a cause except where the injury or death is occasioned by the employee's willful intention to produce it, or where the injury results solely from his intoxication while on duty; it graduates the compensation for disability according to a prescribed scale based upon the loss of earning power, having regard to the previous wage and the character and duration of the disability; and measures the death benefits according to the dependency of the surviving wife, husband, or infant children. Perhaps we should add that it has no retrospective effect, and applies only to cases arising some months after its passage.

Of course, we cannot ignore the question whether the new arrangement is arbitrary and unreasonable, from the standpoint of natural justice. Respecting this, it is important to be observed that the act applies only to disabling or fatal personal injuries received in the course of hazardous employment in gainful occupation. Reduced to its elements, the situation to be dealt with is this: Employer and employee, by mutual consent, engage in a common operation intended to be advantageous to both; the employee is to contribute his personal services, and for these he is to receive wages, and ordinarily nothing more; the employer is to furnish plant, facilities, organization, capital, credit, is to control and manage the operation, paying the wages and other expenses, disposing of the product at such prices as he can obtain, taking all the profits, if any there be, and of necessity bearing the entire losses. In the nature of things, there is more or less of a probability that the employee may lose his life through some accidental injury arising out of the employment, leaving his widow or children deprived of their natural support; or that he may sustain an injury not mortal but resulting in his total or partial disablement, temporary or permanent, with corresponding impairment of earning capacity. The physical suffering must be borne by

the employee alone; the laws of nature prevent this from being evaded or shifted to another, and the statute makes no attempt to afford an equivalent in compensation. But, besides, there is the loss of earning power; a loss of that which stands to the employee as his capital in trade. This is a loss arising out of the business, and, however it may be charged up, is an expense of the operation, as truly as the cost of repairing broken machinery or any other expense that ordinarily is paid by the employer. Who is to bear the charge? It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents. Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case but in all cases assuming any loss beyond the prescribed scale.

Much emphasis is laid upon the criticism that the act creates liability without fault. This is sufficiently answered by what has been said, but we may add that liability without fault is not a novelty in the law. The common-law liability of the carrier, of the inn-keeper, of him who employed fire or other dangerous agency or harbored a mischievous animal, was not dependent altogether upon questions of fault or negligence. Statutes imposing liability without fault have been sustained. *St. Louis & San Francisco Ry. Co. v. Mathews*, 165 U. S. 1, 22; *Chicago, Rock Island and Pacific Ry. Co. v. Zernecke*, 183 U. S. 582, 586.

We have referred to the maxim *respondeat superior*. In a well-known English case, *Hall v. Smith*, 2 Bing. 156, 160, this maxim was said by Best, C. J., to be "bottomed on this principle, that he who expects to derive advantage from an act which is done by another for him, must answer for any injury which a third person may sustain from it." And this view has been adopted in New York. *Cardot v. Barney*, 63 N. Y. 281, 287. The provision for compulsory compensation, in the act under consideration, cannot be deemed to be an arbitrary and unreasonable application of the principle, so as to amount to a deprivation of the employer's property without due process of law. The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to one more remote—the primary cause, as it may be deemed—and that is, the employment itself. For this, both parties are responsible, since they voluntarily engage in it as co-adventurers, with personal injury to the employee as a probable and foreseen

result. In ignoring any possible negligence of the employee producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that in modern industry the utmost diligence in the employer's service is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work, the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected, and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the State to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who were entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence.

This, of course, is not to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

But, it is said, the statute strikes at the fundamentals of constitutional freedom of contract; and we are referred to two recent declarations by this court. The first is this: "Included in the right of personal liberty and the right of private property — partaking of the nature of each — is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense." *Coppage v. Kansas*, 236 U. S. 1, 14. And this is the other: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U. S. 33, 41.

It is not our purpose to qualify or weaken either of these declarations in the least. And we recognize that the legislation under review does measurably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the State. In our opinion it is fairly supportable upon that ground. And for this reason: The subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare. "The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the State must suffer." *Holden v. Hardy*, 169 U. S. 366, 367. It cannot be doubted that the State may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared, in bills of rights, to be "natural and inalienable"; and the authority to prohibit

contracts made in derogation of a lawfully established policy of the State respecting compensation for accidental death or disabling personal injury is equally clear. *Chicago, Burlington & Quincy R. R. Co. v. McGuire*, 219 U. S. 549, 571; *Second Employers' Liability Cases*, 223 U. S. 1, 52.

We have not overlooked the criticism that the act imposes no rule of conduct upon the employer with respect to the conditions of labor in the various industries embraced within its terms, prescribes no duty with regard to where the workmen shall work, the character of the machinery, tools, or appliances, the rules or regulations to be established, or the safety devices to be maintained. This statute does not concern itself with measures of prevention, which presumably are embraced in other laws. But the interest of the public is not confined to these. One of the grounds of its concern with the continued life and earning power of the individual is its interest in the prevention of pauperism, with its concomitants of vice and crime. And, in our opinion, laws regulating the responsibility of employers for the injury or death of employees arising out of the employment bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations. *Sherlock v. Alling*, 93 U. S. 99, 103; *Missouri Pacific Ry. Co. v. Castle*, 224 U. S. 541, 545.

No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the Fourteenth Amendment. The denial of a trial by jury is not inconsistent with "due process." *Walker v. Sauvinet*, 92 U. S. 90; *Frank v. Mangum*, 237 U. S. 309, 340.

The objection under the "equal protection" clause is not pressed. The only apparent basis for it is in exclusion of farm laborers and domestic servants from the scheme. But, manifestly, this cannot be judicially declared to be an arbitrary classification, since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar. *Missouri, Kansas & Texas Ry. Co. v. Code*, 233 U. S. 642, 660, and cases there cited.

We conclude that the prescribed scheme of compulsory compensation is not repugnant to the provisions of the Fourteenth Amendment, and are brought to consider, next, the manner in which the employer is required to secure payment of the compensation. By § 50, this may be done in one of three ways: (a) state insurance, (b) insurance with an authorized insurance corporation or association, or (c) by a deposit of securities. The record shows that the predecessor of plaintiff in error chose the third method, and, with the sanction of the commission, deposited securities to the amount of \$300,000, under § 50, and \$30,000 in cash as a deposit to secure prompt and convenient payment, under § 25, with an agreement to make a further deposit if required. This was accompanied with a reservation of all contentions as to the invalidity of the act, and had not the effect of preventing plaintiff in error from raising the questions we have discussed.

The system of compulsory compensation having been found to be within the power of the State, it is within the limits of permissible regulation, in aid of the system, to require the employer to furnish satisfactory proof of his financial ability to pay the compensation, and to deposit a reasonable amount of securities for that purpose. The third clause of § 50 has not been,

and presumably will not be, construed so as to give an unbridled discretion to the commission; nor is it to be presumed that solvent employers will be prevented from becoming self-insurers on reasonable terms. No question is made but that the terms imposed upon this railroad company were reasonable in view of the magnitude of its operations, the number of its employees, and the amount of its payroll (about \$50,000,000 annually); hence no criticism of the practical effect of the third clause is suggested.

This being so, it is obvious that this case presents no question as to whether the State might, consistently with the Fourteenth Amendment, compel employers to effect insurance according to either of the plans mentioned in the first and second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that it is within the power of the State to impose. Regarded as optional arrangements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint. Manifestly, the employee is not injuriously affected in a constitutional sense by the provisions giving to the employer an option to secure payment of the compensation in either of the modes prescribed, for there is no presumption that either will prove inadequate to safeguard the employee's interests.

Judgment affirmed.

At the same time with its decision sustaining the New York act, the Supreme Court of the United States handed down decisions sustaining the workmen's compensation acts of the States of Washington and Iowa. Four of the nine justices dissented from the Washington decision. The Iowa decision was unanimous. The Washington law differs from the New York law in that the State had been made the sole agency for compensation insurance; the Iowa law, in that compensation insurance was optional. The cost of compensation was met in Washington by an occupational tax. The decision in the Washington case opens the way, as concerns the Federal Constitution, for monopoly of workmen's compensation insurance and entire exclusion of private casualty companies by the state government within any State. Since the Washington and Iowa decisions are of vital interest to New York as well as to all other States of the Union, their full texts are inserted here, as follows:

WASHINGTON DECISION

MOUNTAIN TIMBER Co. v. WASHINGTON, 243 U. S. 219, Mar. 6, 1917.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an action brought by the State against plaintiff in error, a corporation engaged in the business of logging timber and operating a logging railroad and a sawmill having power-driven machinery, all in the State of

Washington, to recover under c. 74 of the Laws of 1911, known as the Workmen's Compensation Act, certain premiums based upon a percentage of the estimated payroll of the workmen employed by plaintiff in error during the three months beginning October 1, 1911. Plaintiff in error by demurrer raised objections to the act based upon the Constitution of the United States. The Supreme Court of Washington overruled them, and affirmed a judgment in favor of the State, 75 Washington, 581, following its previous decision in *State, ex rel. Davis-Smith Co. v. Clausen*, 65 Washington, 156; and the case comes here under § 237, Judicial Code.

The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employers and employees in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sole source of compensation for injured employees and for the dependents of those whose injuries result in death. We will recite its provisions to an extent sufficient to show the character of the legislation.

The first section contains a declaration of policy, reciting that the common-law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions, and in practice proves to be economically unwise and unfair; that the remedy of the workman has been uncertain, slow and inadequate; that injuries in such employments, formerly occasional, have become frequent and inevitable; and that the welfare of the State depends upon its industries, and even more upon the welfare of its wage-workers. "The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extra hazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

The second section, declaring that while there is a hazard in all employments, certain employments are recognized as being inherently constantly dangerous, enumerates those intended to be embraced within the term "extra hazardous," including factories, mills, and workshops where machinery is used, printing, electrotyping, photo-engraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gas works, water works, reduction works, breweries, elevators, wharves, docks, dredges, smelters, powder works; logging, lumbering, and shipbuilding operations; logging, street and interurban railroads; steamboats, railroads, and a number of others; at the same time declaring that if there be or arise any extra hazardous occupation not enumerated, it shall come under the act, and its rate of contribution to the accident fund shall be fixed by the Department created by the act upon the basis of the relation which the risk involved bears to the risks classified, until the rate shall be fixed by legislation. The third section contains a

definition of terms, and, among them, "Workman means every person in this state, who, after September 30, 1911, is engaged in the employment of an employer carrying on or conducting any of the industries scheduled or classified in section 4, whether by way of manual labor or otherwise, and whether upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer;" with a proviso giving to a workman injured while away from the plant through the negligence or wrong of another not in the same employ, or, if death results from the injury, to his widow, children, or dependents, an election whether to take under the act or to seek a remedy against the third party. "Injury" is defined as an injury resulting from some fortuitous event, as distinguished from the contraction of disease.

Section 4 contains a schedule of contribution, reciting that industry should bear the greater portion of the burden of the cost of its accidents, and requiring each employer prior to January 15th of each year to pay into the state treasury, in accordance with the schedule, a sum equal to a percentage of his total payroll for the year, "the same being deemed the most accurate method of equitable distribution of burden in proportion to relative hazard." The application of the act as between employers and workmen is made to date from the first day of October, 1911, the payment for that year to be made prior to that date and upon the basis of the payroll of the last preceding three months of operation. At the end of each year an adjustment of accounts is to be made upon the basis of the actual payroll. The schedule divides the various occupations into groups, and imposes various percentages upon the different groups, the lowest being 1½ per cent, in the case of the textile industries, creameries, printing establishments, etc., and the highest being 10 per cent, in the case of powder works. The same section establishes 47 different classes of industry, and declares:

"For the purpose of such payments accounts shall be kept with each industry in accordance with the classification herein provided and no class shall be liable for the depletion of the accident fund from accidents happening in any other class. Each class shall meet and be liable for the accidents occurring in such class. There shall be collected from each class as an initial payment into the accident fund as above specified on or before the 1st day of October, 1911, one-fourth of the premium of the next succeeding year, and one-twelfth thereof at the close of each month after December, 1911: Provided, Any class having sufficient funds credited to its account at the end of the first three months or any month thereafter, to meet the requirements of the accident fund, that class shall not be called upon for such month. In case of accidents occurring in such class after lapsed payment or payments said class shall pay the said lapsed or deferred payments commencing at the first lapsed payment, as may be necessary to meet such requirements of the accident fund. The fund thereby created shall be termed the 'accident fund' which shall be devoted exclusively to the purpose specified for it in this act. *In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration, the rates in this section named are subject to future adjustment by the legislature, and the classifications to rearrangement following any relative increase or decrease of hazard shown*

by experience.¹ . . . If, after this act shall have come into operation, it is shown by experience under the act, because of poor or careless management, any establishment or work is unduly dangerous in comparison with other like establishments or works, the department may advance its classification of risks and premium rates in proportion to the undue hazard. In accordance with the same principle, any such increase in classification or premium rate, shall be subject to restoration to the schedule rate. . . . If, at the end of any year, it shall be seen that the contribution to the accident fund by any class of industry shall be less than the drain upon the fund on account of that class, the deficiency shall be made good to the fund on the 1st day of February of the following year by the employers of that class in proportion to their respective payments for the past year."

Section 5 contains a schedule of the compensation to be awarded out of the accident fund to each injured workman, or to his family or dependents in case of his death, and declares that except as in the act otherwise provided such payment shall be in lieu of any and all rights of action against any person whomsoever. Where death results from the injury, the compensation includes the expenses of burial, not exceeding \$75 in any case, a monthly payment of \$20 for the widow or invalid widower, to cease at remarriage, and \$5 per month for each child under the age of 16 years until that age is reached, but not exceeding \$35 in all, with a lump sum of \$240 to a widow upon her remarriage; if the workman leaves no wife or husband, but a child or children under the age of 16 years, there is to be a monthly payment of \$10 to each child until that age is reached, but not exceeding a total of \$35 per month; if there be no widow, widower, or child under the age of 16 years, other dependent relatives are to receive monthly payments equal to 50 per cent. of the average monthly support actually received by such dependent from the workman during the twelve months next preceding his injury, but not exceeding a total of \$20 per month. For permanent total disability of a workman, he is to receive if unmarried \$20, or, if married, \$25 per month, with \$5 per month additional for each child under the age of 16 years, but not exceeding \$35 per month in all. (Section 7 provides that the monthly payment, in case of death or permanent total disability, may be converted into a lump sum payment, not in any case exceeding \$4,000, according to the expectancy of life.) For temporary disability there is a somewhat different scale, compensation to cease when earning power is restored. For permanent partial disability the workman is to receive compensation in a lump sum equal to the extent of the injury, but not exceeding \$1,500.

By § 6, if injury or death results to a workman from his deliberate intention to produce it, neither he nor his widow, child, or dependents shall receive any payment out of the fund. If injury or death results to a workman from the deliberate intention of the employer to produce it, the workman or his

¹ By Sess. Laws 1915, c. 188, p. 674, 677, § 4 was amended so as to substitute in the place of the clause italicized the following: "In that the intent is that the fund created under this section shall ultimately become neither more nor less than self-supporting, exclusive of the expense of administration, the rates named in this section are subject to future adjustment by the industrial insurance department, in accordance with any relative increase or decrease in hazard shown by experience, and if in the judgment of the industrial insurance department the moneys paid into the fund of any class or classes shall be insufficient to properly and sufficiently distribute the burden of expense of accidents occurring therein, the department may divide, rearrange or consolidate such class or classes, making such adjustment or transfer of funds as it may deem proper."

of the employer are to be made whether injuries have befallen his own employees or not, so that however prudently one may manage his business, even to the point of immunity to his employees from accidental injury or death, he nevertheless is required to make periodical contributions to a fund for making compensation to the injured employees of his perhaps negligent competitors.

In the present case the Supreme Court of Washington (75 Washington, 581, 583), sustained the law as a legitimate exercise of the police power, referring at the same time to its previous decision in the *Olaveen Case*, 65 Washington, 156, 203, 207, which was rested principally upon that power, but also (pp. 203, 207), sustained the charges imposed upon employers engaged in the specified industries as possessing the character of a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purposes of regulation. We are not here concerned with any mere question of construction, nor with any distinction between the police and the taxing powers. The question whether a state law deprives a party of rights secured by the Federal Constitution depends not upon how it is characterized, but upon its practical operation and effect. *Henderson v. Mayor of New York*, 92 U. S. 259, 268; *Stockard v. Morgan*, 185 U. S. 27, 36; *Galeston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U. S. 217, 227; *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1, 28, 30; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 162; *St. Louis Southwestern Ry. Co. v. Arkansas*, 235 U. S. 350, 362. And the Federal Constitution does not require a separate exercise by the States of their powers of regulation and of taxation. *Gundling v. Chicago*, 177 U. S. 183, 189.

Whether this legislation be regarded as a mere exercise of the power of regulation, or as a combination of regulation and taxation, the crucial inquiry under the Fourteenth Amendment is whether it clearly appears to be not a fair and reasonable exertion of governmental power, but so extravagant or arbitrary as to constitute an abuse of power. All reasonable presumptions are in favor of its validity, and the burden of proof and argument is upon those who seek to overthrow it. *Erie R. R. Co. v. Williams*, 233 U. S. 685, 699. In the present case it will be proper to consider: (1) Whether the main object of the legislation is, or reasonably may be deemed to be, of general and public moment, rather than of private and particular interest, so as to furnish a just occasion for such interference with personal liberty and the right of acquiring property as necessarily must result from carrying it into effect. (2) Whether the charges imposed upon employers are reasonable in amount, or, on the other hand, so burdensome as to be manifestly oppressive. And (3) whether the burden is fairly distributed, having regard to the causes that give rise to the need for the legislation.

As to the first point: The authority of the States to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people, carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state regulation and administration. *Lawton v. Steele*, 152 U. S. 133, 136. "The police power of a State is as broad and plenary as its taxing power." *Kidd v. Pearson*, 128 U. S. 1, 26. In *Barbier v. Connolly*, 113 U. S. 27, 31, the court, by Mr. Justice Field, said: "Neither the [fourteenth] amendment—broad and comprehensive as it is—nor any other

amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.” It seems to us that the considerations to which we have adverted in *New York Central R. R. Co. v. White*, *supra*, as showing that the Workmen’s Compensation Law of New York is not to be deemed arbitrary and unreasonable from the standpoint of natural justice, are sufficient to support the State of Washington in concluding that the matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies. Certainly the operation of industrial establishments that in the ordinary course of things frequently and inevitably produce disabling or mortal injuries to the human beings employed is not a matter of wholly private concern. It hardly would be questioned that the State might expend public moneys to provide hospital treatment, artificial limbs, or other like aid to persons injured in industry and homes or support for the widows and orphans of those killed. Does direct compensation stand on a less secure ground? A familiar exercise of state power is the grant of pensions to disabled soldiers and to the widows and dependents of those killed in war. Such legislation usually is justified as fulfilling a moral obligation or as tending to encourage the performance of the public duty of defense. But is the State powerless to compensate, with pensions or otherwise, those who are disabled, or the dependents of those whose lives are lost, in the industrial occupations that are so necessary to develop the resources and add to the wealth and prosperity of the State? A machine as well as a bullet may produce a wound, and the disabling effect may be the same. In a recent case, the Supreme Court of Washington said: “Under our statutes the workman is the soldier of organized industry accepting a kind of pension in exchange for absolute insurance on his master’s premises.” *Storis v. Industrial Insurance Commission*, 158 Pac. Rep. 256, 263. It is said that the compensation or pension under this law is not confined to those who are left without means of support. This is true. But is the State powerless to succor the wounded except they be reduced to

the last extremity? Is it debarred from compensating an injured man until his own resources are first exhausted? This would be to discriminate against the thrifty and in favor of the improvident. The power and discretion of the State are not thus circumscribed by the Fourteenth Amendment.

Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? If not warranted by any just occasion, the least imposition is oppressive. But that point is covered by what has been said. Taking the law, therefore, to be justified by the public nature of the object, whether as a tax or as a regulation, the question whether the charges are excessive remains. Upon this point no particular contention is made that the compensation allowed is unduly large; and it is evident that unless it be so the corresponding burden upon the industry cannot be regarded as excessive if the State is at liberty to impose the entire burden upon the industry. With respect to the scale of compensation, we repeat what we have said in *New York Central R. R. Co. v. White*, that in sustaining the law we do not intend to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable, and that any question of that kind may be met when it arises.

Upon the third question—the distribution of the burden—there is no criticism upon the act in its details. As we have seen, its fourth section prescribes the schedule of contribution, dividing the various occupations into groups, and imposing various percentages evidently intended to be proportioned to the hazard of the occupations in the respective groups. Certainly the application of a proper percentage to the pay-roll of the industry cannot be deemed an arbitrary adjustment in view of the legislative declaration that it is “deemed the most accurate method of equitable distribution of burden in proportion to relative hazard.” It is a matter of common knowledge that in the practice of insurers the pay-roll frequently is adopted as the basis for computing the premium. The percentages seem to be high; but when these are taken in connection with the provisions requiring accounts to be kept with each industry in accordance with the classification, and declaring that no class shall be liable for the depletion of the accident fund from accidents happening in any other class, and that any class having sufficient funds to its credit at the end of the first three months or any month thereafter is not to be called upon, it is plain that, after the initial payment, which may be regarded as a temporary reserve, the assessments will be limited to the amounts necessary to meet actual losses. As further rebutting the suggestion that the imposition is exorbitant or arbitrary, we should accept the declaration of intent that the fund shall ultimately become neither more nor less than self-supporting, and that the rates are subject to future adjustment by the legislature and the classifications to rearrangement according to experience, as plain evidence of an intelligent effort to limit the burden to the requirements of each industry.

We may conveniently answer at this point the objection that the act goes too far in classifying as hazardous large numbers of occupations that are not in their nature hazardous. It might be sufficient to say that this is no concern of plaintiff in error, since it is not contended that its businesses of logging timber, operating a logging railroad, and operating a sawmill with power-driven machinery, or either of them, are non-hazardous. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544. But further, the question

whether any of the industries enumerated in § 4 is non-hazardous will be proved by experience, and the provisions of the act themselves give sufficient assurance that if in any industry there be no accident there will be no assessment, unless for expenses of administration. It is true that, while the section as originally enacted provided for advancing the classification of risks and premium rates in a particular establishment shown by experience to be unduly dangerous because of poor or careless management, there was no corresponding provision for reducing a particular industry shown by experience to be included in a class which imposed upon it too high a rate. This was remedied by the amendment of 1916, quoted in the margin, above, which, however, cannot affect the decision of the present case. But in the absence of any particular showing of erroneous classification—and there is none—the evident purpose of the original act to classify the various occupations according to the respective hazard of each is sufficient answer to any contention of improper distribution of the burden amongst the industries themselves.

There remains, therefore, only the contention that it is inconsistent with the due process and equal protection clauses of the Fourteenth Amendment to impose the entire cost of accident loss upon the industries in which the losses arise. But if, as the legislature of Washington has declared in the first section of the act, injuries in such employments have become frequent and inevitable, and if, as we have held in *New York Central R. R. Co. v. White*, the State is at liberty, notwithstanding the Fourteenth Amendment, to disregard questions of fault in arranging a system of compensation for such injuries, we are unable to discern any ground in natural justice or fundamental right that prevents the State from imposing the entire burden upon the industries that occasion the losses. The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the pay-roll, the repair account, or any other item of cost. The plan of assessment insurance is closely followed, and none more just has been suggested as a means of distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them.

We are clearly of the opinion that a State, in the exercise of its power to pass such legislation as reasonably is deemed to be necessary to promote the health, safety, and general welfare of its people, may regulate the carrying on of industrial occupations that frequently and inevitably produce personal injuries and disability with consequent loss of earning power among the men and women employed, and, occasionally, loss of life of those who have wives and children or other relations dependent upon them for support, and may require that these human losses shall be charged against the industry, either directly, as is done in the case of the act sustained in *New York Central R. R. Co. v. White*, *supra*, or by publicly administering the compensation and distributing the cost among the industries affected by means of a reasonable system of occupation taxes. The act cannot be deemed oppressive to any class of occupation, provided the scale of compensation is reasonable, unless the loss of human life and limb is found in experience to be so great that if charged to the industry it leaves no sufficient margin for reasonable profits. But certainly, if any industry involves so great a human wastage as to leave no fair profit beyond it, the State is at liberty, in the

interest of the safety and welfare of its people, to prohibit such an industry altogether.

To the criticism that carefully managed plants are in effect required to contribute to make good the losses arising through the negligence of their competitors, it is sufficient to say that the act recognizes that no management, however careful, can afford immunity from personal injuries to employees in the hazardous occupations, and prescribes that negligence is not to be determinative of the question of the responsibility of the employer or the industry. Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry they will occur, we deem that the State acted within its power in declaring that no employer should conduct such an industry without making stated and fairly apportioned contributions adequate to maintain a public fund for indemnifying injured employees and the dependents of those killed, irrespective of the particular plant in which the accident might happen to occur. In short, it cannot be deemed arbitrary or unreasonable for the State, instead of imposing upon the particular employer entire responsibility for losses occurring in his own plant or work, to impose the burden upon the industry through a system of occupation taxes limited to the actual losses occurring in the respective classes of occupation.

The idea of special excise taxes for regulation and revenue proportioned to the special injury attributable to the activities taxed is not novel. In *Noble State Bank v. Haskell*, 219 U. S. 104, this court sustained an Oklahoma statute which levied upon every bank existing under the laws of the State an assessment of a percentage of the bank's average deposits, for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks. There, as here, the collection and distribution of the fund were made a matter of public administration, and the fund was created not by general taxation but by a special imposition in the nature of an occupation tax upon all banks existing under the laws of the State. In *Hendrick v. Maryland*, 235 U. S. 610, 622, and *Kane v. New Jersey*, 242 U. S. 160, 169, we sustained laws, of a kind now familiar, imposing license fees upon motor vehicles, graduated according to horse power, so as to secure compensation for the use of improved roadways from a class of users for whose needs they are essential and whose operations over them are peculiarly injurious. And see *Charlotte, Columbia & Augusta R. R. Co. v. Gibbs*, 142 U. S. 386, 394-5, and cases cited. Many of the States have laws protecting the sheep industry by imposing a tax upon dogs in order to create a fund for the remuneration of sheep-owners for losses suffered by the killing of their sheep by dogs. And the tax is imposed upon all dog-owners, without regard to the question whether their particular dogs are responsible for the loss of sheep. Statutes of this character have been sustained by the state courts against attacks based on constitutional grounds. *Morey v. Brown*, 42 N. H. 373, 375; *Tenney, Chairman, v. Lenz*, 16 Wisconsin, 566; *Mitchell v. Williams*, 27 Indiana, 62; *Van Horn v. People*, 46 Michigan, 183, 185, 186; *Longyear v. Buck*, 83 Michigan, 236, 240; *Cole v. Hall, Collector*, 103 Illinois, 30; *Holst v. Roe*, 39 Ohio St. 340, 344; *McGlone, Sheriff, v. Womack*, 129 Kentucky, 274, 283 *et seq.*

We are unable to find that the act, in its general features, is in conflict with the Fourteenth Amendment. Numerous objections are urged, founded

upon matters of detail, but they call for no particular mention, either because they are plainly devoid of merit, are covered by what we have said, or are not such as may be raised by plaintiff in error.

Perhaps a word should be said respecting a clause in section 4 which reads as follows: "It shall be unlawful for the employer to deduct or obtain (*sic*) any part of the premium required by this section to be by him paid from the wages or earnings of his workmen or any of them, and the making or attempt to make any such deductions shall be a gross misdemeanor." If this were to be construed so broadly as to prohibit employers and employees, in agreeing upon wages and other terms of employment, from taking into consideration the fact that the employer was a contributor to the state fund, and the resulting effect of the act upon the rights of the parties, it would be open to serious question whether as thus construed it did not interfere to an unconstitutional extent with their freedom of contract. So far as we are aware the clause has not been so construed, and on familiar principles we will not assume in advance that a construction will be adopted such as to bring the law into conflict with the Federal Constitution. *Backtel v. Wilson*, 204 U. S. 36, 40; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546.

Judgment affirmed.

THE CHIEF JUSTICE, MR. JUSTICE McKENNA, MR. JUSTICE VAN DEVANTER and MR. JUSTICE MOREYNOLDS dissent.

IOWA DECISION.

HAWKINS v. BLEAKLY, 243 U. S. 210, Mar. 6, 1917.

MR. JUSTICE PITNEY delivered the opinion of the court.

This is a suit in equity, brought by appellant in the United States District Court, to restrain the enforcement of an act of the General Assembly of the State of Iowa, approved April 18, 1913, relating to employers' liability and workmen's compensation; it being chapter 147 of Laws of Iowa, 35 G. A.; embraced in Iowa Code, Supp. of 1913, section 2477m. The bill sets forth that complainant is an employer of laborers within the meaning of the act, but has rejected its provisions, alleges that the statute is in contravention of the federal and state constitutions, etc., etc. A motion to dismiss was sustained by the District Court (220 Fed. Rep. 378), and the case comes here by direct appeal, because of the constitutional question, under section 238, Judicial Code.

Since the decision below, the Supreme Court of Iowa, in an able and exhaustive opinion, has sustained the act against all constitutional objections, at the same time construing some of its provisions. *Hunter v. Colfax Consolidated Coal Co.*, 154 N. W. Rep. 1037; 157 N. W. Rep. 145. Hence no objection under the state constitution is here pressed, and we of course accept the construction placed upon the act by the state court of last resort.

As to private employers, it is an elective workmen's compensation law, having the same general features found in the recent legislation of many of the States, sustained by their courts. See *Opinion of Justices*, 209 Massachusetts, 607; *Young v. Duncan*, 218 Massachusetts, 346; *Borgnis v. Falk Co.*, 147 Wisconsin, 327; *State, ex rel. Yaple v. Creamer*, 85 Ohio St. 349; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571; *Seaton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85; 86 N. J. L. 701; *Deibeikis v. Link-Belt Co.*, 261 Illinois, 454;

Crooks v. Tazewell Coal Co., 263 Illinois, 343; *Victor Chemical Works v. Industrial Board*, 274 Illinois, 11; *Mathison v. Minneapolis Street Ry. Co.*, 126 Minnesota, 286; *Shade v. Cement Co.*, 92 Kansas, 146; 93 Kansas, 257; *Sayles v. Foley* (R. I.), 96 Atl. Rep. 340; *Greene v. Caldwell*, 170 Kentucky, 571; *Middleton v. Texas Power & Light Co.* (Tex.), 185 S. W. Rep. 556. The main purpose of the act is to establish, in all employments except those of household servants, farm laborers, and casual employees, a system of compensation according to a prescribed schedule for all employees sustaining injuries arising out of and in the course of the employment and producing temporary or permanent disability, total or partial, and, in case of death resulting from such injuries, a contribution towards the support of those dependent upon the earnings of the employee; the compensation in either case to be paid by the employer in lieu of other liability, and acceptance of the terms of the act being presumed unless employer or employee gives notice of an election to reject them. To this main purpose no constitutional objection is raised, the attack being confined to particular provisions of the law.

Some of appellant's objections are based upon the ground that the employer is subjected to a species of duress in order to compel him to accept the compensation features of the act, since it is provided that an employer rejecting these features shall not escape liability for personal injury sustained by an employee arising out of and in the usual course of the employment because the employee assumed the risks of the employment, or because of the employee's negligence unless this was willful and with intent to cause the injury or was the result of intoxication, or because the injury was caused by the negligence of a co-employee. But it is clear, as we have pointed out in *New York Central R. R. Co. v. White*, decided this day, *ante*, 188, that the employer has no vested right to have these so-called common-law defenses perpetuated for his benefit, and that the Fourteenth Amendment does not prevent a State from establishing a system of workmen's compensation without the consent of the employer, incidentally abolishing the defenses referred to.

The same may be said as to the provision that in an action against an employer who has rejected the act it shall be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to rebut the presumption of negligence. In addition, we may repeat that the establishment of presumptions, and of rules respecting the burden of proof, is clearly within the domain of the state governments, and that a provision of this character, not unreasonable in itself and not conclusive of the rights of the party, does not constitute a denial of due process of law. *Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed*, 219 U. S. 35, 42.

Objection is made to the provision in section 3, that where an employee elects to reject the act he shall state in an affidavit who, if anybody, requested or suggested that he should do so, and if it be found that the employer or his agent made such a request or suggestion, the employee shall be conclusively presumed to have been unduly influenced, and his rejection of the act shall be void. Passing the point that appellant is an employer, and will not be heard to raise constitutional objections that are good only from the standpoint of employees (*Hatch v. Reardon*, 204 U. S. 152, 160; *Rosenthal v. New York*, 226 U. S. 260, 271; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 544; *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 576; *Hendrick v. Maryland*,

235 U. S. 610, 621); it is sufficient to say that the criticised provision evidently is intended to safeguard the employee from all influences that might be exerted by the employer to bring about his dissent from the compensation features of the act. The lawmaker no doubt entertained the view that the act was more beneficial to employees than the common-law rules of employer's liability, and that it was highly improbable an employee would reject the new arrangement of his own free will. The provision is a permissible regulation in aid of the general scheme of the act.

It is said that there is a denial of due process in that part of the act which provides for the adjustment of the compensation where the employer accepts its provisions. In case of disagreement between an employer and an injured employee, either party may notify the Industrial Commissioner, who thereupon shall call for the formation of an arbitration committee consisting of three persons, with himself as chairman. The committee is to make such inquiries and investigations as it shall deem necessary, and its report is to be filed with the Industrial Commissioner. If a claim for review is filed, the commissioner, and not the committee, is to hear the parties, may hear evidence in regard to pertinent matters, and may revise the decision of the committee in whole or in part, or refer the matter back to the committee for further findings of fact. And any party in interest may present the order or decision of the commissioner, or the decision of an arbitration committee from which no claim for review has been filed, to the district court of the county in which the injury occurred, whereupon the court shall render a decree in accordance therewith, having the same effect as if it were rendered in a suit heard and determined by the court, except that there shall be no appeal upon questions of fact or where the decree is based upon an order or decision of the commissioner which has not been presented to the court within ten days after the notice of the filing thereof by the commissioner. With respect to these provisions, the Supreme Court of Iowa held (154 N. W. Rep. 1064): "Appeal is provided from the decree enforcing the award on which all save pure questions of fact may be reviewed. . . . We hold that though the act does not in terms provide for judicial review, except by said appeal, the statute does not take from the court all jurisdiction in the premises. . . . We are in no doubt that the very structure of the law of the land, and the inherent power of the courts, would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitration committee were by it exceeded—could inquire whether the act was being enforced against one who had rejected it, whether the claiming employee was an employee, whether he was injured at all, whether his injury was one arising out of such employment, whether it was due to intoxication of the servant, or self-inflicted or, acceptance being conceded, into whether an award different from the statute schedules had been made, into whether the award were tainted with fraud on part of the prevailing party, or of the arbitration committee, and into whether that body attempted judicial functions, in violation of or not granted by the act." Thus it will be seen that the act prescribes the measure of compensation and the circumstances under which it is to be made, and establishes administrative machinery for applying the statutory measure to the facts of each particular case; provides for a hearing before an administrative tribunal, and for judicial review upon

all fundamental and jurisdictional questions. This disposes of the contention that the administrative body is clothed with an arbitrary and unbridled discretion, inconsistent with a proper conception of due process of law. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 545.

Objection is made that the act dispenses with trial by jury. But it is settled that this is not embraced in the rights secured by the Fourteenth Amendment. *Walker v. Sauvinet*, 92 U. S. 90; *Frank v. Mangum*, 237 U. S. 309, 340; *New York Central R. R. Co. v. White*, ante, 188.

It is elaborately argued that, aside from the Fourteenth Amendment, the inhabitants of the State of Iowa are entitled to this right, because it was guaranteed by the Ordinance of July 13, 1787, for the government of the Northwest Territory, 1 Stat. 51, in these terms: "The inhabitants of the said territory, shall always be entitled to the benefits of . . . the trial by jury." The argument is rested, first, upon the ground that Iowa was a part of the Northwest Territory. This is manifestly untenable, since that Territory was bounded on the west by the Mississippi River, and Iowa was not a part of it, but of the Louisiana Purchase. But, secondly, it is contended that the guaranties contained in the Ordinance were extended to Iowa by the Act of Congress approved June 12, 1838, establishing a territorial government (c. 96, § 12, 5 Stat. 235, 239), and by the acts for the admission of the State into the Union. Acts of March 3, 1845, chaps. 48 and 76, 5 Stat. 742, 789; Act of August 4, 1846, c. 82, 9 Stat. 52; Act of December 28, 1846, c. 1, 9 Stat. 117; 1 Poor, Chart. & Const., 331, 534, 535, 551. This is easily disposed of. The Act of 1838 was no more than a regulation of territory belonging to the United States, subject to repeal like any such regulation; and the act for admitting the State, so far from perpetuating any particular institution previously established, admitted it "on an equal footing with the original States in all respects whatsoever." The regulation, although embracing provisions of the Ordinance declared to be unalterable unless by common consent, had no further force in Iowa after its admission as a State and the adoption of a state constitution, than other acts of Congress for the government of the Territory. All were superseded by the state constitution. *Permoli v. First Municipality*, 3 How. 589, 610; *Coyle v. Oklahoma*, 221 U. S. 559, 567, 570; *Cincinnati v. Louisville & Nashville R. R. Co.*, 223 U. S. 390, 401. The State of Iowa, therefore, is as much at liberty as any other State to abolish or limit the right of trial by jury; or to provide for a waiver of that right, as it has done by the act under consideration.

Section 5 is singled out for criticism, as denying to employers the equal protection of the laws. It reads: "Where the employer and employee elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employee had not rejected the terms, conditions and provisions thereof." As we have shown, if the employer rejects the act he remains liable for personal injury sustained by an employee, arising out of and in the usual course of the employment, and is not to escape by showing that he had exercised reasonable care in selecting competent employees in the business, or that the employee had assumed the risk, or that the injury was caused by the negligence of a co-employee, or even by showing that the plaintiff was negligent, unless such negligence was willful and with intent to cause the injury or was the result of intoxication on the part of the injured party. This is the result whether the employee on his part

accepts or rejects the act. But where the employee rejects it and the employer accepts it, then, by § 3b, "the employer shall have the right to plead and rely upon any and all defenses including those at common law, and the rules and defenses of contributory negligence, assumption of risk and fellow-servant shall apply and be available to the employer as by statute authorized unless otherwise provided in this act;" with a proviso not material to the present point. We cannot say that there is here an arbitrary classification within the inhibition of the "equal protection" clause of the Fourteenth Amendment. All employers are treated alike, and so are all employees; and if there be some difference as between employer and employee respecting the inducements that are held out for accepting the compensation features of the act, it goes no further than to say that if neither party is willing to accept them the employer's liability shall not be subject to either of the several defenses referred to. As already shown, the abolition of such defenses is within the power of the State, and the legislation cannot be condemned when that power has been qualifiedly exercised, without unreasonable discrimination.

Section 42 of the act provides: "Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance. . . . And if such employer refuses, or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under part one (1) of this act." The Supreme Court of Iowa, in the *Hunter Case*, said of § 42, 154 N. W. Rep. 1056: "This clearly shows that no employer is compelled to insure unless he has accepted, and thus become subject to, the Act"; proceeding, however, to discuss the case further upon the hypothesis that all employers named in the act were compelled to maintain insurance. In view of the construction adopted, it is unnecessary for us to pass upon the question of compulsory insurance in this case, appellant not having accepted the act.

Other contentions are advanced, but they are without merit and call for no particular mention.

Decree affirmed.

In the Workmen's Compensation Law of New York, as originally enacted, § 15, subd. 3, limited compensation for loss of a single hand, arm, foot, leg or eye to a fixed number of weeks, but § 15, subd. 1, extended compensation for loss of two of such members throughout the recipient's life-time. The law overlooked a class of occasionally occurring accidents in which the employee having lost one such member by one accident loses another by another accident. For example, an employee having lost an arm in 1912 loses a leg in 1915. L. 1916, chapter 622, made special provision for injuries of this class by adding § 15, subd. 7, which provides life-time compensation for them from a special fund accumulated by taxing insurance carriers one hundred dollars whenever any employee dying from his injuries leaves no beneficiaries.

The insurance carriers unsuccessfully challenged the constitutionality of this provision in two cases decided by the Appellate Division in a single opinion. The court declared that the legislature has power to establish a monopolistic state fund, citing *Mountain Timber Co. v. Washington* as conclusive. Part of the text of the opinion, interpretative of the provision's wording, appears in appropriate connection in Part II of this bulletin. The part relative to constitutionality is as follows:

STATE INDUSTRIAL COMMISSION V. EDSALL and v. NEWMAN, 179 App. Div. 481, July 2, 1917, *in part*.

WOODWARD, J.: Chapter 622 of the Laws of 1916, materially amending the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), added subdivision 7 to section 15, so as to provide that "If an employee who has previously incurred permanent partial disability through the loss of one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the State Treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of one hundred dollars. The State Treasurer shall be the custodian of this special fund, and the Commission shall direct the distribution thereof."

In *Matter of Newman* this legislation is challenged as being violative of the Constitution of this State, the contention being that under the provisions of section 19 of article 1 of the State Constitution it is necessary that the relation of employer and employee shall exist between the parties in order to raise the right to compensation, and that this relationship does not exist in the case of the special fund, which may be devoted to the payment of compensation arising out of employment by an entirely different employer from the one who is called upon to make the payment into the state treasury. * * *

While it is undoubtedly true that the original Workmen's Compensation Law contemplated that each employer, or his insurance carrier, should provide the compensation for his own employees, section 19 of article 1 of the State Constitution was not limited to the provisions of that act. It provides generally that "Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws * * * for the payment, either by employers, or by employers and employees or otherwise, either directly or through a State or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault," etc., and if there could be broader language in removing constitutional limitations it does not occur to us.

There is no dispute that the law permits of providing for the employees of particular firms or corporations, and in both of the cases now under consideration there is no question that if they had left dependents, as defined by the statute, such dependents would have been entitled to compensation in addition to the funeral expenses, but it is urged that, because they did not happen to have such dependents, the State may not demand the payment of a comparatively trifling sum for the purpose of providing a special fund for the payment of a class of claims not heretofore provided for. There can be no doubt that if the Legislature had repealed the original law, and had compelled all employers to contribute to a state insurance fund such an act would have been valid under the provisions of section 19 of article 1 of the Constitution; and we discover no reason for doubting that the original act may be modified to provide for a special insurance fund to meet a new class of claims, and particularly as it does not make any unreasonable exaction, or one which would not exist except for special conditions in the case of the fatal injury. The discussion of the United States Supreme Court in *Mountain Timber Co. v. Washington* (243 U. S. 219), appears to be conclusive upon this point, and it does not seem to be necessary to prolong this discussion. Section 19 of article 1 of the Constitution has opened the door to class legislation of this character, and citizens must look to the Legislature, rather than the courts, for the adjustment of their rights.

The awards to the State Treasurer in both cases should be affirmed.

Awards to the State Treasurer in both cases unanimously affirmed.

The Court of Appeals, choosing the Newman case for its opinion, has affirmed without dissent the Appellate Division's decision both as to constitutionality and as to interpretation of the law's wording. The special fund created by § 15, subd. 7, the court says, does not differ in principle, as to creation and use, from the state fund. The part of the opinion relative to the law's working is reserved with the similar part of the Appellate Division's decision for presentation in appropriate place in Part Two. The part relative to constitutionality is as follows:

STATE INDUSTRIAL COMMISSION V. NEWMAN, 222 N. Y. 363, January 29, 1918,
in part.

COLLIN, J.: The State Industrial Commission decided that Julia De Hart, an employee of the appellants, died from injuries received under conditions making the Workmen's Compensation Law applicable, and left surviving her no person entitled under the law to compensation. (See Workmen's Compensation Law [Cons. Laws, ch. 67], § 16.) They, therefore, pursuant to the provisions of section 15, subdivision 7, of the law, awarded to the State Treasurer the sum of one hundred dollars. The appeal here is from the order of the Appellate Division affirming the award. The subdivision provides: "If an employee who has previously incurred permanent partial disability through the loss on one hand, one arm, one foot, one leg, or one eye, incurs permanent total disability through the loss of another member

or organ, he shall be paid, in addition to the compensation for permanent partial disability provided in this section and after the cessation of the payments for the prescribed period of weeks special additional compensation for the remainder of his life to the amount of sixty-six and two-thirds per centum of the average weekly wage earned by him at the time the total permanent disability was incurred. Such additional compensation shall be paid out of a special fund created for such purpose in the following manner: The insurance carrier shall pay to the State Treasurer for every case of injury causing death in which there are no persons entitled to compensation the sum of one hundred dollars. The State Treasurer shall be the custodian of this special fund, and the commission shall direct the distribution thereof." (Section 15, subd. 7, added by L. 1916, ch. 622.)

The appellants assert that the provision requiring the payment to the State Treasurer is not authorized by the Constitution of the State, in that it requires the insurance carrier to pay compensation to another than employees of the employer insured by it. Their statement in effect is: The Constitution authorizes statutory compensation, under the prescribed condition, from an employer to his employee or to the dependents of the employee in case the injuries cause his death; within the intendment of the Constitution, the legislature was so restricted in enacting the law as to be unable to obligate an employer to others than his employees or their dependents, or to establish a pension fund for employees generally. The constitutional provision, so far as relevant here, is: "Nothing contained in this Constitution shall be construed to limit the power of the legislature to enact laws * * * for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except * * *; provided that all moneys paid by an employer to his employees or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer." (State Const. article 1, § 19.)

An historical statement will indicate the approach to a correct determination of the question presented. In 1910, a legislative act entitled "An act to amend the labor law, in relation to workmen's compensation in certain dangerous employments" became a law. It was the forerunner of and in general purpose and character similar to the existing Workmen's Compensation Law. (Laws of 1910, ch. 674.) In March, 1911, we adjudged it invalid because it infringed certain provisions of the State Constitution which then did not contain the section (§ 19 of article 1) we have referred to and in part quoted. That section was duly adopted on November 4, 1913, and, of course, became effective January 1, 1914. In March, 1914, the present Workmen's Compensation Law was finally enacted. (Laws of 1914, ch. 41.) It did not then contain the provisions, here involved, of subdivision 7 of section 15. In November, 1915, we decided that a claimant, who became an employee under the act, having theretofore lost a hand, became entitled, upon the loss of the remaining hand while such employee, to the compensation for permanent total disability and not to the lesser compensation for permanent partial disability. (*Matter of Claim of Schoab v. Emporium F. Co.*, 216 N. Y. 712.) Our decision related to a claim arising in July, 1914, and affirmed

the decision of the Appellate Division rendered May 5, 1915. (*Matter of Claim of Schwab v. Emporium F. Co.*, 167 App. Div. 614.) Manifestly, the law was a hindrance to those who, having lost a hand or other member, sought to become employees under the act, because the loss of the remaining member subjected the employer to the payment of a compensation substantially greater than it would in case the employee had had the two members. After the decision of the Appellate Division, the legislature by an amendment to subdivision 6 of section 15 enacted that "an employee who is suffering from a previous disability shall not receive compensation for a later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with the previous disability." (Laws of 1915, ch. 615.) The provisions of section 15 were supplemented in 1916 by the addition of subdivision 7 which we have already quoted. The evident and clear purpose of the subdivision was to remove a condition, as between employers and partially disabled employees, inconsonant with the spirit of the act and, perhaps, unjust, through the creation of a state fund contributed to by the insurance carriers and, as the permanent total disability arose, accessible to any member of the entire prescribed class of employees so disabled. Its provisions are within the letter and spirit of the Constitution.

The act requires each employer within its provisions to secure the prescribed compensation to his employees in one of the following ways: (1) By insuring and keeping insured the payment of such compensation through the state fund; or (2) through any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in the state; or (3) securing from the state industrial commission in the stated manner permission to be a self-insurer. (§ 50.) The term "insurance carrier" of subdivision 7 of section 15 includes the state fund, the stock corporations or mutual associations and the self-insurer. (§ 3, subd. 12.) All employers, therefore, contribute under identical conditions to the special fund of said subdivision 7, those utilizing the state fund or the stock or mutual associations through the insurance premiums contributed to the fund or association and the self-insurers by payments directly. The special fund is exclusively distributed among the employees of those who contribute. Its creation and use are not different in principle from those of the state fund or the funds of the associations constituted of the premiums received. In the last analysis all compensation to the employees of the employers paying those premiums is not paid by the employer to his employees, but from the aggregated and indiscriminate funds. From those funds the awarded compensation is directly paid to the employees or dependents, or reimbursement for payments by employers is made to them. (§§ 53, 54, 25, 26.) In *Matter of Jensen v. Southern Pacific Co.* (215 N. Y. 514) we expressed the conclusions that the scheme of the act is essentially and fundamentally the creation of a state fund from premiums paid by employers to insure or effect the payment of a prescribed compensation for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments, and that the act was amply sustained by the Constitution. Subdivision 7 is well within the scheme. * * *

On June 22, 1916, a guard in Sing Sing state prison was shot to death by a convict. The Workmen's Compensation Law not cov-

ering his case, a special bill for compensation of his dependents was introduced into the legislature. The Attorney-General gave opinion as to the constitutionality of the measure. It became L. 1917, chapter 33. At the same session, the legislature, by L. 1917, chapter 705, added to Workmen's Compensation Law, § 2, a new group, numbered 44, covering keepers, guards, nurses and orderlies in state and municipal prisons, hospitals, etc. The legislature has passed a special act, L. 1918, chapter 599, similar to the Sing Sing prison guard act, in the case of an engineer of "The New York House of Refuge." The Attorney-General's opinion relative to the constitutionality of the special bill in the case of the slain Sing Sing guard is as follows:

JANUARY, 25th, 1917.

HON. WALTER W. LAW, JR., *Assembly Chamber, Albany, N. Y.*

DEAR SIR.—I have been examining carefully the proposition embraced in Assembly bill, Int. 60, Pkt. 60, in which you seek to provide workmen's compensation for Daniel McCarthy for loss of his life as a guard in Sing Sing Prison. I am satisfied that this legislation is constitutional. It seems to me, however, that the form of it might be improved as I shall suggest.

The question which bothered me was the appropriation of public moneys for a purpose which might not be deemed to be a public one or which might be deemed to be extra compensation within the provisions of the Constitution, Article III, Section 28, which prohibits the Legislature from granting any extra compensation to any public officer.

The leading authority for appropriations of this character is the case of *Town of Guilford v. Supervisors*, 13 N. Y. 143, in which the court held that the Legislature can recognize claims in favor of individuals founded in equity and justice or in gratitude or charity. The Constitution was subsequently amended, however, so as to prevent the use of public moneys for the payment of gratuities. Certain restrictions were imposed in 1875 by Article III, Section 28, to which I have referred, and Article VIII, Sections 9 and 10, which now restrict the power of the State and its municipalities as you will see by an examination of them. From that time, public moneys whether state or municipal could no longer be expended in the exercise of gratitude or charity, but the amendment did not prevent the Legislature from recognizing claims founded on equity and justice though not such as could have been enforced in a court of law. This has been decided in *Matter of Mahon v. Board of Education*, 171 N. Y. 263; *Lehigh Valley Railroad Co. v. Canal Board*, 204 N. Y. 471; *Cole v. State*, 102 N. Y. 48; *O'Hara v. State*, 112 N. Y. 146.

I wish to call your attention particularly to the *Mahon* case in 171 N. Y., where the Court of Appeals held that it was unconstitutional to confer

pensions upon teachers who had retired before the establishment of the pension system. This was upon the ground that it was a gratuity or extra compensation to a public servant within the prohibition of Article III, Section 28.

There might be some doubt of the constitutionality of your proposed legislation in view of that decision if it were not for the fact that the Constitution had been amended by adding Section 19 to Article 1, dealing particularly with workmen's compensation and providing as follows:

"Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for * * * the payment either by employers, or by employers and employees or otherwise, either directly or through a State or other system of insurance, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as the cause thereof," etc.

Since it has been declared that no other provision of the Constitution shall be construed to limit the power of the Legislature in the granting of workmen's compensation, I am convinced that it is within the power of the Legislature to assume liability for compensation for Daniel McCarthy for his death resulting from the injury received while acting as guard in the State Prison.

The only criticism that I have to offer is that your bill is so worded at the outset that it seems to constitute judicial interpretation by legislation by declaring a certain thing to have been a hazardous employment which was not such under the terms of the law. I would suggest the following in the place thereof:

Section 1. The State Industrial Commission is hereby authorized to hear, audit and determine the claim of the dependents of Daniel McCarthy against the State for his death resulting from injuries alleged to have been sustained by him while in the employ of the State as a guard in Sing Sing State Prison on the 22d day of June, 1916, arising out of and in the course of such employment by reason of being shot by a convict in such prison; and if the State Industrial Commission finds that such death and injury were so sustained, an award therefor shall constitute a legal and valid claim against the State provided a notice of any claim on account of such death and injury be given to the State Industrial Commission, as provided by Section 18 of the Workmen's Compensation Law, within thirty days after this act takes effect. The State Industrial Commission is hereby authorized to make an award against the State pursuant to the Workmen's Compensation Law in the same manner and to the same extent as if the employment of Daniel McCarthy had been a hazardous employment under the provisions of the Workmen's Compensation Law on June 22d, 1916.

Sec. 2. Such award shall be certified by the State Industrial Commission to the Superintendent of State Prisons, and shall be payable from the capital fund of the state prisons, on the certificate of the Superintendent of State Prisons.

Sec. 3. This act shall take effect immediately.

Very truly yours,

E. E. WOODBURY, *Attorney-General.*

By HAROLD J. HINMAN, *Deputy.*

COVERAGE

OUTLINE

- A. Definition of accident.
- B. Independent contractors.
- C. Hazardous employment.
- D. Elective compensation plan.
- E. Incidentalness of injuries.
 - 1. One occupation incidental to another.
 - (1) Watchmen.
 - (2) Workers repairing buildings, installing machinery, etc.
 - (3) Salesmen and other outside employees.
 - 2. Subsidiary or adjunctive work.
 - 3. Coming to or leaving work, noon interval, etc.
 - 4. Assault by another than injured employee.
 - 5. Assault by the injured employee.
 - 6. Unintentional injury by another than injured employee.
 - 7. Posting or procuring employer's mail.
 - 8. Casual tasks performed out of hours.
 - 9. Accommodating another.
 - 10. Procuring a newspaper.
 - 11. Watching a fire.
 - 12. Doing own laundry work.
 - 13. Falling asleep.
 - 14. Slipping on a public highway.
 - 15. Slipping on floor of workplace.
 - 16. Washing up.
 - 17. Relief of nature.
 - 18. Jumping upon a passing vehicle.
 - 19. Using instruments other than those provided by the employer.
 - 20. Hiring men and procuring supplies.
 - 21. Diversion during idle moment.
 - 22. Smoking during work hours.
 - 23. Horseplay.
 - 24. Exposure to unusual risks.

F. Pecuniary gain.

1. Workers repairing buildings, installing machinery, etc.
2. Social clubs, etc.
3. Experimental work.

G. Employer, stockholder or officer acting as an employee.

H. Farm laborers.

I. Domestic servants.

J. Fault.

1. Negligence.
2. Willful intention to injure.
3. Intoxication.
4. Taking oneself out of the employment.
5. Violation of rules or orders.
6. Violation of law.
7. Refusal of medical treatment.

K. Disease.

L. Internal injuries.

M. Exclusiveness of remedy.

N. Failure to insure.

O. Third party responsible.

P. Extra-territoriality.

Q. Interstate and intrastate commerce.

1. Exclusiveness of the Federal Employers' Liability Act.
2. Cases determined to be in interstate commerce.
 - (1) Express messenger service.
 - (2) Vessel of foreign corporation.
3. Cases remanded for further evidence.
 - (1) Making light repairs on engines.
 - (2) Cutting and removing grass from rights of way.
4. Cases determined to be in intrastate commerce.
 - (1) New construction work.
 - (2) Repair of coal pocket.
 - (3) Care of plumbing beneath a station.
 - (4) Repair of private spur track.
 - (5) Work in repair shops or yards.
 - (6) Scrubbing station floor.
 - (7) Coupling cars under Federal Safety Appliance Act.

5. Suggested legislation.

6. Suit under the Federal Employers' Liability Act after award of state compensation.

R. Admiralty or maritime jurisdiction.

1. Texts of United States Supreme Court decisions.

2. Claims denied under the decisions.

3. Claims determined not to be in admiralty.

4. Attorney-General's opinion.

5. Rescindment of awards.

6. Awards in pending cases.

7. Return of premiums.

8. Appellate Division decisions relative to jurisdiction and estoppel.

9. Vessel of foreign corporation.

DECISIONS

A. *Definition of accident.*—Sunstroke may be compensatable. The State Industrial Commission awarded compensation to an employee overcome by heat while handling lumber in a close car but denied compensation to an employee overcome by heat while brushing up and cleaning up brewery premises. In the former case the Commission said that the special circumstances of the work justified the award; in the latter, that the day was no hotter indoors than out and the work not unusual: *Hernon v. Holihan*, Bul., vol. 3, p. 4, Aug. 13, 1917; *Kneff v. Michel Brewing Co.*, S. D. R., vol. 11, p. 623, Nov. 27, 1916. The Appellate Division affirmed without opinion an award to a driver who fell from his wagon, sunstroke being a probable cause: *Henderson v. Donovan Co.*, Case No. 16407, Feb. 3, 1917; 178 App. Div. 946, May 17, 1917, and later affirmed with opinion the award in the *Hernon* case. The opinion deals in the main with the probative value of hearsay evidence. It is as follows:

HERNON V. HOLIHAN, — App. Div. —, Mar. 6, 1918.

H. T. KELLOGG, J.: This award was made to compensate for the death of an employee found by the Commission to have died as the result of sunstroke. If such was the cause of death there is sufficient authority to justify the award. (*Days v. Trimmer*, 176 App. Div. 124; *State v. District Court*, 164 N. W. 916; *Kanscheit v. Laundry Co.*, 164 N. W. 608.) The only serious question presented is whether or not sunstroke as a cause of death was established by competent evidence.

The deceased on the morning of August 23, 1916, was assisting in the unloading of lumber from a railroad box car which was upon a float lying along side a pier projecting into the North river. The maximum official temperature on that day was ninety and the humidity was eighty-two, which was excessive. The maximum temperature on August twenty-second was ninety-four, and on August twenty-first, ninety. Deceased had been sick on the day previous, and had spent the night of August twenty-second sitting in a chair in a saloon. A co-employee came to the saloon for him at about seven o'clock on the morning of August twenty-third. He told his co-employee that he had been up all night vomiting, and was not fit for work. However, he went to the pier, and from about eight o'clock to eleven-thirty in the morning was intermittently engaged in the unloading of lumber. Sometimes he worked inside the car, and sometimes outside in the hot sun. He complained of being sick and had to rest. He wished to leave the work, but was persuaded to remain until about eleven-thirty o'clock. He was seen about twelve o'clock, and at six that evening was found lying dead among the lumber piles. No physician was sworn on the hearings to testify to the cause of death.

There were seven hearings upon this claim. The claimants were unrepresented at the first hearing, which however, was attended by an attorney for the insurance carrier, who placed witnesses upon the stand, and conducted an examination. He opened the proceedings with the following statement: "This is a case where the man was found in the insured's yard, having been overcome by the heat." He presented to the Commission the inquisition of the coroner in the case of this deceased, and called their attention to the following statement therein: "Came to his death 2323/16 at 542 W. 57th Street by heat insolation." He called the employer to the stand, who testified that a co-employee of the deceased told him that the deceased was "all in" and "had a touch of the heat." The employer further testified, without objection, that the deceased himself told him that he was "all in," to which statement employer replied "Rest up, probably the heat has got you a little." A statement was also offered by the attorney for the insurance company which had been made by a co-employee of the deceased in which it is stated, "He (deceased) had told me that morning that once before he had been hit by the heat, and couldn't stand working in any great heat." It was further proven that deceased told his employer that he blamed the heat for his illness.

It will be observed that the proof of sunstroke is chiefly made up of hearsay statements and declarations. These statements, however, were either introduced by the insurance carrier itself or were received without objection. The carrier cannot now be heard to claim that such statements were incompetent, and had no probative value. "Nothing is more common than for testimony to be given which is not in its nature strictly competent upon matters about which both parties are conscious that there is no dispute—matters which both fully understand to be true. And such evidence is taken because the adverse party makes no question of the fact it tends to establish. He can never be permitted to say on appeal that the fact was not proved because the evidence offered and received was not competent testimony, and ought to have been objected to and rejected." (*Flora v. Carbean*, 38 N. Y. 111.)

The award should be affirmed, with costs. Award unanimously affirmed.

Frost bite may be compensatable. The Commission denied compensation to a motorman who alleged that his foot had been frozen in the course of his employment but could not fix the time or prove unusual exposure: *Solmonsohn v. Nassau Electric R. R. Co.*, Bul., vol. 2, p. 207, June 19, 1917; but awarded compensation to an employee whose fingers and toes were frozen while he was handling wet coal in a storm: *S. D. R.*, vol. 9, p. 285, May 25, 1916. The latter ruling was affirmed by the Appellate Division with opinion as follows:

DAYS V. TRIMMER & SONS, 176 App. Div. 124, Dec. 28, 1916.

LYON, J.: The employer, S. Trimmer & Sons, Inc., was a coal dealer. As such it delivered coal by wagons, and carried coal into the houses of its customers. The claimant was employed as a helper. It was his duty to assist the driver in the care of the horses and in carrying coal. February 15, 1916, was a very cold and stormy day, and while the claimant, wearing only a pair of cheap gloves, was engaged in carrying coal, all his fingers and toes were frost bitten. As a result of such frost bites ulcers developed on the third and fourth fingers of both hands, and the first and second fingers of the right hand were so badly injured as to necessitate amputation. The Commission found that by reason of the injuries to the third and fourth fingers of both hands, the claimant was disabled from working for the period of twelve weeks from February 15, 1916, irrespective of the injuries to and the amputation of the first and second phalanges of the right hand and awarded claimant compensation for ten weeks for the disability occasioned by the injuries to the third and fourth fingers of both hands, for the further and subsequent period of forty-six weeks for the loss of his right first finger, and for the further and subsequent period of thirty weeks for the loss of his right second finger. From such award this appeal has been taken.

Appellants contend that frost bites are not accidents, and that claimant did not sustain accidental injuries within the meaning of the Workmen's Compensation Law. This is practically the only question involved upon this appeal. In support of their contention appellants cite *Karemaker v. S. S. "Corsican"* (4 B. W. C. C. 295), and *Warner v. Couchman* (Id. 32; *affd.*, 5 id. 177). In those cases the courts held that assuming frost bite to be an accident it was not an accident arising out of the employment. In those cases the court found that the man was not specially affected by the severity of the weather by reason of his employment, and the appellate court held that such finding was one of fact and binding.

Beyond question the injuries sustained by the claimant in the case at bar were accidental within the meaning of the Workmen's Compensation Law. (*Matter of Heitz v. Ruppert*, 218 N. Y. 148; *Matter of Moore v. Lehigh Valley R. R. Co.*, 169 App. Div. 177.) That the injuries arose out of the employment was fairly a question of fact for the determination of the Commission, and it was fully justified in finding from the evidence that the claimant by reason of his employment in handling wet coal in the storm was specially affected by the severity of the weather. The awards were con-

secutive and not concurrent, and were justified by our decision in *Marhoffer v. Marhoffer* (175 App. Div. 52).

The award should be affirmed. Award unanimously affirmed.

Vertigo may be compensatable. Persons working high on buildings or other structures become dizzy upon looking down, lose their balance and fall. As the court says in the following opinion, the fainting and falling are caused by the conditions under which they are working.

SANTACROCE V. SAG HARBOR BRICK WORKS, — App. Div. —, Mar. 6, 1918.

JOHN M. KELLOGG, P. J.: The claimant, a brickmaker, was required to perform his duties while standing on a pile of brick about fifteen feet above the ground. He was seized "with an attack of vertigo, or with some similar disorder, which caused him to fall to the frozen ground." It is urged that his injury was the result of the vertigo and not of an accident; but the findings and proceedings indicate that he was in good health at the time and no reason is given for the fall except the dizziness. The natural inference is that the dizziness, the fall and the injury resulted from the elevated position in which he was standing while performing his work.

Appellants rely, apparently with confidence, upon *Matter of Collins v. Brooklyn Union Gas Co.*, (171 App. Div. 381). In that case the superintendent, who was standing upon the street, fell to the ground and received his injury. There was no apparent cause for the fall aside from an attack of cardiac syncope to which the previous condition of his heart predisposed him. Here the fainting and the fall were caused by the conditions under which the man was working.

We conclude the award should be affirmed. Award unanimously affirmed.

Nervous breakdown may be compensatable. Upon a cry of fire in a factory a woman employee fainted and remained unconscious for two hours. In consequence she became choreic. She had been in excellent health and spirits before her fright. The briefs in Appellate Division arrayed numerous precedents for and against affirmation of the award made to her by the Commission. The court affirmed the award unanimously and without opinion: *London v. Casino Waist Co.*, Case No. 60642, Aug. 2, 1917; 181 App. Div. —, Dec. 28, 1917.

Strain may be compensatable. Question appears to have arisen in the following case whether strain arising out of and in the course of employment should be held to be an accident in every instance. The claimant, Malanzona, was firing a small boiler. His employer set him to firing a larger boiler which necessitated handling a larger coal shovel. He was incapacitated by strain

after working an hour or less. Commissioner Lyon's statement, endorsed by the Commission, is as follows:

MALANZONA V. UTICA STEAM & MOHAWK V. C. MILLS, S. D. R., vol. 10, p. 604; Bul., vol. 2, p. 92, Oct. 16, 1916.

LYON, Commissioner: It may be that a workman who receives a strain while doing the ordinary things connected with his employment, where nothing extraordinary happens would not be held to have received an accident within the meaning of our Compensation Law, although other Commissioners are clearly of the opinion that such a strain is an accident. Be that as it may, in this case I think the facts, as stated, do constitute an accident. The claimant had a pretty definite line of duties which did not call for any great exertion, and if his testimony is to be believed, the new duties to which he was sent and which he had been engaged in for not more than an hour, put a very different strain upon his muscular system and called for the use or not only different implements, but a different degree of physical energy. The use of this large shovel lifting coal of very much greater weight than he was accustomed to, followed by a strain which seems to have had the severe consequence testified to here, in my opinion, constitute an accident, even though a strain in the ordinary course of his employment should not be held to be so, and I advise that the award heretofore made be confirmed.

On the 17th day of January, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

In *Hackford v. Veeder & Brown*, S. D. R., vol. 8, p. 472, April 27, 1916; 176 App. Div. 924, Dec. 29, 1916, unanimously affirmed by the Appellate Division without opinion, Commissioner Lyon said: "Any unusual exertion or strain resulting in incapacitating a laboring man from work would be an injury within the meaning of the Compensation Law, in my opinion." Cases of strain are considered generally below, pages 216, 232.

The following cases involve the relation of occupational disease to accident and the distinction between the two.

An employee collapsed upon leaving an air lock and died in hospital; the Commission gave hearings at unusual length and denied award on the ground of no proof that the death resulted from working under compressed air; the brief of counsel for the employer went thoroughly into the relation of accident and occupational disease: *Cunningham v. Rodgers & Hagerty*, File No. 6236, December 5, 1916.

The Appellate Division affirmed an award to an employee who had been overcome by gas and steam while working in a "dead corner" of a cellar: *O'Dell v. Adirondack Electric Power Corp.*,

Death File No. 12192, April 27, 1917; 181 App. Div. 910, November 14, 1917.* The granting of this award is in contrast with the denial of an award in *Naud v. King Sewing Machine Co.*, Bulletin 81, page 402; 223 N. Y. Rep. —, March 12, 1918.

While occupational disease is not compensatable *per se*, like other disease it is compensatable when accelerated by accident. Upon this principle the Commission awarded compensation to an employee whose hand had been cut by glass and whose bandages caused "a sufficient immediate absorption of mercury into his system to have produced in conjunction with employment through the years" the dangerous condition in which he found himself: *Boslee v. Bache & Co.*, Bul., vol. 3, p. 12, September 5, 1917. The Appellate Division affirmed without opinion an award to the widow of a laborer in an enameling plant the skin of whose thumb and finger had been cracked by washing castings in naphtha and who had incurred infection following an accident that scraped the skin from his hand and bruised his forearm: *Sturges v. King Sewing Machine Co.*, Death File No. 18933, May 29, 1917; 181 App. Div. 911, November 14, 1917.

If the entrance of an anthrax germ into the body of an employee arises out of and in the course of his employment, it is immaterial where or how his skin may have gotten into the condition permitting such entrance. The Appellate Division appears to so hold in the following opinion, contrary to the Commission's finding in *Eldridge v. Endicott, Johnson & Co.*, noticed in Bulletin 81, page 50. The Commission denied compensation to Eldridge's dependents on the ground that the cutting of his skin by the barber's razor, not the entrance of the germ, constituted the accident, but the Appellate Division presents the theory that the mere entrance of the anthrax germ is an accident in itself. The court likens the attack to the sudden bite of a concealed serpent. Anthrax, in distinction from occupational diseases, is "unexpected, unusual and extraordinary." Upon authority of this Hiers decision the Commission has reopened the disallowed anthrax case of *Getman v. Baker Co.*, Claim No. 26780, January 2, 1918, in which the employee contracted the infection through a pimple and ingrowing hair on his face or neck, and has made an award to Getman. The text of the Heirs decision is as follows:

*Affirmed by Court of Appeals, 223 N. Y. Rep. —, May 14, 1918.

HIERES v. HULL & Co., 178 App. Div. 350, May 2, 1917.

COCHRANE, J.: The occupation of the claimant was weighing hides on the piers in Brooklyn, which hides constituted cargoes or parts of cargoes unloaded from vessels. He was doing this work in the performance of the duties which as an employee he owed to his employer. The employment was, therefore, hazardous within the meaning of group 10 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41).

Previous to February 10, 1916, while in the same work, wet salt from the hides had permeated his gloves and caused a swelling on the back of one of his hands and an abrasion of the skin or fissure resulted. On the day mentioned he was handling dirty and diseased hides and anthrax germs contained therein was communicated to him through the fissure in the back of his hand causing infection and disease for which the award in question has been made.

Subdivision 7 of section 3 of the act defines an injury for which compensation may be made as meaning "only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom."

In *Bacon v. United States Mutual Accident Association* (123 N. Y. 304) an anthrax case was before the court in an action on a policy of insurance against "bodily injuries effected through external, violent and accidental means within the intent and meaning of the by-laws of the association and the conditions" of the policy. The insurance was not to extend "to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease; nor to any death or disability which may be caused wholly or in part by bodily infirmities or disease existing prior or subsequent to the date" of the policy "nor to any case except where the injury is the proximate or sole cause of the disability or death." It was held that anthrax was a disease and that the disease was not caused by an accident within the meaning of the policy. That case was decided with reference to the particular provisions and phraseology of the policy then under consideration and it is quite clear that it constitutes no precedent under the statute we are now called upon to apply.

In *Matter of Plass v. Central New England Railway Company* (169 App. Div. 826) this court held that contact with poison ivy constitutes a personal injury within the meaning of the statute.

There is a broad distinction between the present case and the case of an occupational disease. The latter is incidental to the occupation or is a natural outcome thereof. It is expected, usual and ordinary. This disease incurred by the claimant was unexpected, unusual and extraordinary; as much so as if a serpent concealed in the hides had attacked him. There is no difference in principle because the attack instead of being made unexpectedly by a concealed serpent was made unexpectedly by a concealed disease germ. There seems to be no question in this case but that the claimant contracted the disease in the manner and under the conditions above indicated. We think the circumstances constitute an accidental injury within the meaning of the statute.

However, there is another theory on which this award may be upheld. The claimant in the course of his employment and as a result thereof had

received an abrasion on his hand or a fissure therein. This may properly be deemed an accidental injury arising out of and in the course of his employment and the disease or infection caused by the anthrax germ may be deemed "such disease or infection as may naturally and unavoidably result" from such injury within the meaning of the statute.

The award should be affirmed. Award unanimously affirmed.

The nature of accident has been considered in Bulletin 81, pages 48-50. The question crops out continually throughout the opinions in the disease and internal injury cases presented in that bulletin and in this. See Bulletin 81, pages 100-102, 249-256; and below, this bulletin, pages 208-248.

B. Independent contractors.—In 1914 the Workmen's Compensation Commission denied compensation to the dependents of Robert Rheinwald, a painter killed by a fall while repainting a sign for the Builders' Brick & Supply Company. The Commission ruled that Rheinwald's status at the time of the accident was that of independent contractor, not of employee. The Appellate Division reversed this ruling and sent the case back to the Commission with instructions to make an award. The Commission accordingly made an award. Upon appeal a second time, the Appellate Division reversed the award upon authority of the decision that it had made in the meantime in *Bargey v. Massaro Macaroni Co.* The Rheinwald case has finally reached the Court of Appeals which, without opinion, on March 19, 1918, has approved of the denial of compensation to Rheinwald's dependents, not on authority of its own affirmation of the Appellate Division's order reversing the award in the Bargey case, but on the original ground of denial by the Workmen's Compensation Commission, namely, that Rheinwald was an independent contractor. The full citation for the *Rheinwald* case is as follows: S. D. R., vol. 1, p. 417, September — October, 1914; 168 App. Div. 425, May 14, 1915; S. D. R., vol. 7, p. 440, February 16, 1916; 174 App. Div. 935, September 13, 1916; 223 N. Y. Rep. —, March 19, 1918. The Appellate Division's opinion of May 14, 1915, has been published in Bulletin 81, pages 59-70.

The effect of the Bargey decision of the Court of Appeals as a precedent has been nullified by its later decisions in *McNally v. Diamond Mills Paper Co.* and *Dose v. Moehle Lithographic Co.* Accordingly independent or casual artisans of the type of Dowd, (Part Two), Rheinwald, Bargey, Dose or McNally would appear

to be now within the Workmen's Compensation Law's protection even without their inclusion under the voluntary agreement plan appended to Workmen's Compensation Law, § 2, by L. 1916, ch. 622. The subject and the cases are presented under the heading, "Workers repairing buildings, installing machinery, etc.," below, pages 99, 166. The problem of contract also figures in cases falling under the heading, "Which is the Employer?": Bulletin 81, pages 340-347; this Bulletin, Part Two.

Woodsmen often undertake to clear forest tracts by the job; in a case of the kind a falling tree limb killed one of six partners; the Commission awarded death benefits to his mother; the insurance carrier appealed to the courts on the ground that the woodsmen were independent contractors; the courts affirmed the award without opinion (175 App. Div. 952; 220 N. Y. Rep. 671), except dissenting opinion of Justice Woodward, as follows:

CLAREMONT V. DE COSS, 175 App. Div. 952, Nov. 16, 1916.

Appeal from an award made by the State Industrial Commission March 2, 1916.

Award affirmed. All concurred, except Woodward, J., who dissented.

WOODWARD, J. (dissenting): Joseph Claremont received injuries resulting in his death on the 3d day of July, 1914, while engaged in felling a tree at or near Benson Mines, St. Lawrence county, this State. The first claim for compensation, signed by Mary Claremont of Lyon Mountain, alleged that Joseph G. Claremont, age twenty-three, was in July, 1914, working for J. H. Corbit at Benson Mines, N. Y.; that Ovide Ducier had charge of the men, among whom was Joseph G. Claremont; that the men were engaged in lumbering, and while Mr. Claremont was felling a tree, it struck him and caused his death. It further alleged that "the undersigned, Mary Claremont, is the widow of said Joseph G. Claremont, and that her address is Lyon Mountain, N. Y.; that the following are children of said Joseph G. Claremont and dependent on her for support," and then this claim tells us that this man of twenty-three years of age had as his children Ruth Claremont, age fourteen years; George Claremont, age twelve years; Albert Claremont, age ten years; Francis Claremont, age six years, and Roy Claremont, age four years, and that the daily wages of this young and prolific father, engaged in cutting down trees in St. Lawrence county, was five dollars per day, and that "I claim for myself and children the compensation allowed under the Workmen's Compensation Law, passed March 16, 1914." Subsequently, and on the 6th day of October, 1915, without any attempt to explain the original claim, so far as it appears from the record, Mary Claremont, giving her present address as Faust, N. Y., "old address, Lyon Mountain, N. Y.," makes a new claim, from which not only are all these alleged children dropped, but the claimant now appears as the mother of this remarkable young man instead of his widow with five named children, the eldest of whom was alleged to have been within nine years of the age of her alleged

father, depending upon her for support. I call attention to this fact because of the great stress which appears to be given to the first report of the alleged employer, made on the very day of the accident, upon a regular blank, containing a warning that the same must be filled in to avoid a penalty, in which in answering the question "Employer's name?" the name "Ovid De Coss" is given, and he states that the employee was injured in the course of his employment, and the name of the employee is given as Joseph J. Claremont. Upon this basis alone, though contradicted by the subsequent sworn statement of Ovid De Coss, the alleged employer, and several others, this award is based. In the affidavit of the alleged employer he says that he took a contract from the Carthage Tissue Paper Mills of Carthage; that his business was cutting, peeling and piling pulp wood; that the decedent was not in his employ; "I sublet him a portion of my contract." He again states, in answer to the question, "In what capacity was he in your employ?" that he was "Not in my employ." It is true that the physician who attended the decedent states that the latter was employed by Mr. De Coss, but it does not appear that he had any knowledge of the matter other than the fact of the accident and that the decedent was engaged in the work of felling a tree. One Albert Burrell makes an affidavit to the effect that he was the book-keeper for Ovid De Coss at his log camp in the woods west of Benson Mines on the day of the accident; that he kept the books of all the men working for De Coss; that he knew Joseph Claremont, Jr., and remembers the time when he came to the De Coss camp. Joseph Claremont, Jr., his father and five other men went to work in the woods near the De Coss camp cutting pulp; they were jobbers and were to cut not more than 1,000 cords of wood; they cut 951 cords and were paid two dollars and fifteen cents per cord; that he kept a time book, and that Claremont and the other six men were not on it; he did not keep their time; after they had cleared the woods the timber was measured and the men paid and they left the camp; they had boarded themselves in the woods in a shack. Arthur Plant and Horace Marcoux make a joint affidavit to the effect that in the month of June, 1914, they came to the De Coss camp with Joseph Claremont, Sr., Joseph Claremont, Jr., H. Marcoux, T. King, T. Parquet and E. La Bonty, to work clearing the woods of pulp; they were to receive two dollars and fifteen cents per cord and divide it between the seven; "I never worked by the day during the summer, always worked as jobbers and had the other six work with me as jobbers." Ovid De Coss, the alleged employer, in an affidavit says "that he has a contract with the Carthage Tissue Paper Company of Carthage to clear the woods for pulp wood, west of Benson Mines; * * * during the course of the contract he hired men by the day and others by the job; the jobbers, as they are called, were given a woods to clear, and were to receive so much per cord, cut and piled; these men took full charge of the work and had no one over them. It is a common custom for woodsmen to take jobs of clearing. On or about the 15th day of June, 1914, Arthur Plant and Joseph Claremont, Sr., were given a job by me to clear a portion of the woods; these men and Joseph Claremont, Jr., H. Marcoux, Emedie La Bonty, Frank Parquet and T. King, had been working by the job for Joseph Ducey, and when Plant and Claremont, Sr., took the job they had the other five men join them on my job; the seven went to work and cleared the woods and the amount of work was to be divided between the seven. The work was completed by the

six after Claremont, Jr., was killed. When the job was finished it was checked up and found that they had 951 cords of pulp wood and received two dollars and fifteen cents per cord. This money was divided into seven portions, during the time J. Claremont, Jr., worked, and six portions for the remainder of the time. J. Claremont's share was given to the father. After the job was finished they left. * * * The seven men worked independent of deponent; they cleared when they wanted to, peeled of their own free will. They had no connection with deponent except to be paid by the cord when finished. The seven men were from Lake Placid." There appears to have been a hearing before a deputy commissioner, but no evidence was adduced, and the Commission awarded two dollars and sixty cents per week during the alleged dependency of the claimant, who appears to be the wife of Joseph Claremont, Sr., and not the widow of Joseph Claremont, Jr., with the alleged five children to support. This finding and award in favor of the claimant is made against the advice of W. C. Richards, the deputy commissioner, who investigated the claim, and who was unable to discover that there were any legitimate claimants, and it seems clear that the action of the Industrial Commission is without warrant in law, and should be reversed. Liberal as are the provisions of the Workmen's Compensation Law, they do not, in my judgment, warrant the paying of this claim, which bears upon its face so much evidence of bad faith, and which is not supported by any evidence of probative force. The mere fact that the alleged employer, making a report on the very day of the accident, under a threatened penalty for a neglect to do so, admitted that he was the employer of the deceased, did not estop him from telling the truth afterward, any more than the claim of Mary Claremont to be the widow of deceased with five children nearly as old as the alleged father, estopped her from setting up her true relation; and I am persuaded that Joseph Claremont, Jr., was not an employee of Ovid De Coss within the contemplation of the Workmen's Compensation Law; he was clearly engaged in a partnership undertaking as independent contractors under the original contract between De Coss and the Carthage Tissue Paper Company, and was employed as a contractor, not as a laborer. I think there was no evidence before the Industrial Commission to sustain this award, and it should be reversed.

The Commission has held that a junk gatherer who undertook for a specified sum a special job of breaking up a balance wheel for a junk dealer and was permanently disabled by unexpected explosion of dynamite was an employee and not an independent contractor: *Levine v. Gold's Sons*, Bul., vol. 3, p. 78, November 15, 1917.

Recent award cases resisted on the ground that the injured employees were independent contractors are: *Litts v. Risley Lumber Co.*, S. D. R., vol. 14, p. 714, Bul., vol. 3, p. 119, January 2, 1918; *McKibben v. Pakowski*, File No. 61, June 21, 1917; and *Hungerford v. Bonn*, S. D. R., vol. 14, p. 720, Bul., vol. 3, p. 121, January 2, 1918. The Litts award was affirmed and the McKibben award reversed by the Appellate Division, May 8, 1918.

C. *Hazardous employment*.—Only accidents that occur in hazardous employment are compensatable. "Hazardous employment means a work or occupation described in section two" of the Workmen's Compensation Law. These occupations, five or six hundred in number, are arranged in forty-four groups. The general rule governing definition of each and all of them has been set forth in Bulletin 81, pages 102-109. In addition to the decisions reproduced textually there, decisions interpretative of § 2 that have been handed down since are presented in numerical order of the groups as follows:

Group 8. *Vessels of other states or countries*.—A foreign corporation using a vessel in interstate or foreign commerce is exempt from the New York Workmen's Compensation Law's provisions, though the injured employee be a resident, the contract of employment be made, the corporation maintain an office, and the vessel be enrolled or registered in New York. The Appellate Division, one justice dissenting with opinion, has so held in *Charlton v. Hilton-Dodge Transportation Co.*, the text of which is presented below, page 304.

Group 10. *Longshore work*.—The special business of supplying watchmen for cargoes is not longshore work. Watchmen so supplied are not engaged in longshore work when they do nothing else but watch. 'The character of the employment, not the particular place, determines the classification.' The Appellate Division has so held without dissent in the following opinion reversing an award to a watchman:

OBERG v. McROBERTS & Co., 175 App. Div. 1, No. 15, 1916.

WOODWARD, J.: The employer in this case, W. J. McRoberts & Company, is located in the city of New York and is engaged in the business of supplying watchmen to steamship companies for the purpose of watching their cargoes. The claimant is the widow of one Axel Oberg who, on the 19th of April, 1915, was employed by said company as a watchman on the pier under the control of the Bush Terminal Company in Brooklyn, and on that date he fell and sustained injuries which are claimed to have resulted in static pneumonia and his ultimate death. A witness testified as to the injury that "I was watching cotton on one of the Bush Docks, Pier No. 1, about 300 feet away. The railroad track is down the center of the dock. Oberg, he was watching freight right opposite of me—general merchandise. I think it was the second night I was there. He was watching about two o'clock in the morning. There was two sections of it. There is a partition running through. He went around one of those offices opposite me, and it was in the dark; there

was no light in that section, but it was light on my side. Oberg, he hollered, and when I heard him holler the second time, so I went up to him, and I saw him lying on the floor. I asked him what is the matter, and he said he fell and hurt himself. I asked him how, and he said he heard some noise, and he went to investigate. He said his leg was hurt, his hip was hurt, and he could not get on his feet. So I got hold of him and dragged him into the office, put an overcoat under his head, and went to call an ambulance. The ambulance came, they looked him over and took him away. That is all I know about it."

Upon the question of an accidental injury, therefore, we are persuaded the claimant has established sufficient to justify the conclusion that Oberg was accidentally injured, rather than being the victim of a fall from an attack of vertigo, and if the right to compensation hinged upon this question we should have little reluctance in affirming the award.

The difficulty, however, is that the statute requires that the employer shall be one "employing workmen in hazardous employments," and a hazardous employment is "a work or occupation described in section two of this chapter." An employee, to come within the provisions of the act, must be "a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer." (Workmen's Compensation Law [Consol. Laws, chap. 67; Laws of 1914, chap. 41], § 3, as amd. by Laws of 1914, chap. 316.)* This court in *Matter of Aylesworth v. Phoenix Cheese Co.* (170 App. Div. 34) held that a manufacturer of cheese, employing a man exclusively in the work of gathering ice to be used by the cheese factory, was not engaged in a hazardous occupation within the meaning of the statute, although the cheese manufacturer was in fact engaged in one of the occupations declared to be hazardous. The Court of Appeals in a recent decision has declared that "Certainty is of the very essence of the law. Shifting and changing rules or principles do not constitute law. The avoidance or prevention of litigation through the establishment by the courts of fixed and certain rules is a useful and beneficial effect of the litigations had" (*Matter of Grifenhagen v. Ordway*, 218 N. Y. 458), and if this wholesome conception of law is to be followed the award in this case cannot be sustained.

The employer in this case is not engaged as a longshoreman; he was engaged in employing watchmen to watch cargoes, and the fact that these watchmen were subcontracted merely to watch steamship cargoes did not make the employment that of longshoremen any more than a like employment for the purpose of watching freight train cargoes. A longshoreman is defined by Webster to be "one of a class of laborers employed about the wharves of a seaport, especially in loading and unloading vessels," and the statute (§ 2, group 10) classes as hazardous employment in "longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage." The evidence in this case, wholly undisputed, is that W. J. McRoberts & Company were engaged in

* Since amd. by Laws of 1916, chap. 622. [REP.]

hiring men to act as watchmen for steamship cargoes; that these men were furnished to steamship companies; who paid in advance upon the wages paid by the employer, and that the employer had full charge over them, and became responsible for the goods left in charge of his employees; that these watchmen did nothing except to watch cargoes; that "the watchmen are not supposed to touch the cargoes; the watchmen I employ are usually pretty old men, not good for heavy work."

But beyond this it is not only necessary that the employer should be engaged in hazardous occupation, but the employee must be "engaged in a hazardous employment in the service of an employer carrying on or conducting the same." (§ 3, subd. 4), and surely there is nothing in the statute which attempts to make the position of a watchman a hazardous employment. A man engaged exclusively to watch a ship cargo, having no occasion to touch the cargo in any manner, merely to see that it is not stolen, cannot either technically or in common understanding be regarded as a longshoreman. His occupation is that of a watchman, and the mere fact that it is at a dock instead of a railroad station can have no legitimate bearing upon the question here presented; he does not become a longshoreman because he is stationed upon a dock to perform his services rather than upon the shipping platform of a manufacturing plant or a railroad freight depot. It is the character of the employment, not the particular place, which determines the classification, and it is counter to the language of the statute to award compensation to one who is not at the time of his injuries engaged in a hazardous occupation, as that expression is defined in the statute. In this case the employer was not "employing workmen in hazardous employments," nor was the deceased "engaged in hazardous employment in the service of an employer carrying on or conducting the same" hazardous employments, and under the law as it is laid down in *Matter of Aylesworth v. Phoenix Cheese Co.* (170 App. Div. 34), the award cannot be sanctioned.

The award should be reversed and set aside. All concurred. Award reversed, and claim dismissed.

Group 12. *Electric appliances*.—Moving picture machines are not appliances. The rule of *ejusdem generis* precludes such construction. The term appliance has to do with electric operating power. The Appellate Division has so held without dissent in the following opinion reversing an award to a moving picture machine operator. But by amendment of L. 1918, ch. 634, to group 42, theatrical moving picture machines are specifically brought within the law's coverage.

BALCOM V. ELLINTUCH & YARFITZ, 179 App. Div. 548, Sept. 13, 1917.

LYON, J.: The single question presented by this appeal is whether the State Industrial Commission was in error in holding that a moving picture machine was an "appliance" within the meaning of the term "appliances" as used in group 12 of section 2 of the Workmen's Compensation Law

which provided as a hazardous employment the "construction, installation, repair or operation of electric light and electric power lines, dynamos, or appliances, and power transmission lines."

The facts are undisputed. The claimant at the time of sustaining the injury was a licensed operator of an automatic moving picture machine, the motive power of which was electricity to the extent of one-eighth of one horse power. The Commission has found as a conclusion of fact that while the claimant "was engaged in operating the said electrical appliance, his right hand was struck by a projecting shaft, thereby causing bruises of the terminal phalange of the thumb of that hand in which developed an abscess by reason of which he was disabled from working * * * fourteen and one-half weeks." The claimant testified that something happened in the bottom magazine which drove his thumb against "the drive machine"; also, that the crank shaft, on the head of which was the lower magazine, projected beyond the machine, and that as he went to open the lower magazine he struck his right thumb against the crank shaft thereby sustaining bruises from which an abscess of the bone developed.

No claim is made that operating a moving picture machine was of itself one of the specified hazardous employments, but the award appealed from has been made upon the theory that a moving picture machine was an "appliance" within the language of group 12 before quoted. In this we think the Commission was in error. While the word "appliances" is a general term, it may be limited with respect of the subject-matter in relation to which it is used. (*People v. Richards*, 108 N. Y. 137, 148.) The word is used in group 12 in connection with the repair or operation of electric light and electric power lines, dynamos and power transmission lines. Plainly the application of the rule of *ejusdem generis* precludes the construction claimed by the respondent. The word "appliances" must be considered as limited by the words with which it is associated. (*Holtz v. Greenhut & Co.*, 175 App. Div. 878; *Pardy v. Boomhower Grocery Co.*, 178 id. 347; 164 N. Y. Supp. 775.) The motor which applied the current to the moving picture machine might properly be called an appliance within the meaning of group 12, and had the claimant been injured while operating the motor a very different question would be presented. It can hardly be said, however, that the machine to which the electricity was applied, simply resulting in the machine being put in motion, was itself an appliance within group 12. The operation of the machine by electricity or the presence of electricity had nothing whatever to do with causing the injury to claimant. The injury would have been sustained had the machine been operated by means of water or any other motive power. The only connection between the electric power and claimant's injury was that electric power operated the machine upon coming in contact with which the claimant was injured. As well might it be claimed that a person struck by the revolving crank of a washing machine, the operating power of which was electricity, was injured by an electrical appliance. Cars and machinery of all kinds are operated by electricity, yet it cannot be said that such mere consumers of electric current are in themselves electrical appliances.

An employment cannot be treated as hazardous unless the law, fairly construed, declares it to be such. We cannot give the act a strained construction for the purpose of bringing within it an employment not intended by the

legislature to be embraced within it. (*Matter of Tomassi v. Christensen*, 171 App. Div. 284.) It is not for us to speculate whether every employee injured through the operation of a power machine should be entitled to receive compensation under the Workmen's Compensation Law. As was said in *Matter of Wilson v. Dorflinger & Sons* (218 N. Y. 84): "It may be observed, however, that the courts are not concerned with the wisdom of the legislation under consideration when they are engaged in construing a statute. Their only purpose is to ascertain the true meaning and intent of the lawmakers."

The award should be reversed, and the claim dismissed. All concurred. Award reversed, and claim dismissed.

Group 14. *Lumbering*.—In *Uhl v. Hartwood Club*, the Court of Appeals says:

Whether a club or an individual owning a tract of woodland is or is not engaged in forestry and logging for pecuniary gain is a question of degree. It could not be said that the owner of a city lot who cut a tree and sold the timber was so engaged. Nor where a farmer here and there felled trees on his farm. But where the owner of a large tract of woodland cuts and sells the lumber upon it regularly, although that work may be incidental to his main business, he comes within the definition of the statute.

The opinions of the courts in this case appear below, pages 182, 186.

An amendment of L. 1918, ch. 635, to group 14 excepts from its coverage "operations solely for the production of fire wood in which not more than four persons are engaged by a single employer."

Group 16. *Upholstering*.—An employee engaged in taking up an old carpet and putting down a new one knelt upon an upturned rusty tack. The Commission held that his work was upholstering and awarded compensation for infection of his knee: *Strader v. Stern Bros.*, S. D. R., vol. 15, p. —, Bul., vol. 3, p. 117, January 17, 1918.

Group 17. *Mouldings*.—The term mouldings refers to manufacture, not to the fastening of mouldings for picture hanging. The Appellate Division has so held without dissent in an opinion reversing an award to a picture hanger: *Grassell v. Brodhead*, 175 App. Div. 874, December 29, 1916. The text of this case is presented below, page 84. Picture hanging is now covered by group 42.

Group 22. *Operation of boilers*.—The Commission awarded compensation to the janitor of an apartment house who was injured while chopping wood for use in its hot water boilers: S. D. R.,

vol. 7, p. 452, February 24, 1916. The Appellate Division affirmed the award without opinion, Justice Kellogg dissenting in a memorandum. The Court of Appeals unanimously reversed the Appellate Division's order and dismissed the claim on Justice Kellogg's dissenting opinion: 220 N. Y. Rep. 673, March 20, 1917. The memorandum is as follows:

SIEGFRIED V. GOLDBERG, 175 App. Div. 952, Nov. 29, 1917.

KELLOGG, P. J. (dissenting): Apparently the boiler referred to is the ordinary heater used in houses for furnishing hot water, and has no other use. It was probably larger than that in use in a single house, as there were five apartments to which the water was to be furnished; nevertheless it is the same kind of a boiler. I do not think that a man who builds a fire in a water heater in a house is within group 22,* which is "operation and repair of stationary engines and boilers * * *." The janitor simply was building the fire; there was no engine and no operation of a boiler within the meaning of the law. I favor reversal.

Group 22 has been amended since the accident in the Siegfried case to include "heating and lighting," and group 42 to include "maintenance and care of buildings."

Group 24. *Sleighs, manufacture*.—Repairing a sleigh is not manufacture: *Cronk v. Turner*, S. D. R., vol. 13, p. 547, Bul., vol. 2, p. 167, April 11, 1917. Note, however, that blacksmithing is now within this group's coverage.

Group 27. *Breweries and bottling*.—The driver of a delivery wagon for a bottling firm crushed his fingers while taking half barrels of beer from his employer's basement. The insurance carrier argued that the bottling was incidental to wholesaling and retailing of beers, ales, etc., and that the handling of barrels was not bottling. The Appellate Division affirmed an award unanimously and without opinion: *King v. Gross & Co.*, File No. 7766, January 31, 1917; 179 App. Div. 966, September 25, 1917.

A collector for a brewery was shot by robbers while collecting in a saloon. The Appellate Division unanimously affirmed an award to his dependents with opinion: *Spang v. Broadway Brewery & Malting Co.*, Death Case No. B-30, October 19, 1917; — App. Div. —, March 6, 1918. The text of the opinion appears below, page 111.

*See Consol. Laws, chap. 67 (Laws of 1914, chap. 41), § 2, group 22. Since amd. by Laws of 1916, chap. 622. [REP.]

Group 29. (1) *Milling*.—Operating a rye thresher and cleaner is not milling. The Appellate Division, one justice dissenting, has so held in *Vincent v. Taylor Bros.*, below, page, 80.

(2) *Cattle foods*.—Manufacture of stock tonics and liquid disinfectants is covered by this group: *Markham v. United Breeders Co.*, S. D. R., vol. 4, p. 390, May 28, 1915; 175 App. Div. 957, November 15, 1916.

(3) *Storage*.—The following three decisions, handed down by the Appellate Division on the same day, tend to limit or restrict the application of the word storage as used under this group. Justice Kellogg dissented in two cases and did not sit in the other.

The first decision affects the retail coal business. The court holds that "the underlying idea" of the various definitions of storage "is that of permanently keeping or holding goods to await some future contingency and that the term is not properly applied to merchandise which a merchant has on hand for immediate sale and disposition." As intimated in the following text, coal yards are now covered by group 19.

ROBERTO V. SCHMADEKE, 180 App. Div. 143, Nov. 14, 1917.

COCHRANE, J.: The employer conducts a large retail coal business at a plant covering practically a city block in Brooklyn, N. Y. The plant consists of three buildings or pockets, containing twenty-eight compartments for different kinds of coal. The maximum capacity of the plant was between 10,000 and 12,000 tons. The employer bought coal and retailed it as fast as possible. The smallest deliveries averaged between 700 and 800 tons a day, and the largest deliveries were 1,200 tons a day. Among the findings of the Commission are the following: "As fast as the coal was sold, the stock was replenished. When business was brisk the pockets were pretty nearly filled. If the market was right, they [the employer] would store in the summer coal for their winter supply, which coal would be sold in winter. At the time of the accident the scarcity of coal required them to get the coal out of the corners of the pockets." The accident happened December 15, 1916. The Commission finds that the employee "was required to enter a coal pocket or compartment in order to trim or move some coal from one portion of a bin to another portion, so that the coal would run by gravity down a chute." This was because the supply of coal was well nigh exhausted and it had to be "trimmed" or moved from the corners of the pocket to the place where the chute was so that it would run down the chute into automobile trucks for delivery to customers. While walking along a corridor around the pocket, the employee fell, sustaining injuries which resulted in his death.

The Commission has found that the employer "was engaged in the business of storage of coal within the meaning of group 29 of section 2 of the Workmen's Compensation Law." That group includes "storage of all kinds

and storage for hire." (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], section 2, group 29, as amended by Laws of 1916, chap. 622.) The accident happened before the Legislature by the amendment of 1917 (Chap. 705) amended group 19 of section 2 so as to include coal yards.

I am unable to see how this award can be sustained unless we are prepared to hold that every merchant and country storekeeper in carrying his ordinary supply and stock of goods is engaged in the storage business. The farmer who deposits his grain in the barn until such time as in the natural and ordinary course of events he would market the same; the merchant who purchases the grain from the farmer and temporarily deposits the same in some convenient place until opportunity presents itself to sell the same to a customer in the ordinary and natural routine of business; the miller who receives the grain from the merchant and keeps it in his mill for a day or two until the natural exigencies of his business permit him to grind it into flour; the manufacturer who buys a commodity and has it in his factory with a view to using it or transforming it into the manufactured product; are all engaged in the storage business within the meaning of group 29, if the employer in this case was so engaged. It is true that the employer was conducting a large and extensive business, but it is not the size or magnitude of the business which is controlling, but the manner in which it is conducted. The method pursued by this coal dealer was precisely that which exists in the ordinary coal yards of the cities and villages of the State. If a merchant purchases a stock of goods in excess of his immediate requirements and holds the same for an advance in price, or for any reason does not expose or offer the same for immediate sale, he perhaps to that extent engages in the storage business within the meaning of group 29. But if his stock of goods is on hand for present sale at the prevailing prices, and is immediately offered and exposed for sale, I cannot think that such stock of goods is being stored merely because the thrift and prudence of the merchant prompts him to have on hand a sufficient supply to meet the most pressing demands which may be made. In this case it has been found that if the market was right the employer "would store in the summer coal for their winter supply, which coal would be sold in winter." Perhaps to that extent and in that respect the employer was engaged in storage within the meaning of group 29. But that need not be determined because it has no application or relation to this accident. There had been a scarcity of coal since the previous October and at the time of the accident the supply was nearly exhausted, so much so that the work which the deceased was proceeding to do consisted in "trimming" or moving the coal from the corners of the pocket out into the center of the pocket where it could fall into the chute and be loaded onto the trucks. In fact the finding of the Commission is: "At the time of the accident the scarcity of coal required them to get the coal out of the corners of the pockets." There was, therefore, no hoarding or storage of coal at the time of the accident. There can be no contention that the employer at that time was carrying a larger supply than the immediate demands and requirements of the business made appropriate. There was not on hand a single pound of coal which the employer would not have sold at any moment to any customer in the usual course of the business. Definitions are sometimes vague and unsatisfactory and the definitions of the term "storage" as given by lexicographers are not conclusive in discovering the legislative

intent, but may be helpful in doing so. I think the underlying idea of those various definitions is that of permanently keeping or holding goods to await some future contingency, and that the term is not properly applied to merchandise which a merchant has on hand for immediate sale and disposition. The legislative intent is controlling and the problem is to discover that intent. The expression "storage of all kinds and storage for hire" of course implies that if an employer is storing his own property he may be engaged in a "hazardous employment." But the question in this and other similar cases is to determine under what circumstances the employer is engaged in the "employment" of storing his own property. It is of course impossible to enunciate a rule applicable to all cases. Each case as it arises must largely be determined with reference to its own facts. It may be difficult in some cases to draw the line of demarcation. It seems quite clear, however, that in a case like the present where a merchant is not holding his stock of goods or any part thereof with reference to any future requirements of the market or business contingency, but is endeavoring to sell the same to his customers and is immediately offering and exposing the same for sale in the ordinary course of his business, such a person is not engaged in the "employment" of "storage." (See, also, *Walsh v. Woolworth Co.*, 180 App. Div. 120, decided herewith.)

The award should be reversed and the claim dismissed. All concurred, except *KELLOGG*, P. J., who dissented for the reasons stated in his memorandum in *Kronberger v. Harlem Bottle Co.* (181 App. Div. 900), decided herewith. Award reversed and claim dismissed.

The second decision relates to retail mercantile establishments, in this instance a five and ten cent store. The court holds that storage under group 29 means "not purely incidental storage of the goods necessary to keep up a retail stock, but the wholesale storage of merchandise in large packages, involving special dangers in their handling and storage." The full text of the decision is as follows:

WALSH V. WOOLWORTH Co., 180 App. Div. 120, Nov. 14, 1917.

WOODWARD, J.: In the present case a boy, sixteen years of age, was employed by the F. W. Woolworth Company in a five and ten-cent store at Oswego during the school vacation. His duties were to take the merchandise arriving from day to day and delivered upon the sidewalk in front of the store and place it in the basement in receptacles provided for that purpose, and to take these goods, from time to time, to the salesroom above at the request of the salesmen. This boy terminated his employment on the 21st day of October, 1916, having worked later than was expected because of the fact that the schools were not opened at the usual time that year. On the following day the father of the boy reported to the manager of the company that the boy had sustained a sprain of his back, and the company made a report upon the alleged accident, and the claimant filed the notice of injury and the claim for compensation in due time. The matter came on

for a hearing at Oswego on the fifth day of February, 1917, and at that time the claimant testified that he took a barrel of peanuts from the sidewalk on the twenty-first day of October previous and took it to the basement; that he was obliged to roll this up an incline, and that in so doing he sustained an injury to his back — a strain.

The insurance carrier asked to have the hearing held open for further proof, and upon a further hearing upon the twenty-sixth of February, it was shown by the records that no such goods were received on the twenty-first day of October, or at any time between the eighteenth and the twenty-fourth days of October, and one of the Commissioners adroitly asked: "But you see from the testimony there was none received that day?" and the boy answered: "I might have taken the barrel in a couple of days before and put it off to one side," and then the witness concludes that the barrel was already in the cellar when he went to work on the day he had the kink in his back. Of course, there was some evidence in support of the injury, and under the statute this must be conclusive.

But the real question here is whether the employment in which the claimant was engaged comes within the provisions of the statute. The evidence shows that the Woolworth Company was engaged in a retail trade — a five and ten-cent store — and it is evident that it was handling only a comparatively small stock of goods, replenished from day to day by incoming shipments. It is conceded that under the provisions of the original act, as construed by this court in *Matter of Mihm v. Hussey* (169 App. Div. 742), group 29 of section 2 of the Workmen's Compensation Law (Consol. Laws, chapter 67; Laws of 1914, chapter 41), it would not embrace the present case, as the employer was not conducting a warehouse or storage place for pecuniary gain, but it is urged that the amendment of this group by the provisions of chapter 622 of the Laws of 1916 was intended to meet the point decided in that case, and to enlarge the group so as to include the present case. In a dissenting opinion in the case cited, Mr. Justice KELLOGE said: "It is urged that the employer was storing only his own goods and was not engaged in the business of storage, and that the statute contemplates a warehousing business or storage business carried on for the storage of goods of others for hire. We think this is too narrow a construction of the law. If the employer has a large storage warehouse and was receiving heavy packages of merchandise which were to be moved from time to time by his employees, the risk to them is the same whether he is storing the goods for himself or for others. The statute is a beneficial one, intended to throw upon the business the risks incident to and resulting from it, and the liability ought not to depend upon the question whether the goods in storage were the goods of the employer or the goods of others." This was the other view of the construction to be put upon the statute, and if we assume that the Legislature intended to overrule in effect the determination of the court in the case under consideration we may assume that it likewise had in view the wider construction suggested by Mr. Justice KELLOGE, and that the purpose was to provide for the case of an employee engaged by an employer who was in fact conducting a warehouse in the common understanding of that word.

Section 2 of the Workmen's Compensation Law as now existing (Laws of 1916, chapter 622), provides that "Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged

in the following hazardous employments: * * *. Group 29. Milling; manufacture of cereals or cattle foods; warehousing; storage of all kinds and storage for hire; operation of grain elevators."

The provisions of group 29 in the original statute were: "Milling; manufacture of cereals or cattle foods; warehousing; storage; operation of grain elevators." The most obvious thing about group 29, in connection with the scheme of the Workmen's Compensation Law generally, is the fact that it deals with wholesale matters; with large industrial undertakings, the manufacturing and transportation of the products of the forests, mines and farms of the country, excluding as it does domestic servants and farm laborers. (Section 3, subdivision 4, as amended by Laws of 1916, chapter 622.) There is not to be found within the limits of the forty-three groups enumerated in the statute a single provision for a retail establishment, with the possible exception of groups 30 and 34 of section 2 (as amended by Laws of 1916, chapter 622), and these obviously involve dangerous operations apart from the mere distributing of goods at retail, and when the statute refers to warehousing or "storage of all kinds and storage for hire" we are to understand, not purely incidental storage of the goods necessary to keep up a retail stock, but the wholesale storage of merchandise in large packages, involving special dangers in their handling and storage. Otherwise, if we read this statute literally, every farmer who stores fertilizer, lime, seed or other things necessary for the carrying on of his farm operations would be construed to be engaged in a dangerous business, and would be liable for injuries sustained by his employees, and every householder who providently put in a supply of coal or wood or of potatoes, would be within the classification, and any accident occurring to an employee would be entitled to compensation. That no such construction was contemplated is clear from the general scope of the law, and it is emphasized by the amendment to the definition of an employee contained in the same statute as the amendment here under consideration. Subdivision 4 of section 3 now defines "employee" to mean "a person engaged in one of the occupations enumerated in section 2 or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants." And a "hazardous employment" continues to be defined in subdivision 1 of section 3, as before, to mean "a work or occupation described in section 2." Formerly an "employee" was defined to be "a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same," but now it is "a person engaged in one of the occupations enumerated," or one "who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises," etc., and this clearly excludes the claimant in this case, for it cannot be contended that the employer's "principal business" was that of a warehouseman or storageman, in the light of the record now before us.

Group 29 of section 2 is to be read in connection with the entire statute as amended, and the definition of an "employee" as now provided limits its operation to those who are exclusively engaged in the lines enumerated, or whose "principal business is that of carrying on or conducting a hazardous employment upon the premises, or at the plant, or in the course of his

employment away from the plant of his employer," and the word "employment" "includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain." (§ 3, subd. 5.) If the "principal business" of the F. W. Woolworth Company was the carrying on or conducting of a warehouse or storage plant, incidentally retailing goods, the claimant would be entitled to assert his claim, but it clearly appears that the warehousing or storing of goods by the employer was purely incidental to the carrying on of a retail business, and the case is not within the letter or the spirit of the statute. (See, also, *Roberto v. Schmadeke, Inc.*, 180 App. Div. 143, decided herewith.)

The award should be reversed, and the claim dismissed. All concurred, KELLOGG, P. J., not sitting. Award reversed and the claim dismissed.

The third decision concerns dealers in second-hand bottles. The employee in the case slipped and fell while carrying a box of bottles. The Appellate Division reversed an award without opinion upon authority of its contemporaneous decisions in the Roberto and Walsh cases, above. The case is noteworthy for the dissenting opinion of Justice Kellogg which is as follows:

KRONBERGER v. HARLEM BOTTLE Co., 181 App. Div. 900, Nov. 14, 1917.

PER CURIAM: Award reversed and claim dismissed, on the authority of *Matter of Roberto v. Schmadeke*, 180 App. Div. 143, and *Matter of Walsh v. Woolworth Co.*, 180 Id. 120, decided herewith.

KELLOGG, P. J. (dissenting): In the *Matter of Mihm v. Hussey*, 169 App. Div. 743, we held by a divided court that a wholesale produce dealer who stored his produce, until sold, in a building kept for such storage, was not engaged in warehousing or storage within group 29 of section 2 of the Workmen's Compensation Law. Immediately following that decision that group was amended by adding after the word "storage" the words "of all kinds and storage for hire." The amendment, we infer from the statement of the Commission, was procured by it to meet the Mihm case.

Here the employer's business was keeping men upon the city dumps, picking bottles from the junk and refuse there, taking them to its warehouse, washing, steaming and sorting them according to kind, and keeping them until sold. It also bought new bottles, and bottles from secondhand dealers, and junk dealers, wherever offered, by the carload lots, wagon load or by barrels and otherwise.

It occupied a building about thirty feet by eighty, in part of which was an office and the remainder was used for storing the bottles. The secretary of the company well defined its business as follows: "Q. Do you do anything else beside buying bottles? A. Buy them and store them inside and sell them,—that's all we do."

The Commission found that the business of the employer was that "of junk dealer in respect to bottles and storage." Ordinarily the buying of second-hand bottles is not in itself dealing in junk as that word is generally understood, but the men whose business it is to go upon the public dumps of the city of New York, overhauling the junk and refuse there and picking

out and removing bottles therefrom, are evidently exposed to the risks and dangers incident to the employment embraced within Group 43. But it is unnecessary to determine whether within this beneficial statute the employer might be held to be a dealer in junk with respect to bottles, as found by the Commission, as we conclude that he was engaged in storage of some kind within the meaning of Group 29. The group should have a liberal construction so as to bring within it, so far as reasonably may be, the employees who are exposed to the risks and dangers ordinarily incident to the business embraced within it.

In *Wilmott v. Paton*, 4 W. C. C. 65, it was said: "I think that, upon the admitted facts as stated to us, there was clearly a prima facie case that these premises were a warehouse. The premises were used for the purpose of breaking up old iron for sale. Very large quantities of old iron were kept stored in large covered sheds upon the premises." And in *Green v. Britten*, 8 W. C. C. 82, upon the same subject, the court says: "Nor can it be limited so as to apply only to a building where the public can send their goods to be stored for them, as in the case of the large furniture repositories. The word is applicable to a building used by the owner for the storage of his own goods, though it has no connection of any sort with water transit. * * * While it may be difficult to define 'warehouse,' I am of the opinion that, as used in the Act of 1897, it involves the idea of a place normally of considerable size, mainly used for the storage of goods in bulk or in large quantities, and in which consequently the dangers incident to the handling of goods in bulk or in large quantities might naturally arise."

In *Armour & Company v. Industrial Board of Illinois*, 114 N. E. 173, the company, in its building, stored its produce for sale to dealers in Danville and vicinity; fresh meats were kept usually no longer than a week, and smoked meats from one to three weeks. It was held to be within the act providing for "the operation of any warehouse or general or terminal warehouse."

The workmen in such employment are subject to all the hazards and risks attending an employment in a regular storage or warehouse. Their place of employment is in and about the warehouse and in connection with the storing of the merchandise, differing entirely from the employee in the ordinary store which keeps a quantity of merchandise in stock to sell to its regular trade. The employees of the store are salesmen who handle the goods as salesmen. Here the employees' duties are to collect the second-hand bottles, and to place them in the storage and hold them there. We are construing a statute intended for the benefit of the employee and to charge upon the hazardous employment the risks flowing from it. It places the loss from industrial accidents in hazardous employments upon the ultimate consumer and not upon the injured employee. The presumptions of the statute are all with the claimant whose claim is presumed to be within the act. It is not always the question what his business is called, or whether technically he is within the strict letter of the group. The question is,—is his employer engaged in a business within the fair spirit of the group. Is his employer using or employing him in the regular performance of his duties, where he is subject to the risks and dangers intended to be covered by the group? Is he fairly within the legislative intent? In this case the employer was

fairly engaged in the business of collecting and storing second-hand and other bottles. The storage was of course with the expectation of making a contract of sale at a proper time.

I think the Commission was justified in determining, as a matter of fact, that the employer was engaged in a hazardous business and that the employee is entitled to the benefits of the act. I therefore favor an affirmance.

Group 30. *Preparation of meats*.—An opinion of the Appellate Division holding that this group does not cover the ordinary preparation of meats for cooking has been published in Bulletin 81, pages 102-104. In the following opinion the Appellate Division holds that the group did not cover the grinding of meat by hand in a retail meat market prior to insertion of the words "meat markets" by L. 1916, ch. 622:

PIETHA v. MURDTER, 174 App. Div. 764, Nov. 15, 1916.

WOODWARD, J.: The defendant is engaged in the business of conducting a retail meat market in the city of New York. The claimant was in his employ, and on the 29th day of November, 1915, while engaged in passing two pounds of meat through a hand-grinding machine for a customer in waiting, one of his fingers was caught in the machine and injured so that amputation became necessary. Upon the original hearing this claim was disallowed on the ground that it did not come within the law, but subsequently the case was opened and an award made. From this award the employer and insurance carrier appeal, urging that the original decision was right, and that the claimant was not engaged in a hazardous employment as defined by the statute at the time of his injuries. This accident occurred prior to the enactment of chapter 622 of the Laws of 1916, which now includes meat markets in group 30 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), and the fact that the Legislature has found it necessary to include meat markets in the list of hazardous occupations clearly shows that it was not a part of the law prior to the enactment of this statute. The learned Attorney-General says that "the facts are all conceded and the only question of law presented is as to whether the process of grinding meat is a business in the preparation of meat;" and we are fully persuaded that the incidental grinding up of a few pounds of meat, purchased by a customer who is present and waiting for this service to be performed, is not "a business in the preparation of meat," any more than the chipping of dried beef, purchased at a grocery store, is such a business, or the grinding of a pound of coffee while the customer waits is "milling" within the meaning of group 29 of section 2. Group 30 of section 2 does not provide for the preparation of meat; its language is "Packing houses, abattoirs, manufacture or preparation of meats or meat products or glue." It is where the employer is engaged in the "manufacture or preparation of meats or meat products," that he comes within the law; not where he incidentally prepares a particular purchase of meat for the convenience or satisfaction of his customer. In a

sense, of course, one is engaged in preparing meat when he cuts off a steak or trims away some portion of the flesh or fatty matter, but the statute is to be intelligently construed; words are to be construed in their ordinary and commonly accepted sense, and no one, in reading the provisions of group 30 of section 2, would think of such an incidental work as that involved in the present case being a preparation of meats, unless he was looking for a pretext to pay for an accident which had happened in the particular act. If there is liability under the statute here, then there would be liability if a grocer chipped the dried or smoked beef which his customer purchased, if an accident happened in the particular act, and there would be equal liability if a clerk cut his fingers in carving a cheese, for this under group 33 of section 2 would be a "canning or preparation of fruit, vegetables, fish or food stuffs," and, as we have already suggested, it would be "milling" under group 29 of section 2 to grind a pound of coffee which the customer had purchased, and would be the preparation of food stuffs perhaps under group 33 of section 2.

The statute, fairly construed, means, of course, the commercial preparation of meats and meat products; the curing of meats in connection with the packing houses, abattoirs, etc., and has no possible relation to the mere cutting up of particular pieces of meat, whether the cutting be in large or small particles. It might be, of course, that a man conducting a meat market might be engaged in the occupation of a sausagemaker, or in the preparation of meats or meat products for the market generally, and if this was done he might come within the statute in so far as his employees were engaged in this manufacturing branch of the business, but here the record shows that the grinding was of a small quantity of meat purchased by a customer, a purely incidental service performed for the particular customer in connection with the purchase.

The award should be annulled and the claim dismissed. All concurred. Award reversed and claim dismissed.

Group 33. *Food stuffs, canning or preparation.*—Prior to the amendment of L. 1916, ch. 622, adding the words "manufacture of dairy products," this group, with exception of its provision for pickle factories and sugar refineries, was limited to eatables canned and prepared, as distinguished from eatables manufactured. Therefore, as the following opinion of the Appellate Division sets forth, it did not cover the making of butter:

PARDY V. BOOMHOWER GROCERY Co., 178 App. Div. 347, May 2, 1917.

COCHRANE, J.: The employer was engaged in a general grocery business and also in the operation of a butter factory. On October 29, 1915, the employee while packing butter in tubs was revolving a tub in the performance of his work and a splinter from one of the hoops of the tub penetrated the palm of his hand and the wound thereby occasioned becoming infected, blood poisoning resulted which caused his death. An award has been made to his widow and children. The only group under section 2 of

the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) which is suggested as including this claim is group 33, which at the time of the accident was as follows: "Canning or preparation of fruit, vegetables, fish or food stuffs; pickle factories and sugar refineries." For several reasons we are persuaded that the claim is not within this group.

First. The expression "food stuffs" as used in group 33 evidently means food which may be subjected to "canning" or similar "preparation." Clearly group 33 does not include all kinds of food because if it did the statute would not specifically provide in group 29 for "cereals" or in group 30 for "meats or meat products," or in group 34 for "crackers and biscuits." Such a construction must be given to the statute if possible as will render every part thereof useful or purposeful, and if butter is included in group 33, there is no reason why the cereals of group 29, or the meat preparation of group 30, or the crackers and biscuits of group 34, should not likewise be included in group 33, and the provisions in respect to those articles in the other groups mentioned would be useless.

Second. In the various groups of section 2, a clear and well-defined distinction is made between the use of the term "manufacture" and the term "preparation." Butter is an article which is more naturally and properly classified with those that are manufactured. In common parlance the housewife does not prepare but "makes" butter. The producer and consumer alike speak of butter as an article made or manufactured rather than as something which is prepared as by canning or other similar process. It is brought into existence by a mechanical process. Not only in common parlance but by legislative recognition is it a manufactured product. Section 30 of the Agricultural Law (Consol. Laws, chap. 1 [Laws of 1909, chap. 9], as amd. by Laws of 1913, chap. 455) contains the following definition: "The term 'butter' when used in this article means the product of the dairy, usually known by that term, which is manufactured exclusively from pure, unadulterated milk or cream or both with or without salt or coloring matter." Group 29 of section 2 of the Workmen's Compensation Law speaks of the manufacture of cereals. Group 30 of the manufacture or preparation (meaning apparently similar preparation) of meats, and group 34 of the manufacture of crackers and biscuits; and by clear analogy butter if intended to be within the act would likewise be designated as a manufactured article and would not be included in a group, the dominating idea of which is not the process of manufacturing but the process of "canning" or some "preparation" which evidently means some preparation akin or similar to canning which merely modifies the form but does not destroy the identity of the articles to which the canning process or other similar preparation applies. In the amendment to group 33 hereafter mentioned the Legislature says "manufacture of dairy products." (Laws of 1916, chap. 622.) Group 33 as it was before the amendment had reference to the canning or similar preparation of food which subjects it to some change without bringing into existence a new product. Butter is a newly formed product to which the idea of canning or any similar preparation is quite inapplicable. The word "preparation" as used in group 30 and group 33 is subject to the well-known canon of construction that "words, however general, may be limited with respect to the subject-matter in relation to which they are used." (*People v. Richards*, 108 N. Y. 137, 150.)

Third. Butter making is one of the great industries of the State. It would seem that had the Legislature intended to include it as a hazardous employment it would not have left the matter to conjecture or argument. In *Matter of Wilson v. Dorflinger & Sons* (218 N. Y. 84) it was said by Chief Judge BARTLETT: "The character of the Workmen's Compensation Law indicates that it was prepared with the utmost care and it is only fair to its authors to assume that nothing was inadvertently omitted therefrom." Since the accident, group 33 has been amended by adding thereto the words "manufacture of dairy products" which clearly includes the manufacture of butter. And this amendment indicates that in the view of the Legislature the manufacture of butter or other dairy products had not previously been made a hazardous employment. Otherwise there was no necessity for the amendment.

The award should be reversed and the claim dismissed. All concurred. Award reversed and claim dismissed.

An employee of a milk handling firm cut his finger while washing bottles and died from ensuing infection and disease. The Commission awarded death benefits. The accident occurred May 3 or 4, 1916, before the amendment to group 33, inserting the words "manufacture of dairy products," became effective. Upon appeal the insurance carrier claimed that the occupation was not covered at the time of the accident and cited the above decision in the Pardy case. The Appellate Division affirmed the award, however, unanimously and without opinion: *Rodgers v. Borden's Condensed Milk Co.*, Death File, No. 27351, July 13, 1917; 182 App. Div. —, Jan. 18, 1918.

The Commission granted compensation under group 33 to an employee injured while wiring bottles of peroxide, apparently on the ground that the employer was operating a canning factory; the Appellate Division vacated the award on the ground that the employer's main business of wholesale groceries was not hazardous and that the employee was not injured while engaged in a hazardous employment. Two other points of law, not pertinent in this connection, were passed upon in the court's opinion. The portion of the text relative to group 33 is as follows:

BECKMANN V. OELERICH & SON, 174 App. Div. 353, Sept. 13, 1916, *in part*.

As to the third claim of the appellant, that the injury sustained by the claimant did not arise out of or in the course of his employment. The Commission held that the employment of claimant fell within group 33 of section 2, which was as follows: "Canning or preparation of fruit, vegetables, fish or food stuffs; pickle factories and sugar refineries." It appears from the remarks of the members of the Commission, preceding making the

award of October sixth, that the Commission concluded that the employer should be held to have been operating a canning factory, and, hence, that the claimant's employment fell within group 33 of section 2. However, the finding of the Commission states that the employer corporation was engaged in the business of "grocers' sundries and wholesale groceries." This was also the statement in the employer's first report of injury. The policy stated that the employer's business was "Wholesale dealers in grocers' specialties." The employer cannot fairly be considered to have been operating a canning factory. It appears that claimant's work covered fully seventeen lines of employment, seven of which are mentioned in the foregoing conclusions of fact, in no one of which its employees were engaged continuously, but in each of which work was done from time to time, doubtless as was necessary to keep the stock up, and as demands of the trade required. Of these seventeen employments apparently not more than three or four could be classed as hazardous employments under the Workmen's Compensation Law as it existed at the time the claimant was injured.

The evidence shows that the claimant's injury resulted from the bursting of a bottle containing peroxide which had been filled, corked and left standing on the floor some days before, and as the claimant placed it upon a bench for the purpose, by the use of a hand machine, of placing wires over the corks to prevent their being forced out by the gas, the gas which had accumulated in one of the bottles exploded. Prior to classifying "bottling" as a hazardous employment under group 27 of section 2 by the amendment of 1916 (Chap. 622), drawing from barrels, peroxide, which was described as a liquid antiseptic, a disinfectant, and as commonly sold by grocers for cleaning purposes, and placing it in bottles, was not embraced in the hazardous employments, nor was it incidental to a hazardous employment. Neither was the business of "grocers' sundries and wholesale groceries," classified as a hazardous employment. The question, therefore, presented by this branch of the appeal is whether an employee working in August, 1914, in an industry, not in itself hazardous, in which there were several lines of employment, some of which were hazardous, and some non-hazardous, who was injured while working in one of the non-hazardous employments which was in no way incident to a hazardous employment, was entitled to compensation. The word "employee" as defined in section 3, subdivision 4 (prior to the amendment of 1916), "means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same * * *." Section 2 of the Workmen's Compensation Law awards compensation to employees "engaged in the following hazardous employments;" and this right of compensation concededly extended to an employment which was an incident to a hazardous employment. That the injury must have arisen out of a hazardous employment, or, in other words, have been sustained while the employee was engaged in a hazardous employment or in an employment incident to a hazardous employment in order to justify making an award has been held in several cases, among others: *Matter of Newman v. Newman* (218 N. Y. 325; 169 App. Div. 745); *Matter of Mihm v. Hussey* (Id. 742); *Matter of Gleisner v. Gross & Herbener* (170 id. 37); *Matter of Sickles v. Ballston Refrigerating Storage Co.* (171 id. 108).

The decision of the Commission should be reversed, and the award vacated. All concurred. Decision of the Commission reversed and award vacated.

Group 38. *Clothing manufacture*.—Employees of a retailer of clothing who alter garments so as to fit his customers are covered by this group: *Mattura v. Price & Co.*, S. D. R., vol. 11, p. 635, December 26, 1916; 179 App. Div. 952, July 3, 1917; *Smith v. Gold*, S. D. R., vol. 9, p. 376, July 20, 1916, reversed in Appellate Division, November, 1916, see below, page 139.

Group 40. *Moving picture films*.—Incidentally to its business of distributing moving picture films a firm altered and repaired them. A film jumped from a reel, broke a cement bottle and splashed the contents into the eye of an examiner. Award was made for loss of the eye. The Commission held that the firm was engaged in the "manufacture" of films: *McDowell v. New Film Corp.*, or *Dispatch Film Corp.*, Bul., vol. 3, p. 10, September 5, 1917; affirmed by Appellate Division, March 6, 1918.

Group 41. *Operation of vehicles*.—An employee engaged in a non-hazardous employment for pecuniary gain, for example, a retail grocer, is responsible for compensation to his driver operating a vehicle for delivery or other purposes connected with his business, even though the accident may have happened before the redefinition of an employee by L. 1916, ch. 622. The Court of Appeals has so held in *Glatzl v. Stumpp* and *Mulford v. Pettit & Sons*, the texts of which cases appear below, pages 169, 172.

(1) *Hand trucks operation*.—Operation of hand trucks, having been declared a non-hazardous employment in the following opinion, the Legislature of 1917 made it a hazardous employment by amending group 41. The court has suggested that pushing wheelbarrows may come within the group's coverage.

HOLTZ v. GREENHUT & Co., 175 App. Div. 878, Dec. 28, 1916.

LYON, J.: The question certified to this court by the State Industrial Commission is "Was the said Abraham Holtz at the time he received the said accidental personal injuries engaged in a hazardous employment within the meaning of the Workmen's Compensation Law."

Claimant's employer was engaged in operating a retail department store in the city of New York. This business was not then classified as a hazardous employment. Claimant was employed as a delivery helper. Among his duties was loading goods on a truck and drawing the truck by hand to the place in the basement where it was to be unloaded. In January, 1916, while lifting a barrel for the purpose of putting it upon a truck and moving it to another part of the store, a nail in the bottom of the barrel pierced one of his fingers. The wound becoming infected caused the disability for which he makes claim for compensation. The claimant although a mere helper was engaged while

loading the truck in the operation of the truck. (*Matter of Costello v. Taylor*, 217 N. Y. 179; *Matter of Dale v. Saunders Bros.*, 218 id. 59; 171 App. Div. 528; *Matter of Smith v. Price*, 168 id. 421; *Matter of Hendricks v. Seeman Bros.*, 170 id. 133.) His injuries, therefore, arose out of and in the course of his employment.

Concededly, the only group in which claimant could be considered as being included was group 41, which at the time of the happening of the accident, read as follows: "The operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules." In the case of *Matter of Wilson v. Dorflinger & Sons* (218 N. Y. 84) it was held that an elevator was not included in the term "vehicles," as used in group 41, and that while the Workmen's Compensation Law must be liberally construed, the rule of *ejusdem generis* applied to the group, and the vehicles referred to must be construed as referring to cars, trucks or wagons operated on streets and highways. The association of the word "trucks" with the words "cars" and "wagons" indicates that it was intended to cover vehicles of similar use. The sentence as a whole indicates that the trucks, wagons and other vehicles intended to be included were those only which were power propelled, and not operated on tracks, and also those drawn by horses or mules.

In order that the truck in question may be considered as being embraced in group 41, it must be held that the words "propelled by * * * other power" include a truck drawn by hand and operated inside a building. The application of the rule of *ejusdem generis* to the group, precludes such a construction, and requires the holding that the expression "other power" applies to trucks propelled by steam, gas, gasoline, electric, mechanical or other power of like character. Under the construction contended for by claimant, an accidental injury sustained in a non-hazardous employment while pushing a wheelbarrow could be held to be included in the group. The addition, by the amendment of 1916 (Chap. 622), to the hazardous employments theretofore specified in group 41, of "public garages, livery, boarding or sales stables; movers of all kinds," tends to indicate that the proper construction of the language of the group is as before stated.

We conclude, therefore, that the question certified to us should be answered in the negative. All concurred. Question certified answered in the negative.

(2) *Snow scrapers or carriers.*—Movers of all kinds are covered by an amendment of L. 1916, ch. 622, to group 42. Prior to this, an employee injured his spine in dumping wet snow or slush from a scraper. The Court of Appeals has upheld an award in the case without opinion: *Berg v. Hetzler Bros.*, 222 N. Y. Rep. 645, January 22, 1918. The Appellate Division had handed down an opinion holding, in contrast with its opinion in the Holtz case immediately above, that the rule of *ejusdem generis* applied. It is as follows:

BERG v. HETZLER BROS., 179 App. Div. 551, Sept. 13, 1917.

LYON, J.: In March, 1916, the claimant while engaged in removing snow from an ice field sustained a compression or laceration of the spinal cord resulting in paralysis of both legs. The single question presented by this appeal is whether the implement used by him in his work was a "vehicle" within the meaning of group 41 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), which at the time the claimant was injured named as a hazardous employment "The operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules." The implement is designated in the evidence as a scraper, conveyor or snow carrier. It was about six feet in length and four and one-half feet in width, and was used to roughly remove the snow from the field of ice to the land, being followed by the machine scraper which cut off the rough places, cleaned the ice and prepared it for marketing, cutting and harvesting. In construction the implement was very similar to the body of the pole scraper in common use. It was drawn by a horse driven by the claimant who walked behind it holding and guiding it by the two handles attached thereto. As soon as it had been filled, which in the deep snow on this occasion occurred when it had been but a little more than its length, it was tipped down, thus retaining the snow with which it was loaded, and as the Commission finds it was then used as a sled to carry the snow to a place where it was to be dumped. The dumping place was on the land often fifty or sixty feet, and at times much farther, from the place where the last collection of snow had been made. The carrying of snow by the scraper was across ice which had been cleared of snow. An earlier method of removing the snow had been to shovel it into wagons and draw it to the dumping place. Upon the implement being dumped, it evidently rested upon projections or runners upon its face, and was thus drawn back to the place where it was to be reloaded. At the time the claimant was injured the scraper or conveyor was filled with wet snow or slush. As the claimant was raising the handles for the purpose of tipping it up and dumping the snow, the weight proved too heavy for him and he sustained the injuries before stated.

In May, 1916, the State Industrial Commission disallowed the claim as not being within the act. The Commission later reconsidered its action and made the six several awards of compensation appealed from.

A vehicle is defined: "1. Any carriage moving on land, either on wheels or on runners; a conveyance. 2. That which is used as an instrument of conveyance, transmission or communication." (Century Dict.; *Davis v. Petrino-vich*, 112 Ala. 656.) "That in which anything is carried; a carriage; a conveyance." (Worcester's Dict.) "1. That in or on which any person or thing is, or may be carried, as a coach, carriage, wagon, cart, car, sleigh, bicycle, etc.; a means of conveyance; specifically a means of conveyance upon land. 2. That which is used as the instrument of conveyance or communication; as, matter is the vehicle of energy." (Webster's Dict.) "The word 'vehicle' includes every description of carriage or other artificial contrivance used, or capable of being used, as a means of transportation on land." (U. S. R. S. § 4.) "The word 'vehicle' * * * shall be deemed to include

wagons * * * sleighs or other conveyances for persons or property." (New York City Charter; *Fifth Avenue Coach Co. v. City of New York*, 194 N. Y. 19.) The term "vehicle" includes a threshing machine and separator. (*Heib v. Town of Big Flats*, 66 App. Div. 88.) A covered sleigh drawn by horses and used for carrying passengers and property is a vehicle. (*Marselis v. Seaman*, 21 Barb. 319, 323.)

The appellant has cited as sustaining his contention the cases of *Holtz v. Greenhut & Co.* (175 App. Div. 878) and *Matter of Wilson v. Dorflinger & Sons* (218 N. Y. 84). In the former case we held that a truck operated by hand should be excluded from the effect of group 41 for the reason that the language of the group indicated that the vehicles intended to be included were those only which were power propelled including those drawn by horses and mules. In the latter case the decision was placed upon the ground that the rule of *ejusdem generis* must be held to apply to group 41; and that as an elevator which ran up and down bore no similarity either in construction or in method of operation to the vehicles mentioned in group 41, it must be held not to be included within that group. In the case at bar the implement in question was not only similarly operated, being power propelled, and for the same purposes, but its operation was attended by like dangers as the operation of trucks and sleds. It collected its load in the same manner as the ordinary wheel scraper but conveyed it by being drawn as a sled rather than as a truck.

We think the implement must be held to have been a vehicle and as such embraced in the language of group 41, "other vehicles * * * drawn by horses or mules." The act of unloading it was an incident of its operation, and hence if a vehicle, an injury sustained thereby was within the Workmen's Compensation Law. It may be noticed that doubt in the future as to the proper construction of the provisions of group 41 in the respect here considered has been removed by the amendment of 1916 (Chap. 622) which has added the words: "Movers of all kinds."

The awards should be affirmed.

All concurred, except COCHRANE, J., who dissented, with opinion.

COCHRANE, J. (dissenting): In no just or proper sense can the implement in question be considered a "vehicle" within the meaning of group 41 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). Its primary and only purpose was to remove the loose snow from the surface of the ice preparatory to harvesting the ice. Conveying the snow to a convenient place of deposit was merely an incident of the work. Besides the claimant was not injured during this process of conveying the snow. As well might it be held that the ordinary road scraper is a vehicle within the meaning of the act. That and other devices which might be mentioned and in common use by farmers, manufacturers and others, are merely implements for the accomplishment of some special or particular kind of work and are not vehicles either in the ordinary sense of the term or as that term is used in the statute. In *Matter of Wilson v. Dorflinger & Sons* (218 N. Y. 84) the court, in holding that an ordinary elevator in a building was not within the statute, said: "We think that the rule of *ejusdem generis* applies to group 41 and that the vehicles therein referred to are structures similar to those previously mentioned, that is to say, similar

to cars, trucks or wagons operated on streets and highways," and that the contention that such an elevator was within the scope of group 41 was "too far-fetched to be justified by any canon of statutory interpretation." It seems to me that there is certainly as much difficulty in including a snow scraper within group 41 as it read before the amendment of 1916 (Chap. 622), as there was in including an elevator within that group, and that the reasoning which excludes the elevator must necessarily exclude the snow scraper or other similar device. Awards affirmed.

(3) *Motor cycles and automobiles.*—The operation of a vehicle by an employee, for the purpose of transporting himself, or the operation of a vehicle by an employer, for the purpose of transporting his employees, as well as the ordinary operation of vehicles by drivers, for the purpose of transporting goods or passengers, comes within the broad coverage of group 41. This is true though the employer's business is not hazardous, though the employee owns the vehicle and though the injured employee is not himself operating the vehicle at the time of the accident. The following cases, in which the Appellate Division has affirmed awards unanimously and without opinion, are in point: *Cummings v. Johnson Construction Co.*, S. D. R., vol. 9, p. 369, July 19, 1916; 178 App. Div. 942, May 2, 1917; *Remington v. Briggs Bros. & Co.*, S. D. R., vol. 14, p. 558, Bul., vol. 2, p. 164, May 14, 1917; 179 App. Div. 966, September 27, 1917; *Gurnett v. Ross Co.*, S. D. R., vol. 13, p. 535, Bul., vol. 2, pp. 41, 126, March 14, 1917; 181 App. Div. 910, November 14, 1917; *Savinsky v. Hicks & Sons*, Case No. 32173, April 6, 1917; 181 App. Div. 910, November 14, 1917; *Wooley v. Geneva Cutlery Co.*, File No. 18487, April 6, 1917; 181 App. Div. 909, November 14, 1917; S. D. R., vol. 15, p. —, Bul., vol. 3, p. 156, March 14, 1918. Compare also the award of compensation in *Keating v. Thompson & Starrett Co.*, Bul., vol. 2, p. 229, July 5, 1917.

Cases of employees injured while catching rides on passing vehicles are noticed below, page 160.

(4) *Threshing machines.*—A thresher is a vehicle while moving from place to place but a stationary machine while threshing. Accidents to employees when they are engaged in moving a thresher are compensatable but not accidents when they are helping to thresh. The Appellate Division has so held in the four cases following, affirming the awards in the first three and reversing the award in the fourth:

WHITE v. LOADS, 178 App. Div. 236, May 2, 1917.

KELLOGG, P. J.: The employer was carrying on the business of operating a steam machine for the threshing of grain and beans. The machine was moved from place to place for custom work. The claimant was a day laborer employed in working and moving said machine. When moving it from one place to another, while putting the separator in the barn, a wheel struck some obstruction, throwing the wagon tongue around, striking the claimant on his right knee, causing his injury. We think the case comes within group 41 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), the operation of a vehicle. (*Matter of Costello v. Taylor*, 217 N. Y. 179.)

By subdivision 4 of section 3 of the Workmen's Compensation Law, farm laborers and domestics are not within the protection of the act; but a man who is traveling through the country with a machine, and stopping from place to place to thresh out the grain and beans of the farmers for a compensation, is not engaged in farming, and his employees are not farm laborers. He was running a threshing machine, and while that was not declared a hazardous business, the fact that the machine went from place to place like a wagon or vehicle, and upon wheels, brought it within the group stated, and the injury that came to the claimant arose from the operation of a wagon or vehicle—that is while putting it in the barn.

We answer the question in the affirmative—that the claimant was engaged in a hazardous employment at the time he received his injury.

All concurred. Question certified answered in the affirmative.

Award was made and affirmed in the case of a threshing machine engineer who fell from his engine while traversing a highway and was run over and instantly killed by the separator: *Rudgers v. Winter, Andrus & Burrows*, File No. 12756, February 26, 1917, — App. Div. —, September, 1917; also in the case of a feeder and helper who smashed his finger while putting a separator in place: *Hennessey v. Markendorf*, File No. 8422, March 14, 1917; — App. Div. —, September, 1917; 222 N. Y. 647, January 22, 1918.

Award was reversed in the following case of an employee who lost his hand while feeding a thresher:

VINCENT v. TAYLOR BROS., 180 App. Div. 818, Dec. 28, 1917.

LYON, J.: In September, 1916, the claimant suffered the loss of his right hand while engaged in feeding bundles of rye into a combined thresher and cleaner. This machine was operated by an oil engine connected with it by means of a belt, and the threshing was done at a certain price per bushel and the board of the helpers.

The award was based upon the employers being engaged in the business of milling, and likewise in the operation of a vehicle in connection with the business of threshing rye and other grain with a machine mounted on axles

and wheels and drawn from farm to farm where the work was done. So far as appears the sole duty of the claimant to his employers was feeding the grain-bearing bundles into the machine.

The award is challenged by the employers and the insurance carrier upon the ground that the employment of the claimant was neither that of milling, within the meaning of that term as used in group 29, nor that of operating a vehicle under group 41, of the Workmen's Compensation Law. The machine was drawn to the farm by horses where the accident occurred the day preceding the injury. While being so drawn it was a vehicle. (*White v. Loades*, 178 App. Div. 236.) We think, however, that it cannot be considered a vehicle after the horses had been detached and it was being operated as a stationary machine. (*Wilson v. Dorfinger & Sons*, 218 N. Y. 84; *Holts v. Greenhut & Co.*, 175 App. Div. 878.)

The appellants' contention, that the claimant while feeding bundles into the machine was a farm laborer and hence not entitled to compensation, cannot be sustained. (*White v. Loades, supra.*) It is not claimed that the claimant had anything to do with carrying on the farm where the accident occurred.

As to the claimant being employed in milling, the only evidence of that fact is to be found in the employers' first report of injury in which the question "business (goods produced, work done or kind of trade or transportation)" was answered "milling business." Apparently, in making that answer the appellants treated operating the thresher and cleaner as being engaged in the milling business. There is nothing whatever in the evidence indicating that the employers were in fact millers or that they had any interest whatever in the grain or in threshing it beyond merely separating it from the straw at a certain price per bushel. If such were the conceded fact the award should be reversed and the claim dismissed. However, the stipulation settling the case simply recites that "the foregoing case contains all the material evidence given upon the hearing." Whether facts may have been disclosed by the investigation of the Commission which do not appear in the record but which influenced the Deputy Commissioner before whom the proofs were heard to make the award, for instance that the employers were in fact engaged in the milling business and that the threshing was incidental to their acquiring the grain for such business, does not appear, nor has the Commission so found. In view of the uncertainty as to the record containing all the evidence upon which the Commission acted which in our view of the case might be material, and owing to the lack of evidence as to the claimant being engaged in a business incidental to or connected with milling, and also in view of the serious nature of the claimant's injury, we think the award should be reversed and the claim sent back to the Commission for further hearing and finding. However, should the claimant elect to stipulate that the employers' alleged interest and conduct of the milling business was confined solely to the operation of the thresher and cleaner, the award should be reversed and the claim dismissed; otherwise the claim should be remitted to the Commission for its further action.

All concurred, except WOODWARD, J., dissenting. Award reversed and matter remitted to Commission subject to the right to stipulate as per opinion.

Group 42. (1) *Boilers, engines or heavy machinery, installation.*—A tank for a sprinkler system or for water supply is neither

a boiler nor an engine nor a machine, according to a decision of the Appellate Division in the First Department, from which two justices dissented. The text of the opinion is as follows:

MALONEY v. LEVY & GILLILAND Co., 176 App. Div. 470, Feb. 23, 1917.

PAGE, J.: The action is to recover damages for the negligent causing of the death of the plaintiff's intestate.

The defendant was engaged in transporting and setting up a nine-thousand gallon tank from the railroad to a position on the roof of a building, where it was to be connected with a sprinkler system to be installed by others. The tank was of iron, twenty-seven and a half feet long, cylindrical in form, seven and one-half feet in diameter, and weighing, as variously estimated, from seven and one-half to nine tons. This tank had been hoisted over a coping fourteen feet above the roof and was resting upon skids. These skids were timbers eight inches square and extended from the coping to a crib three feet high about twelve feet distant, and from there other skids were placed to carry the tank to the roof. The tank was to be lowered by means of rollers, placed beneath the tank and upon the skids, and operated by ropes running over pulley blocks. Plaintiff's intestate was ordered by the foreman to hold a plank alongside the tank to prevent it from rolling over. In the course of the operation the foreman placed the rollers in such a manner that the tank dropped at one end from a height of eight or nine inches upon the skids causing the one nearest the plaintiff's intestate to break and the tank to roll over upon the deceased and kill him. Concededly these skids were capable of each sustaining a weight of five or six tons, and in order to sustain the weight of the tank it would be necessary that the weight should be equally distributed, and they could not withstand the blow occasioned by the drop of the tank. The appliance was not, therefore, a reasonably safe one for the defendant to use, and the evidence shows that the foreman was negligent in directing the operation.

The learned trial justice charged the jury that it was the duty of the master to furnish the workman a reasonably safe place to work. On reading the charge as a whole it is clear that the instruction related to the unsafety of requiring an employee to work alongside of an insufficient appliance. Therefore we do not think this error was prejudicial. The defendant claims that the injury sustained comes within the content of the Workmen's Compensation Law (Laws of 1913, chap. 816). If the employment in which the plaintiff's intestate was engaged at the time of his death is within any of those specified in that law, the plaintiff has no right of action or other remedy. (*Shanahan v. Monarch Engineering Co.*, 219 N. Y. 469.)

The defendant claims that the work in which plaintiff's intestate was engaged might well come within either group 10, 41 or 42 of the 2d section of said law. That it does not come within groups 10 or 41 is too clear to require discussion. Defendant's main reliance is upon the words contained in group 42: "installation of * * * boilers, engines or heavy machinery." Certainly it does not come within the generally accepted and well-understood meaning of those words.

This tank, although cylindrical in shape as are many boilers, was to be used not for the heating of water or generation of steam, but merely as a

place in which to store water. It was not a mechanism for utilizing power, hence not a machine, nor was it a machine by which power is applied to the doing of work and, therefore, not an engine. Nor can we say that it is so related in kind to those specified that the rule of *ejusdem generis* would apply. Tanks for the storage of water, not alone in connection with sprinkler systems but also with the water supply, placed upon the roofs of buildings are of such common use that had the Legislature intended that those engaged in the work of their installation should be within the benefits of the Workmen's Compensation Law, it would undoubtedly have so provided.

That act is compulsory in character and applies only to so-called hazardous employments which are expressly designated in the statute. The express mention of the occupations embraced in the several groups of hazardous employments necessarily excludes employments not there mentioned. (*Matter of Aylesworth v. Phœnix Cheese Co.*, 170 App. Div. 34; *Matter of Wilson v. Dorflinger & Sons*, 218 N. Y. 84, 87.)

In our opinion the employment in which the deceased was engaged at the time he was killed was not within any of the groups embraced in section 2 of the said act.

The judgment and order should be affirmed, with costs.

CLARKE, P. J., and SHEARN, J., concurred; SCOTT and DAVIS, JJ., dissented. SCOTT, J. (dissenting):

I dissent, because I think that the work on which the deceased was employed at the time of his death fell fairly within the list of occupations contained in the Workmen's Compensation Law.

DAVIS, J., concurred. Judgment and order affirmed, with costs.

(2) *Structural carpentry*.—Carpenters, as well as painters, plasterers and other artisans whose employment is often casual have been affected by the Bargey decision. Thus, a number of such cases are noticed under the title "Pecuniary gain" below, page 166. Farm hands who incidentally do carpentry, painting and like jobs for their employers do not thereby bring themselves within the protection of this group: *Coleman v. Bartholomew*, below, page 193. Commissioner Lyon and Judge Chase have commented upon the phrase "structural carpentry." In *Geller v. Republic Novelty Works*, S. D. R., vol. 12, p. 585, Commissioner Lyon says: "I am disposed to agree with the proposition that extending shelving in a mercantile establishment is structural carpentry, both because there is nothing in group 42 itself which would seem to limit in any way the meaning of these words, the principle of *ejusdem generis* having no application, since this group is made up of miscellaneous employments, and because under section 21 we are compelled to presume that the injury is covered by compensation." In *Schmidt v. Berger*, 221 N. Y. 26,

Judge Chase says: "The words 'structural carpentry' must be construed together and cannot be separated. They do not include an isolated act in planing wood. (See *Matter of Heitz v. Rupert*, 218 N. Y. 148, 151.) Neither was the act of the claimant in planing the top of the door included within the words 'construction, repair and demolition of buildings.' (*Matter of Bargey v. Massaro Macaroni Co.*, 218 N. Y. 410, 413.)"

(3) *Decorating*.—Hanging pictures is not decorating. Such interpretation, according to the following opinion, strains "words from their ordinary and natural meaning." This group, as the court notes, has since been amended to specifically include picture hanging.

GRASELL v. BRODHEAD, 175 App. Div. 874, Dec. 28, 1916.

KELLOGG, P. J.: The employer was engaged in "selling at retail art goods and picture frames and repairing furniture, and in connection therewith, the business of framing pictures." The duties of the injured employee were "to act as salesman in the store occasionally, and to go out and hang pictures on order, and also to fit frames to pictures. The picture frames were bought already made and were cut down in Mr. Brodhead's place of business so as to fit the size of the pictures which were to be framed." The above extracts from the findings are a pretty broad construction of the evidence, which we may refer to to show that the findings are not to be extended or construed too liberally.

The employer was conducting a retail store, selling antique furniture, mirrors, pictures, paintings, silverware, Sheffield plate, glass vases, bric-a-brac, copper and brass. The antique furniture was second-hand furniture, which would be polished up and perhaps mended by the employee. No other repairing of furniture was done. The picture frames would come to the store already made, but it might be necessary to cut them down in order to fit a particular picture. This when necessary the employee did. When goods were sold out of town it was necessary to box them and sometimes to make a box; this he did. When pictures were sold he would frequently deliver them at the place of the purchaser and hang them, and at times would hang pictures for people who had not bought at the store. About one-tenth of his time was spent in hanging pictures sold by the employer, or in hanging pictures of others, for which the employer charged. He was the general, useful, handy man around the store, sometimes selling goods and performing the various duties incident to the business.

The employer had sold a picture September 12, 1914, and the employee went to the home of the purchaser to hang it. While hanging the picture a rug upon which he was standing slipped and he fell and injured his head upon the floor, and compensation for a total temporary disability has been awarded. In determining whether he is within the act we must take the law as it then stood. (Consol. Laws, chap. 67; Laws of 1914, chap. 41.) The deputy commissioner reported to the Commission that in his judgment the

employee is under group 17 of the law and could also come under group 42. He says "he was a decorator in the sense that he was beautifying the house by the use of the pictures, and was so engaged at the time of the accident." That was not the question before the Commission; the question was, was he "decorating" in the sense in which that word was used in the statute? It is not suggested on either side that it could possibly come within any other group and, therefore, we shall not consider other groups.

Group 17 of section 2 was as follows: "Planing mills, sash and door factories, manufacture of wooden and corrugated paper boxes, cheese boxes, mouldings, window and door screens, window shades, carpet sweepers, wooden toys, articles and wares or baskets." The reference in the group to "mouldings" evidently means the manufacture of mouldings. Here the employee's instructions were not to attach a picture to an insecure moulding. If the moulding upon which a picture was to be hung was insecure, he was to put necessary nails in it to make it secure. If it could not be nailed, and required a new piece, he would report the fact to the store and would put in a new piece, although the employer does not remember of any case where a new piece was inserted. Clearly the employer was not a manufacturer of mouldings for profit, and the employee was not engaged in that employment at the time he received the injury.

Group 42 of section 2 was: "Stone cutting or dressing; marble works; manufacture of artificial stone; steel building and bridge construction; installation of elevators, fire escapes, boilers, engines or heavy machinery; brick-laying, tile-laying, mason work, stone-setting, concrete work, plastering; and manufacture of concrete blocks; structural carpentry; painting, decorating or renovating; sheet metal work; roofing; construction, repair and demolition of buildings and bridges; plumbing, sanitary or heating engineering; installation and covering of pipes or boilers."

It is urged that within that group the business of the employer was "decorating," and that the employee was engaged in that hazardous employment when injured. It seems that "decorating," as used in the statute, naturally means something done to the house itself as a house, to improve the condition of the room or house. Undoubtedly putting a new carpet in a room is in one sense decorating it, but the merchant who sells and puts down a carpet is not a "decorator" within the meaning of this group. The same is true of a merchant putting a new table or any article of furniture in a room. In interpreting the law we must give the language a reasonable and just interpretation and not strain words from their ordinary and natural meaning. Among industrial workers, and in its general acceptance, the word "decorating" would not apply to the employment in which the employer and the employee were engaged. In a sense where we beautify anything we may be said to be "decorating" it. But a "decorator," as stated in the Standard dictionary, is "specifically one whose business is decoration of dwellings or public edifices," and clearly the employer and employee had nothing to do with such work. A merchant sells a picture, an employee carries it to the house of the purchaser and, while standing on a rug, is hanging it, probably by a cord and hook attached to the moulding of the room. It cannot be said that he is decorating within this group. The statutory intent may be gathered by considering the other employments mentioned in the group, such

as stone cutting; marble works; manufacture of artificial stone; steel building and bridge construction; installation of elevators, and the like. And so far as relates to buildings, we have brick-laying, tile-laying, mason work, stone-setting, concrete work, plastering, manufacture of concrete blocks, structural carpentry, painting, decorating or renovating and sheet metal work. The hanging of the picture was a mere incident to the sale, and by hanging it the retail art dealer whose business is not hazardous did not become a "decorator" whose business is hazardous.

The recent amendment in 1916 to this group has inserted after the word "painting," and before the word "decorating," the words "papering, picture hanging, glazing." We may fairly infer that this amendment made certain employments hazardous which were not hazardous before the amendment, and that the Legislature considered, in making the amendment, that picture hanging was not theretofore embraced in the group. It is not clear that this employee, who was merely hanging a picture which had been sold by the employer, the hanging being a mere incident of the sale, would come within the group as amended. That question need not be considered.

It follows, therefore, that Grasell was not an employee within the meaning of subdivision 4 of section 3 of the Workmen's Compensation Law, and is not entitled to the benefit of the provisions of the law. The determination should, therefore, be reversed and the claim dismissed.

All concurred. Award reversed and claim dismissed.

(4) *Plumbing*.—The Commission has awarded compensation to an apartment house superintendent injured while tightening a radiator valve: *Unger v. Supreme Realty Co.*, S. D. R., vol 9, p. 343, June 28, 1916.

(5) *Heating engineering, installation and covering of pipes or boilers*.—The effect of the following decision relative to an apartment house superintendent appears, so far as hazardous employment is concerned, to be nullified by the amendments to group 42 cited in its context.

KAMMER v. HAWK, 221 N. Y. 378, Oct. 16, 1917.

CRANE, J.: Edith A. Hawk was the owner of an apartment house at No. 150 West Eightieth street, borough of Manhattan, New York city. The claimant was superintendent and general repairman of the building. His duties were to make such general carpentering and plumbing repairs as he was able to make and to operate the boilers which supplied the steam heat to the premises. The owner operated this steam heating plant for profit included in the rents paid by the tenants. On January 19, 1916, Kammer went into the storeroom in the basement to obtain a radiator to be put in an apartment for one of the tenants who had complained that the apartment was cold. His purpose was to get the radiator and to connect it up with the heating apparatus so that the apartment might thereby be supplied with heat. In lifting the radiator from a lot of other radiators located in the storeroom, the radiator tumbled over and fell upon his right great toe crush-

ing the same. For this injury he has been awarded compensation by the State Industrial Commission and the Appellate Division has affirmed the award.

Was the employee at the time of injury engaged in any employment or work covered by the Compensation Law?

Group 42 of section 2, as it existed in January, 1916 (Cons. Laws, ch. 67; L. 1914, ch. 41) specified "plumbing, sanitary or heating engineering; installation and covering of pipes or boilers." The lifting of a radiator to connect it up for heating purposes was not heating engineering nor the installation and covering of pipes or boilers. That such work was not included within these terms is evident from the amendment to the law passed subsequently and in the same year. (L. 1916, ch. 622.) Group 42 was amended so as to read "plumbing, sanitary lighting or heating installation or repair;" and the word "engineering" was dropped. So, too, group 22 was amended by the same act to include "heating and lighting." The words "maintenance and care of buildings" were not added to group 42 until 1917. (L. 1917, ch. 705.)

The claimant cannot recover for reasons similar to those expressed in *Matter of Schmidt v. Berger* (221 N. Y. 26.)

The order of the Appellate Division should be reversed and the claim dismissed, with costs in this court and in the Appellate Division to the appellants against the State Industrial Commission.

HISCOCK, CH. J., CHASE, COLLIN, HOGAN, CARDOZO and McLAUGHLIN, JJ., concur. Order reversed, etc.

(6) *Junk dealers*.—A general worker for a dealer in second-hand bottles having been hurt by a fall, the Commission held that the employer was a "junk dealer in respect to bottles and storage." The Appellate Division reversed the award and dismissed the claim. In his dissenting opinion reproduced above, page 68, Justice Kellogg says: "Ordinarily the buying of second-hand bottles is not in itself dealing in junk as that word is generally understood, but the men whose business it is to go upon the public dumps of the city of New York, overhauling the junk and refuse there and picking out and removing bottles therefrom, are evidently exposed to the risks and dangers incident to the employment embraced within group 42:" *Kronberger v. Harlem Bottle Co.*, 181 App. Div. 900, November 14, 1917.

Group 44. *State prison employees*.—A physician at Dannemora State prison, Dr. North, turned out upon the sounding of an alarm of escaping convicts. An escaping prisoner killed him. It was the duty of all prison attendants to assist in the recapture. The question whether Dr. North should be classed as a prison guard with reference to compensation of his dependents has been submitted to the counsel of the Commission: Bul., vol. 3, p. 114.

D. Elective compensation plan.—The concluding part of Workmen's Compensation Law, § 2, provides a plan by which an employer and employee, not otherwise subject, may voluntarily and jointly avail themselves of the Compensation Law's provisions. Workmen's Compensation Law, § 54, subd. 6, permits an insurance carrier to issue policies, "including with employees, employers who perform labor incidental to their occupations," and gives to an employer so insured all the rights and remedies of an employee. These provisions became effective June 1, 1916. In the case of an accident occurring March 29, 1917, the injured claimant was a stockholder and officer of the employing firm. The company, by election under the concluding part of § 2, had brought all of its employees under the law. It had included the claimant in its application for the purpose of fixing the premium and had paid the premium upon such basis. The Commission at first disallowed, and then allowed, compensation. The Appellate Division, in reply to a certified question, decided upon authority of *Bowne v. Bowne Co.*, below, page 189, and without opinion, that the claimant was not an employee: *Sharlow v. Sharlow Bros. Co.*, — App. Div. —, December 28, 1917. In arguing the case the Attorney-General cited § 54, subd. 6, as applying. The insurance carrier claimed, however, that § 54, subd. 6, clearly provides for a special form of policy, that the Commission had not found that the policy had been issued in accordance with such subdivision, that there was no proof of such issue, and that such subdivision was intended to cover employers, not executive officers.

E. Incidentalness of injuries.—The coverage of accidents is most frequently challenged on the ground of incidentalness. The phrase "arising out of" figures continually in rulings and decisions. The circumstances of cases involving incidentalness are various. Most cases can be classified under one or another of such of the heads following as "One occupation incidental to another," "Subsidiary or adjunctive work," "Coming to or leaving work," "Unintentional injury by another," and "Assault by another." Other and rarer cases, arising from time to time, present new points, as indicated by the titles, "Injury consists in poisoning" and "Swimming as diversion from work," in

Bulletin 81, or by the titles, "Procuring a newspaper" and "Falling asleep," in this Bulletin. Questions of incidentalness are considered in Bulletin 81, pages 82-100, 141-153, 182-221. Cases of incidentalness presented here fall under the twenty-four subheads following:

1. *One occupation incidental to another.*—A ruling which holds that foremanship of a livery stable is incidental to operation of its vehicles, has been affirmed by the Court of Appeals without opinion since notice of the case in Bulletin 81: *Leslie v. O'Connor & Richman*, 220 N. Y. Rep. 672, March 20, 1917. The similar case of a taxicab starter injured by slipping on a hotel mat has been unanimously affirmed by the Appellate Division without opinion: *David v. Town Taxi Co.*, S. D. R., vol. 7, p. 464, March 2, 1916; 175 App. Div. 958, November 15, 1916. The Appellate Division has also affirmed awards to the dependents of a porter and watchman killed after hours at night in an unwitnessed elevator accident while cleaning up the workroom floor of his employer who repaired garments in connection with their sale, *Mattura v. Price & Co.*, S. D. R., vol. 11, p. 635, December 26, 1916; 179 App. Div. 952, July 3, 1917; and to the dependents of a salesman and demonstrator of chemicals killed by explosion of an ammonia tank while in the plant of a prospective customer, *Cain v. United Breeders Co.*, Death File, No. 21072, July 18, 1917; 181 App. Div. —, December 28, 1917.* The death of the porter occurred before the amendment to the compensation law making elevator accidents compensatable; the explosion of the ammonia tank had nothing to do with any material that the salesman had sold or was demonstrating. In both cases the affirmation was unanimous and without opinion. The Attorney-General cited *Benton v. Frazier*, Bulletin 81, page 193, in his brief in the Cain case. Incidental occupations have been considered in Bulletin 81, pages 141-153, 182-184.

Three classes of employees, watchmen, casual or temporary employees repairing buildings, installing machinery, etc., and salesmen or other outside employees are conspicuous instances of incidental occupation. They have been receiving special attention in the courts.

(1) *Watchmen.*—The United States Supreme Court has af-

*Argued in Court of Appeals, May 29, 1918.

firmed an award of the New York State Industrial Commission to the dependents of a watchman of new railroad construction materials who was run down at night by a train: *New York Central R. R. Co. v. White*, above, page 11.

Award was denied by the Appellate Division, November 15, 1916, to the widow of a watchman whose employer's business was subcontracting men to watch cargoes. Such business of furnishing watchmen, the court said, was not included in the compensation law's list of hazardous employments. But the court, going further, intimated that a watchman employed by an employer whose business was included in the compensation law's list, for example, a stevedoring company, if his work was solely that of watching, was not under the compensation law's protection. The Appellate Division's decision in *Aylesworth v. Phoenix Cheese Co.* was held pertinent. The text of the opinion has been presented above, page 57.

On November 22, 1916, a week after its decision in the Oberg case, the Appellate Division passed upon the case of a watchman injured in the employ of an employer whose business was included in the compensation law's list of hazardous employments. This watchman was killed by a fall over a stair railing on the premises of his employer, a corporation engaged in the bakery business. The accident happened at night when the plant was not in operation. The court intimated that an accident to a watchman might be compensatable if the watchman's work exposed him to the dangers of the hazardous employment but noted that the watchman in this instance was not so exposed because the plant was idle. It cited the Oberg opinion in support of its reversal of the award and held that the earlier decisions of the Appellate Division and the Court of Appeals in *Sorge v. Aldebaran Co.*, did not govern. In these decisions the courts had affirmed without opinion an award, S. D. R., vol. 3, p. 390, to the dependents of the watchman of a building construction company who had been killed by a similar fall at night while his employer's work was not in progress. Justice Kellogg dissented from the opinion. The majority opinion and the dissenting opinion are as follows:

FOGARTY V. NATIONAL BISCUIT Co., 175 App. Div. 729, Nov. 22, 1916.

COCHRANE, J.: William Fogarty, the employee, received injuries which resulted in his death. He was a night watchman of the National Biscuit

Company, a corporation engaged in the bakery business in the city of New York. The Commission has found that about midnight of October 3, 1915, while Fogarty "was on the fifth or sixth floor of the building making his rounds, he started to go down a spiral stairway to a floor below and accidentally fell over the rail of the stairway and down the well to the floor at the basement," and so met his death. The plant was not operated at night and was not in operation at the time of the accident. The bakery business in which the employer was engaged is one of the hazardous employments enumerated in section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), and falls within group 34 of that section. But it does not follow that because an employee is in the service of an employer conducting a hazardous employment the former is necessarily entitled to compensation for an injury received. There must be some relation between the hazardous employment and the accident. The duties of this night watchman differed in no respect from the duties of many other night watchmen in buildings where non-hazardous employments are conducted. It would be an anomalous feature of the law if compensation were given to a night watchman in a building merely because a hazardous employment was therein conducted in the day time although not at night when the accident occurred, and denied to another night watchman doing precisely the same duties in the same or another building where a hazardous employment was not conducted. The test should be whether the watchman was exposed to the dangers of the hazardous employment. In the present case he was not so exposed and could not be because the business was idle. The hazards of the bakery business do not enter the case. The deceased did not fall down stairs because of the bakery business or because of any act or circumstance incidental thereto. His accident would have occurred regardless of the nature of the business.

In *Oberg v. McRoberts & Co.* (175 App. Div. 1), decided at this term, Mr. Justice WOODWARD aptly says: "It is not only necessary that the employer should be engaged in a hazardous occupation, but the employee must be 'engaged in a hazardous employment in the service of an employer carrying on or conducting the same' (section 3, subd. 4), and surely there is nothing in the statute which attempts to make the position of a watchman a hazardous employment." In the present instance, although the employer was carrying on or conducting the bakery business, the employee was not "engaged in a hazardous employment" within the meaning of the statute. The position of night watchman is not a hazardous employment, and while performing the duties of that position Fogarty was not exposed to the dangers of the bakery business which is a hazardous employment. He was simply at the time of the accident acting as a night watchman and was in the performance of no other duties.

The fact that the accident took place on the plant of the employer is of no significance if the plant is idle and the hazards of the business do not for that reason exist. Fogarty was not engaged at the time of his death in a hazardous employment simply because the business constituting such hazardous employment was not in operation. It can make no difference that such operation was suspended for a night at a time or for months at a time, because during such suspension the hazards of the business were likewise suspended.

Reliance is placed on the case of *Sorge v. Aldebaran Co.* (3 State Dept.

Rep. Off. 390), affirmed by this court and the Court of Appeals without opinion (171 App. Div. 959; 218 N. Y. 636). In that case, however, the employer was engaged in the general contracting and building business and was constructing the building where Sorge as a night watchman fell and received his injuries. The construction of the building itself is made a hazardous employment and is included in group 42 of section 2 of the law. It was this construction work of which Sorge was watchman and he fell from a board temporarily located, receiving injuries which caused his death. A mere statement of the facts shows a clear distinction between that case and this. Sorge was directly exposed to the hazards of the business the same as the other employees and was injured as a result thereof. The hazards in that case were inherent in the building itself. It was the construction work which constituted the hazard and that construction work Sorge was watching and the incompleteness and unfinished condition of the building and dangers arising therefrom were the direct cause of the accident. The award should be reversed and the claim dismissed. All concurred, except KELLOGG, P. J., who dissented in memorandum.

KELLOGG, P. J. (dissenting):

The Workmen's Compensation Law provides compensation for "employees" engaged in any of the forty-two groups mentioned in section 2 of that law. "Employee," as defined by subdivision 4 of section 3, means "A person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer." The compensation is made by a system of insurance, in which the premiums are based upon the payroll of the employer. Evidently this night watchman was upon the payroll, and the premium was based in part upon the compensation he received. He was employed in the plant by an employer whose principal business was that of carrying on and conducting a hazardous employment and was injured therein. Although the bakery was not running at the time it seems clear that the night watchman is an employee in a hazardous employment within the meaning of the law. In *Sorge v. Aldebaran Co.* (171 App. Div. 959) we held that the night watchman upon a construction work was within the act, although no work was being done about the plant at the time. The Court of Appeals affirmed that judgment (218 N. Y. 636). Upon the authority of that case, as well as upon principle, the award should be affirmed. Award reversed and claim dismissed.

Upwards of a month after its decision in the Fogarty case, the Appellate Division reversed an award to the widow of a watchman killed in the employ of an employer whose business was included in the compensation law's list of hazardous employments and was presumably in active operation at the time of the accident. This watchman was overcome in the afternoon by gas escaping in his employer's business office. The court cited the Newman, Bargey, Brown and Mandel decisions in support of its reversal. The texts of these decisions are to be found in Bulletin 81. Justice Kellogg, again dissenting, distinguished the cited cases from the case in

hand and also held that the majority's opinion was inconsistent with its opinion in the Fogarty case. The texts of the majority and minority opinions are as follows:

KEHOE v. CONSOLIDATED TELEGRAPH & E. S. Co., 176 App. Div. 84, Dec. 28, 1916.

LYON, J.: John Kehoe, deceased, the husband of the claimant, was employed by the Consolidated Telegraph and Electrical Subway Company, a corporation engaged in the business of constructing electrical conduits, as a watchman at its store yard in the city of New York. His duties were to sweep and mop out the office and to keep the drivers in the employ of the company out of the toolhouse. No pipes were laid or repaired there, and the tools were not used there. The yard was also used for the storage of tools and of materials, both of which were taken out and used on the work elsewhere, in connection with which the deceased had no duty to perform.

On the afternoon of April 30, 1916, he was found dead in the office. An examination of the premises disclosed gas escaping from the disconnected supply pipe leading to the gas heater, and that his death occurred from gas poisoning. The Commission awarded compensation to the widow of the deceased, and also an allowance for funeral expenses. From such award the employer appeals.

We think the award should not have been made. Concededly, the business which the employer was carrying on was a hazardous one within the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). However, the deceased was employed simply as a watchman at the tools and materials storage plant where none of the business of the employer was being carried on, and he was in no way exposed to the hazards of the employer's business. He was not an "employee" within the contemplation of the Workmen's Compensation Law. Section 3, subdivision 4, defines an "employee" as a person who is engaged in a hazardous employment. This the deceased was not, and hence the claimant was not entitled to the award. (*Matter of Newman v. Newman*, 218 N. Y. 325; *Matter of Bargey v. Massaro Macaroni Co.*, Id. 411; *Brown v. Richmond Light & Railroad Co.*, 173 App. Div. 432; *Mandel v. Steinhart & Bro., Inc.*, Id. 515.)

The award should, therefore, be reversed. All concurred, except KELLOGG, P. J., who dissented in a memorandum in which HOWARD, J., concurred.

KELLOGG, P. J., (dissenting):

The defendant was engaged in a hazardous employment and the deceased employee was a watchman at its plant. We held in *Sorge v. Aldebaran Co.*, (171 App. Div. 959; 155 N. Y. Supp. 1142; affd., 218 N. Y. 636) that a night watchman was within the act. In *Fogarty v. National Biscuit Co.* (175 App. Div. 729), we held, by a divided court, that a night watchman who was going his rounds through the plant at a time when the plant was not in operation, was not within the protection of the act. We stand, therefore, as holding that a watchman is within the act unless it appears that the plant was shut down at the time of the injury. There is nothing in the findings or evidence showing whether or not the plant was shut down. The claim is presumed to come within the act in the absence of

substantial evidence to the contrary. There being no evidence to the contrary, we conclude that the plant was not shut down and that the claim falls within the principle of the *Sorge* case.

The cases cited in the prevailing opinion are not to the contrary. In the *Newman* case the employer's business was not hazardous. The employee was delivering meat during the day time with a wagon; after having put up his horse, while doing an errand, he carried a piece of meat to a customer in the evening, and while doing so was injured. It was held that he was not engaged in the hazardous employment of operating a vehicle at the time of the injury.

In the *Bargey* case the employer was engaged in a hazardous business, but Bargey, a carpenter, was not an employee in that business. He was called to the factory to make some necessary repairs, and it was held that he was not engaged in the macaroni business.

In the *Brown* case the claimant was a process server in connection with the law department of the railroad company, and it was held that he was not in the employment of operating a railroad.

In the *Mandel* case the employer was a manufacturer of leather and other fabric novelties in New York city, a hazardous employment, and the claimant, a salesman, was injured in a public bus near White Plains. It was held that he was not engaged in a hazardous employment at the time of the injury.

Here a watchman is a necessary employee in carrying on the defendant's work, and he met his death at the plant while performing the work there for which he was employed. By subdivision 4 of section 3 of the Workmen's Compensation Law, the word "employee" means a person engaged in a hazardous employment or in the service of an employer whose principal business is that of carrying on or conducting such an employment. I favor an affirmance of the award. HOWARD, J., concurred. Award reversed and claim dismissed.

On the same day that it reversed the award to the watchman in the *Kehoe* case, the Appellate Division unanimously affirmed awards to three other watchmen. In one of these, the unwitnessed drowning of a night watchman on New York city piers, the affirmation was without opinion: *Riedel v. Mallory Steamship Co.*, Bul., vol. 2, pp. 20 (cover), 27; S. D. R., vol. 10, p. 601, Sept. 29, 1916; 176 App. Div. 923, Dec. 28, 1916. In another, the award was sustained on the presumption that the plant was in operation and on the ground that the case was similar to *Larsen v. Paine Drug Co.*, Bulletin 81, pages 187-190. The court's opinion was as follows:

KOBYRA v. ADAMS, 176 App. Div. 43, Dec. 28, 1916.

COCHRANE, J.: The employer was engaged in the business of manufacturing desks and furniture with a plant and place of business at Herkimer, N. Y. The claimant was a night watchman. While working in that

capacity for his said employer at the manufacturing plant and about eleven o'clock in the evening a severe storm arose. The claimant was closing a window because of the storm and while doing so a gust of wind blew some substance from the outside of the building into his left eye, causing an injury which resulted in its removal. The Commission has found that such injury arose out of and in the course of his employment and has made him an award accordingly. The business of manufacturing furniture is included in group 16 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) as one of the hazardous employments there enumerated.

In *Fogarty v. National Biscuit Co.* (175 App. Div. 729), decided by this court at its last term, it was held that a night watchman was not entitled to compensation. But in that case it was found as a fact by the Commission that the plant was not in operation at the time of the accident. The night watchman was, therefore, not exposed at the time of his injury to the hazards of the business. In this case there is no finding on that question and the evidence leaves it uncertain as to whether or not the business was in operation at the time of the accident. The claimant states that he does not remember. The presumption is that the claim comes within the provisions of the law (§ 21). The burden of proof rested on the employer and insurance carrier to show that the plant was not in operation. This was a very light burden for them to bear in this particular instance but they offered no evidence whatever on the question.

Assuming as we must, therefore, that the business was in operation, we have a case where the claimant was exposed to the hazards of that business at the time of his accident, and it is immaterial in such a case that the particular act which he was performing when he received his injury was not an act peculiar to the process of the business which was being conducted. To such a situation the case of *Matter of Larsen v. Paine Drug Company* (218 N. Y. 252) applies, where it was held that if an employee is injured while performing an act fairly incidental to the prosecution of a business and appropriate in carrying it forward, he is not to be barred from recovery because such act is not a step wholly within the precise and characteristic process or operation of the hazardous business.

The award should be affirmed. Award unanimously affirmed, *KELLOGG, P. J.*, concurring in result.

In the third case, the watchman was found to have been performing additional duties of firing a boiler and keeping vats supplied with glue. The court's opinion was as follows:

HELLMAN V. MANNING SANDPAPER Co., 176 App. Div. 127, Dec. 28, 1916.

LYON, J.: The claimant's employer was engaged in the manufacture of sand paper, which was a hazardous employment. The claimant was employed as a night man at the manufacturing plant. His duties were to watch the premises against the danger of fire, and to protect them against the commission of depredations, to keep the furnaces under the boiler supplied with coal, and to pour glue into vats. In the evening of August 1, 1915, while standing upon the front platform of the employer's plant, two men came

thereon. Upon being asked by the claimant what they wanted, they said, "Nothing," but thereupon assaulted the claimant, took a small sum of money from his pocket and while the struggle was going on between the claimant and one of the men, the other entered the factory and stole the claimant's dinner pail. In the struggle the claimant was thrown down the steps of the platform and sustained the injuries for which the award complained of was made.

The employer reported that the claimant was injured in the course of his employment. Two at least of the claimant's duties, those of firing the boiler and keeping the vats supplied with glue, were directly connected with carrying on the employer's business. The claimant was engaged in a hazardous employment in the service of an employer carrying on and conducting the same upon the premises, hence he was an employee within the meaning of the Workmen's Compensation Law (Consol. Laws, chap 67 [Laws of 1914, chap. 41], § 3, subd. 4), and entitled to compensation for accidental injuries arising out of and in the course of his employment. He was injured at his employer's plant while endeavoring to protect it from depredation by violence which he encountered as an incident of his occupation.

I think the award should be affirmed. Award unanimously affirmed.

The status of watchmen has been finally determined by decision of the Court of Appeals overruling the decision of the Appellate Division in the Fogarty case, above, pages 90-92. In its opinion the Court of Appeals ignores the distinction of the Appellate Division relative to operation of the plant at the time of the accident, recurs to earlier opinions declarative for liberal construction of the compensation law and sustains the award to Fogarty's widow upon broad ground of incidentalness. Two of its judges dissented without opinion. The text of the decision is as follows:

FOGARTY v. NATIONAL BISCUIT Co., 221 N. Y. 20, May 8, 1917.

HOGAN, J.: The defendant National Biscuit Company is engaged in the bakery business, designated as "hazardous" under the Workmen's Compensation Law (L. 1914, ch. 41; Cons. Laws, ch. 67), section 2, group 34.

William Fogarty was employed by the biscuit company as a night watchman. As such his principal duty was to patrol the buildings every hour, passing through every department and ring up the clocks, thirty-five in number.

October 2d, 1915, soon after midnight, the body of Mr. Fogarty was found at the bottom of the well under the stairway in one of the buildings of the company. Application was thereafter made by his widow to the industrial commission for compensation under the Workmen's Compensation Law, and after a hearing had the commission made an award. Upon appeal therefrom by the company and insurance carrier, the Appellate Division, by a divided court, held in effect "The position of night watchman is not a hazardous employment and performing the duties of that position, Fogarty was not exposed to the dangers of the bakery business which is a hazardous occupation," reversed the award and dismissed the claim.

This court has given a more liberal construction to the Compensation Law, and held that "where * * * an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process of operation which has been made the basis of the group in which employment is claimed." (*Matter of Larsen v. Paine Drug Co.*, 218 N. Y. 252, 256.) The principle has been extended to cover injuries to night watchmen. (*Matter of White v. N. Y. C. & H. R. R. Co.*, 216 N. Y. 653; affirmed in United States Supreme Court, 243 U. S. 188; *Matter of Sorge v. Aldebaran Company*, 218 N. Y. 636.) The deceased was, therefore, within the Compensation Law.

Counsel for respondent urges that the award made was not sustained by testimony establishing that the death of Mr. Fogarty was the result of an accident arising out of and in the course of his employment; that there were no eye-witnesses to the accident and the stairs and handrail thereon were intact; that the deceased might have had an attack of vertigo and fallen downstairs or he might have died from heart disease.

In cases before the industrial commission the standard prevailing in negligence actions is not to be applied. As was stated in *Matter of Petrie* (215 N. Y. 335, 338):

The Workmen's Compensation Law was adopted in deference to a widespread belief and demand that compensation should be awarded to workmen who were injured and disabled temporarily or permanently in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law. The underlying thought was that such a system of compensation would be in the interest of the general welfare by preventing a workman from being deprived of means of support as the result of an injury received in the course of his employment. The statute was the expression of what was regarded by the legislature as a wise public policy concerning injured employees.

In connection with the language above quoted certain provisions of the Compensation Law are material.

Section 68 provides: Technical rules of evidence or procedure not required.—The commission or a commissioner or deputy commissioner in making an investigation or inquiry or conducting a hearing shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties.

Section 21 provides: Presumptions.—In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary: 1. That the claim comes within the provisions of this chapter; 2. That sufficient notice thereof was given; 3. That the injury was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another; 4. That the injury did not result solely from the intoxication of the injured employee while on duty.

In the *Sorge* case, as in the case at bar, there were no eye witnesses to the accident. The body of Mr. Fogarty was found at the bottom of a well under a stairway. Sorge was found unconscious in the cellar of a building, or as his declarations testified to indicated, he had fallen upon a sidewalk.

The record in the *Sorge* case was made up of the formal proof of death by the widow, the first report of injury by the employer, proof of death by the employer and the form entitled "Proof of death by Eye-witness" together with the coroner's inquisition, and some evidence attached to the same, and the evidence of a hospital physician, all of which tended clearly to show more or less speculation as to the manner in which Sorge was injured and some

conflict as to the cause of his death, together with declarations made by him in his conscious moments as to the manner in which he fell. In the case at bar the record consists of the same form of notices by the employer, the first notice, the second notice, the verified report made by the manager of the company, the evidence of the superintendent of the company. The claimant appeared before the commission and was inquired of with reference to the nature of the work performed by her husband, etc. She also stated what she had heard of the manner in which her husband was injured. The proofs in the case under consideration were fully as favorable to the claimant as the proofs in the *Sorge* case, which was affirmed by this court. The hearsay statement of the claimant was not broader than a like statement in the *Sorge* case, and is not affected by the case of *Matter of Carroll v. Knickerbocker Ice Co.*, (218 N. Y. 435), especially as no substantial evidence was offered in this case to overcome the presumption of fact that the death of Mr. Fogarty was the result of an accident.

It is unnecessary to call attention to the liberal rule prevailing in negligence actions where a recovery is sought when death has resulted and eye-witnesses to the accident cannot be produced. Under the liberal construction which has been placed upon the Compensation Law by this court for the purpose of carrying into effect the intention of the legislature in the enactment of said law, we concluded that there was evidence in the record presented to the commission sufficient to justify the findings made by the commission.

The order of the Appellate Division reversing the award made and dismissing the claim should be reversed, with costs to the State Industrial Commission in the Appellate Division and this court, and award affirmed. CHASE, CARDOZO, POUND and ANDREWS, J. J., concur; HISCOCK, Ch. J., and McLAUGHLIN, J., dissent. Order reversed, etc.

Subsequently to the decision of the Court of Appeals in the Fogarty case, the Appellate Division unanimously affirmed awards in the watchman cases of *Antonio v. Rodgers & Hagerty*, File No. 44342, Mar. 8, 1917; 179 App. Div. 950, July 3, 1917; *Mattura v. Price & Co.*, S. D. R., vol. 11, p. 625, Nov. 28, 1916; 179 App. Div. 952, July 3, 1917; and *Granofsky v. Bing & Bing Construction Co.*, Claim No. 28900, Apr. 5, 1916; 181 App. Div. 909, Nov. 19, 1917.

The accidents to Fogarty and the other watchmen noticed above all happened before the amendment of L. 1916, ch. 622, to Workmen's Compensation Law, § 3, subd. 4, defining an employee, became effective. The opinion of the Court of Appeals in the Fogarty case does not notice this radical amendment. Watchmen have therefore been held to be covered independently of the changes that the amendment effects. That future watchmen cases might have been held to be covered in any event, on account of the amendment, is indicated by the following passage from the Commission's

ruling awarding compensation in the watchman case of *Gifford v. Patterson*, the court decisions relative to which appear below, pages 154, 155. Commissioner Lyon said:

GIFFORD v. PATTERSON, Bul., vol. 2, p. 129, March 15, 1917, *in part*.

Had the accident occurred prior to the recent amendment to the Compensation Law, I should think that the decision in the case of *Fogarty v. National Biscuit Company* would be fatal to this claim. The statute, however, was amended prior to the accident in this case, so as to bring under compensation all employees of an employer whose principal business is hazardous. It seems that this amendment was passed to take such close questions out of the realm of controversy, and make possible a quick, summary and final determination.

A watchman for a warehousing and storage company fell from a second story window whose iron shutters he was closing. He was fatally hurt. The accident occurred October 18, 1916. The Appellate Division and the Court of Appeals affirmed an award of death benefits unanimously and without opinion: *Mack v. N. Y. Dock Co.*, Death Case, No. 24142, July 16, 1917; 181 App. Div. —, Dec. 28, 1917; 223 N. Y. Rep. —, May 14, 1918.

(2) *Workers repairing buildings, installing machinery, etc.*—What far-reaching effects will follow upon the amendment of L. 1916, ch. 622, redefining an employee, court opinions have not had time to fully bring out. But they appear to have already established the fact that the amendment brings carpenters, masons, plumbers, etc., called in temporarily and solely to repair or improve buildings in which the owners thereof are carrying on hazardous employments within the compensation law's coverage. The problem of coverage for such employees first arose in the case of *Rheinwald v. Builders' Brick and Supply Co.*, S. D. R., vol. 1, p. 417; Bulletin 81, pp. 59–71. The Commission, in that early case, did not base its denial of an award upon the argument that Rheinwald's work of painting the sign did not arise out of the Builders' Brick and Supply Company's business of manufacturing brick. It did not declare that the painting of the sign was not incidental to the brickmaking. Instead, it applied the common law doctrine of independent contractor to the case. Likewise, upon appeal, the Appellate Division confined its attention to the independent contractor doctrine. It suggested the point of incidentalness only in a very general way if at all. Its decision, however, that Rhein-

wald's dependents were entitled to death benefits was tantamount to a declaration that the signpainting was incidental to the brick-making.* The Bargey decisions of the Appellate Division and the Court of Appeals, Bulletin 81, page 137-141, upon which the Appellate Division later reversed its Rheinwald opinion, held that injury to a person called in temporarily and solely to work upon a building in which the owners thereof were carrying on a hazardous employment was not incidental to such hazardous employment. The Court of Appeals said in the Bargey case: "The placing of the partition was not an adjunct of or within a department of the employment of preparing macaroni. It was a specific act for which Bargey was specially employed, which had no relation to the hazardous employment except that it made more useful, within the contemplation of the employer, the building in which the employment was carried on."

In a ruling of April 5, 1916, while the Rheinwald and Bargey cases were still in a state of uncertainty, pending decision of the Court of Appeals in the Bargey case, the State Industrial Commission reverted to the independent contractor doctrine. In *McNally v. Diamond Mills Paper Co.* it held that McNally was an independent contractor and denied him compensation: S. D. R., vol. 8, p. 431. The paper company, like the macaroni company in the Bargey case, was carrying on a hazardous employment. Three months later, on July 11, 1916, the Commission reopened the McNally case for further testimony, decided that McNally was not an independent contractor but an employee and made an award to him: S. D. R., vol. 9, p. 352. This was five days before the decision of the Court of Appeals against Bargey's claim. McNally, unlike Bargey, was not working upon a building in which the owners thereof were carrying on a hazardous employment but was helping to install an engine in such a building. He was, however, a temporary and casual employee called in for the sole purpose of the installation. The case having been appealed, the Appellate Division on May 2, 1917, reversed the award upon authority of the Bargey decisions. The court said that "installing this engine had

* For later history of the Rheinwald case, see Bulletin 81, p. 70, footnote. The case finally reached the Court of Appeals which without opinion on March 19, 1918, affirmed the denial of compensation to Rheinwald's widow on the ground that Rheinwald was an independent contractor. This was the ground of the original denial by the Commission in 1914. See page 53 of this Bulletin.

no relation to the hazards of paper making except that it increased the facilities for that purpose." The full text of the decision is as follows:

M McNALLY V. DIAMOND MILLS PAPER Co., 178 App. Div. 342, May 2, 1917.

COCHRANE, J.: The employer was engaged in the business of manufacturing paper. At the time of the accident on December 18, 1914, it was installing a large engine in its manufacturing plant. The claimant was in the business of moving heavy machinery and for that purpose owned the appropriate and necessary implements and equipment and had in his employ men whose compensation in case of injury he secured by procuring insurance under the Workmen's Compensation Law covering his liability to them in case of accident. He had been employed by the paper company to move the engine from the railroad to the plant for the sum of two hundred dollars. In the performance of this work he had used his own implements and the men in his employ. After the completion of this contract the party from whom the paper company purchased the engine pursuant to a provision in the contract of purchase sent a man to the paper company to superintend the work of installation for which the paper company was to pay seven dollars a day. The latter company furnished a number of its own men for the installation of the engine and also employed temporarily the claimant and two of his employees to assist in that work, paying the claimant three dollars and fifty cents per day for his own services and something less for the services of his two employees. During the progress of the work of installation of the engine the claimant was injured, and an award has been made to him on the theory that he was an employee of the paper company.

Assuming that the claimant was in the employ of the paper company, I am of the opinion that he is not within the protection of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). The business of manufacturing paper is a hazardous employment and falls within group 15 of section 2 of the act. But the claimant was not exposed to the hazards of that business. His employment was of a special character. Installing this engine had no relation to the hazards of paper making except that it increased the facilities for that purpose. In his claim for compensation filed with the Commission he stated in answer to questions that his occupation when injured was "helping erect engine" and that he had worked at this occupation "off and on about 30 years." It does not appear that the plant was in operation at the time of the accident. From the fact that this large engine was being installed we may perhaps infer that the work of manufacturing paper was in abeyance until the engine was in place. But however that may be the claimant was not employed to manufacture paper nor did he come within the risks of that business, nor was he in fact injured by the operation of the paper mill. His work in installing this engine was of the same character as that which he was accustomed to do in other places irrespective of whether or not the general business there conducted was hazardous. It seems very clear that the claimant was not engaged in a hazardous employment included within group 15.

Nor can the claimant avail himself of the provisions of group 42, which specifically includes the installation of "engines or heavy machinery." The

case of *Matter of Bargey v. Massaro Macaroni Company* (218 N. Y. 410) is directly opposed to this contention. In that case it was held that the employee who was a carpenter by occupation and had been repairing the building wherein a hazardous business was conducted was not himself engaged in that business or entitled to the protection of the law on that account. It was further contended that he was within group 42. The court said: "The appellant invokes also the part of the language creating group 42 as follows: 'construction, repair and demolition of buildings.' It is answered by the fact that the company did not carry on the occupation of constructing, repairing and demolishing buildings for pecuniary gain. This conclusion is obvious beyond the need of discussion." (See, also *Coleman v. Bartholomew*, 175 App. Div. 122.) In the present case the paper company did not carry on the occupation of installing engines or heavy machinery for pecuniary gain. (§ 3, subd. 5.)

The award should be reversed and the claim dismissed. All concurred. Award reversed and claim dismissed.

On the same day, November 10, 1915, that the Appellate Division reversed the award to Bargey's widow, it affirmed an award to the dependents of one Larsen who was injured while doing carpentry work upon a building in which the owner thereof was presumably carrying on a hazardous employment: *Larsen v. Paine Drug Co.*, Bulletin 81, page 187. Bargey was constructing a partition; Larsen was putting up a shelf. Bargey was a casual worker who did nothing else for the macaroni company than carpentering. Larsen was a regular and general worker whose carpentering was but one of a variety of services performed by him in the drug company's plant. In its opinion affirming the award in the Larsen case, the Court of Appeals said: "Where, as in this case, an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed."

As time has gone on the conflicting influence of these two opinions has tended to confusion. Their failure to harmonize has appeared in a variety of accident cases. The question of incidentalness, complicated enough in itself, has been rendered yet more intricate by connection with interpretations of the phrase "pecuniary gain." That subject is treated below, page 166. It is

sufficient under this title to present the texts of the decision of the Court of Appeals in the above-described case of *McNally v. Diamond Mills Paper Co.*, in which the accident occurred prior to the amendment of L. 1916, ch. 622, redefining the term employee, and the decisions of the Appellate Division and the Court of Appeals in the case of *Dose v. Moehle Lithographic Co.*, in which the accident occurred subsequent to such amendment.

In its McNally opinion the Court of Appeals holds that casual or temporary employment has always been within the protection of the Workmen's Compensation Law and that the risks which an installer of machinery incurs are risks of the business which the machinery is intended to serve. It assimilates the McNally case to the Larsen case. It declares that the facts in the much discussed Bargey case have been misread, since Bargey was working not on the macaroni-making premises but on the saloon premises. The text of the opinion is as follows:

MCNALLY V. DIAMOND MILLS PAPER CO., 223 N. Y. 83, Mar. 12, 1918.

CARDOZO, J.: In 1914 the Diamond Mills Paper Company had a plant at Saugerties, New York. It needed another engine, and brought one from the Erie City Iron Works. The manufacturer agreed to furnish an engineer "to superintend installation." Charles McNally, the claimant, undertook to move the engine from the railroad to the plant for \$225. After that contract had been fully performed, he was asked by one of the officers of the paper mill to assist in the work of installation. He was to be paid by day's labor. He brought with him two of his own hired men, and his own blocking, rigging and jacks. Two of the permanent employees of the mill and two others hired for the job, worked with him. In charge of them all was the engineer. In the course of the work the claimant hurt his arm. The Industrial Commission made an award. The Appellate Division reversed, and dismissed the claim.

We think there is evidence to sustain the finding that the claimant when injured was an employee, and not an independent contractor. That he was a contractor while engaged in transporting the engine from the railroad to the mill may be conceded. But when that contract had been performed, he assumed a new relation. He was then employed by the day to work as a laborer with others. He was not in control of the job; he had no power of superintendence or direction; he had no other rank than the regular employees of the mill who were with him; he took his orders from the engineer whom the mill had placed in charge. In this situation, the distinctive tokens of the independent contractor are lacking. The claimant for the purposes of this job was an employee, and nothing more. What he may have been at other times and for other purposes does not concern us. It is true that his employment was temporary and casual, but that is not enough to exclude him from the protection of the statute. (*Matter of De Noyer v. Cavanaugh*, 221

N. Y. 273). It is true also that he brought two of his own men with him; but he made no profit from their labor. His position was like that of the claimant in *Thompson v. Twiss* (90 Conn. 444, 448, 449), where compensation was awarded. There are other cases of like tenor. (*Tuttle v. Embury Martin Lumber Co.*, 192 Mich. 385; *Matter of Peake v. Lakin*, 221 N. Y. 496; *Woods v. Tupper Lake Chemical Co.*, 221 N. Y. 660). McNally did not undertake to accomplish a specific job in his own way. He did not undertake to accomplish anything. He undertook to help and to obey.

The Appellate Division assumed that the claimant was an employee, but held that the award was condemned by our decision in *Matter of Bargey v. Massaro Macaroni Co.* (218 N. Y. 410). The accident occurred before the amendment of the statute in 1916 (*Matter of Dose v. Moehle Lithographic Co.*, 221 N. Y. 401). The business of the Diamond Mills Paper Co. was the manufacture of paper, which under group 15 of section 2 of the act is a hazardous employment (Workmen's Comp. Law, § 2). In the view of the Appellate Division, the claimant, though an employee, did not come within the statute, because the risks which he incurred were not the risks of the employer's business. We think, however, that they were, and the *Bargey* case has been misread. There a corporation engaged in the manufacture of macaroni used part of a building as a factory and leased part as a saloon (170 App. Div. 103, 104). It employed a carpenter to put a partition in the saloon, and this work was held to have no relation to the hazardous employment. In those circumstances, our ruling was that the carpenter was not an employee within the intendment of the statute (218 N. Y. 410, 413). We have a different situation here. This mill was a going concern; to run it to its full capacity there was need of new machinery; and the installation of another engine was incidental to its continued operation. The men who were doing this work were not improving some building belonging to their employer, but unrelated to the business. They were furthering the business itself. The claimant's position was like that of the clerk in *Matter of Larsen v. Paine Drug Co.* (218 N. Y. 252). There the employer was a manufacturer of drugs. The accident came to Larsen while building a shelf. We said that what he was doing was fairly incidental to the business, and declined to condition relief upon the presence of "the characteristic process or operation" which caused the business to be grouped as hazardous (*Matter of Mulford v. Pettit & Sons*, 220 N. Y. 540; *Matter of Fogarty v. Nat. Biscuit Co.*, 221 N. Y. 20; *Matter of Dose v. Moehle Lithographic Co.*, *supra*).

The order of the Appellate Division should be reversed, and the award affirmed, with costs in the Appellate Division and in this court.

HISCOCK, CH. J., CHASE, COLLIN, CUDDEBACK, POUND and ANDREWS, JJ., concur. Order reversed, etc.

In *Dose v. Moehle Lithographic Co.*, which had been decided by both courts before the McNally case was decided by the Court of Appeals, the Appellate Division held that the amendment of L. 1916, ch. 622, redefining the term employee, did not affect cases of the Bargey and McNally type while the Court of Appeals held that it did.

The Appellate Division held that it was still true, notwithstanding the amendment, that in such temporary or casual cases the injured workmen had no connection with the hazardous businesses being conducted in the buildings or plants that they were engaged to repair or improve. The text of the Appellate Division's opinion is as follows:

DOSE v. MOEHLE LITHOGRAPHIC Co., 179 App. Div. 519, July 3, 1917.

COCHRANE, J.: The employer was conducting a lithographing and printing business which is made a hazardous employment under section 2, group 40, of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of 1916, chap. 622). The employee was a bricklayer by occupation and was employed specially to point up one of the walls of the building wherein the business of the employer was conducted and to repair some cracks in the wall. He was paid six dollars a day for his labor and four dollars a day for a helper to be provided by himself. The employer furnished the materials and ladders and scaffolds. The claimant had been working two or three days when the scaffold on which he was standing fell and he received the injuries for which the award has been made.

The case in its material facts cannot be distinguished from *Matter of Bargey v. Massaro Macaroni Co.* (170 App. Div. 103; affd., 218 N. Y. 410.)

In the year 1916 subdivision 4 of section 3 of the act defining the term "employee" was materially amended. The amendment was far reaching and doubtless overcomes the effect of many decisions theretofore made. The amendment must be construed, however, in connection with other provisions of the statute and it still remains true that under section 10, and subdivision 7 of section 3, the injury for which compensation is made must arise "out of and in the course of" the "employment," and the term "employment" under subdivision 5 of section 3 "includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain." The amendment in question would not have entitled the claimant to an award in the *Bargey* case and does not entitle the claimant to an award in this case because neither the injury in that case nor in this case arose "out of and in the course of" an employment (§ 10, and § 3, subd. 7) "carried on by the employer for pecuniary gain" (§ 3, subd. 5). *Bargey* was a carpenter and was employed specially to do work of that character on the building wherein the hazardous business was conducted. He had no connection with that business. So here the claimant was a bricklayer employed specially to make specific repairs to the building and had no connection whatever with the hazardous employment conducted therein. His injury arose not out of and in the course of the work of lithographing and printing but of bricklaying. The employment of bricklaying was not "carried on by the employer for pecuniary gain" any more than the work of structural carpentry was so "carried on" in the *Bargey* case. The observation of the Court of Appeals in that case that "this conclusion is obvious beyond the need of discussion" is still pertinent and is equally applicable here. The case of *Matter of Mulford v. Pettit & Sons* (175 App. Div. 958; affd., 220 N. Y. 540) is essentially different in its facts from the present case. There the award was sustained

both in this court and in the Court of Appeals. In the opinion by the latter court the opinion in the *Bargey* case is commented on, but we discover nothing in such comments affecting the essential features on which that case was decided and which are present in this case. We do not think that if an employer conducting a hazardous business within a building employs a painter to paint the building, or a plumber to repair a broken pipe therein, or a mason to repair the walls thereof, that it can be said that the business of painting or plumbing or, masonry is "carried on by the employer for pecuniary gain" or that it is "carried on by the employer" in any sense whatever without stretching the meaning of those words beyond their ordinary and reasonable significance. The employment in such a case is special and incidental and for a particular purpose. The amendment in question to subdivision 4 of section 3 was not particularly for the purpose of overcoming the effect of the decision in the *Bargey* case, because the amendment became a law before that case was decided by the Court of Appeals. Full effect can be given to the amendment by applying it to cases of employees who are injured while engaged in "a trade, business or occupation carried on by the employer for pecuniary gain" (§ 3, subd. 5), although it may not be the "principal business" of such employer (§ 3, subd. 4). Illustrations of such cases probably are *Lyon v. Windsor* (173 App. Div. 377), where the employer was a manufacturer of dresses and the employee was a salesman of such dresses; *Matter of Newman v. Newman* (218 N. Y. 325), where the employer was proprietor of a meat market assumed in the opinion for the purposes of the discussion to have been a hazardous employment and the employee was injured while delivering meat; *Matter of Aylesworth v. Phoenix Cheese Company* (170 App. Div. 34), where the employer was a manufacturer of cheese assumed in the opinion for the purposes of the discussion to have been a hazardous employment, and the employee was engaged in harvesting ice for use in manufacturing cheese, and other cases which might be cited. In those cases the claims were denied because although the employers were engaged in hazardous employments, the employees under the statute as it was at the time of the decisions were not so engaged. Now by virtue of the amendment to subdivision 4 of section 3, it is not material that they should be so engaged provided they are "in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment" (§ 3, subd. 4, as amd.), and provided further the injury arises out of and in the course of "a trade, business or occupation carried on by the employer" (§ 3, subd. 5). In the cases cited the claims under the amendment would probably meet both of those requirements and would be allowed because the claimants were generally and permanently engaged in occupations incidental to and forming a part of the "principal business" of the employer and "carried on" by the employer as an adjunct of his "principal business." The distinction between those cases and cases of which the *Bargey* case and the present case are types, seems obvious. In the latter class of cases the injury arises out of and in the course of an occupation not "carried on," within any reasonable interpretation of those words, by the employer in any sense whatever.

The award should be reversed and the claim dismissed. All concurred.
Award reversed and claim dismissed.

While the Court of Appeals based its decisions overruling the Appellate Division and sustaining the award to Dose upon the amendment of L. 1916, ch. 622, redefining an employee, part of its argument appeared to contradict the argument in the Bargey case independently of such amendment and to forecast its opinion in the McNally case. Thus, it cited the decision in *Larsen v. Paine Drug Co.*, referred to above, as governing and said that "a proper conduct of the business of the company required a suitable plant, machinery, tools, etc. The company could not in justice to itself, its business or its employees, continue business in a plant which was actually unsafe or in danger of becoming so. Dose was engaged in an employment incidental and requisite to the business carried on by the company * * *" The full text of the Court of Appeals' decision is as follows:

DOSE V. MOEHLE LITHOGRAPHIC Co., 221 N. Y. 401, Oct. 23, 1917.

HOGAN, J.: The Moehle Lithographic Company, hereinafter designated as the "Company," is engaged in the business of lithographing and printing, classified as hazardous in group 40, section 2, of the Workmen's Compensation Law. The business of the company is carried on in a plant maintained by it in the borough of Brooklyn.

The claimant Dose, by occupation a bricklayer, was employed by the company to point up one of the walls of its plant and repair cracks therein. For such labor he and his helper were to be paid the regular wages for bricklayers and bricklayer's helpers. The company furnished all materials, ladders and supplies. Dose had been employed at the work in question without the aid of a helper for two or three days, and while thus engaged on June 22, 1916, one of the ropes supporting a scaffold upon which he was at work broke. Dose was precipitated a distance of some thirty feet to the ground, receiving injuries for which an award was made to him.

Upon appeal therefrom by the company and insurer the determination of the Industrial Commission was reversed and the claim dismissed upon the authority of *Matter of Bargey v. Massaro Macaroni Co.* (170 App. Div. 103; affirmed, 218 N. Y. 410, 412). I conclude the *Bargey* case is clearly distinguishable from the case at bar.

In that case the accident which resulted in death occurred December 2, 1915. Compensation was awarded April 30, 1915. The reversal by the Appellate Division was made November, 1915. The deceased, a carpenter and builder, had entered into a contract to "raise the second and third story floor and roof of the southwest corner of the macaroni factory to a level with the floor and roof north of this section," and to furnish the material and labor therefor for a stated sum. During the performance of the contract, work additional to that contracted for developed which Bargey did as directed and presented bills therefor to the macaroni company. The factory proper was upon the second and the third floor. When Bargey met his death he was engaged in work in a room on the first floor, which work was additional to

that covered by the contract. The determination of the Industrial Commission was reversed by the Appellate Division upon the ground that Bargey was not an employee engaged in a hazardous employment within the Compensation Law, which conclusion was approved by this court.

Judge COLLIN, writing for the court, said: "Obviously, two factors are essential to empower the commission to award compensation, namely, (a) an employee injured, (b) while engaged in a hazardous employment named in the section." The opinion then quotes definitions from the Compensation Law in force at the time of the death of Bargey, and in substance holds that though the macaroni company was an employer because it employed workmen in a hazardous employment, to wit, preparing macaroni, Bargey was not an employee because he was not engaged in the preparation of macaroni.

At the time the Bargey claim arose and the award was made, the Workmen's Compensation Law (Cons. Laws, ch. 67, section 3) contained the following definitions: "'Employer' * * * a person, partnership, association, corporation, * * * employing workmen in hazardous employments * * *;" "'Employee' means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants;" "'Employment' includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain;" "'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment * * *."

By chapter 622, Laws of 1916, the statute defining "employee" was amended to read:

"'Employee' means a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants."

As bearing upon the purpose of the amendment, the brief of counsel for the Industrial Commission calls attention to the report of the State Industrial Commission to the legislature for the year 1915 wherein the commission recommended an amendment to the law which would "cover employees called in to do construction or repair work as in the *Bargey* case, and also clerical office employees and others who are not definitely and clearly included within the scope of the act at the present time," and to a memorandum made by the governor approving the amendment.

While the documents referred to indicate the intention of the legislature in the enactment of the amended statute and a construction of the same by the executive, it is obvious from a comparison of the earlier law with the amended statute, that under the statute before the amendment an employee to be entitled to an award must have been engaged in a hazardous employment in the service of an employer conducting a hazardous employment. Such was the construction of the law in the *Bargey* case. The amendment of 1916 was intended to and does embrace an additional class of employees, viz., those in the service of an employer carrying on a hazardous employment, even though such employee is not actually engaged in a hazardous employment. The claimant Dose was clearly within the class embraced in the amended law.

The Appellate Division held that the injury to Dose did not arise out of and in the course of an employment "carried on by the employer for pecuniary gain," that Dose had no connection whatever with the hazardous employment conducted in the building; that his injury arose not out of and in the course of the work of lithographing and printing but of bricklaying and the employment of bricklaying was not carried on by the employer for pecuniary gain. That conclusion would render meaningless the amendment of 1916. The company was an employer of workmen. It conducted a hazardous business for pecuniary gain, which term as used in the statute merely means that the employer must be carrying on a trade, business or occupation for gain in order to come within the act. (*Matter of Mulford*, 220 N. Y. 543.) The injury received by Dose was accidental and sustained by him as an employee in the service of the company which carried on a hazardous employment. The fact that he was employed in bricklaying, which was not carried on for pecuniary gain by the company, is untenable. A proper conduct of the business of the company required a suitable plant, machinery, tools, etc. The company could not in justice to itself, its business or its employees, continue business in a plant which was actually unsafe or in danger of becoming so. Dose was engaged in an employment incidental and requisite to the business carried on by the company and under the law as amended was clearly entitled to compensation.

In *Larsen v. Paine Drug Co.* (218 N. Y. 252, 256), decided prior to the amendment of 1916, this court held, Judge HISCOCK writing, "where * * * an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed."

The same principle was applied in *Matter of Waters v. Taylor Co.* (218 N. Y. 248) and *Matter of Glatzi v. Stumpp* (220 N. Y. 71).

The language quoted, especially when applied in connection with the amendment to the statute in this case, justified the award made by the State Industrial Commission.

The order of the Appellate Division should be reversed and the determination of the State Industrial Commission affirmed, with costs to the Commission in the Appellate Division and this court. HISCOCK, Ch. J., CHASE, COLLIN, CARDOZO, McLAUGHLIN and CRANE, JJ., concur. Order reversed, etc.

Attention should be called in this connection to the amendment of L. 1917, ch. 705, to Workmen's Compensation Law, § 3, subd. 13, which has provided that "'Manufacture,' 'construction,' 'operation,' and 'installation' shall include * * * all work done in connection with the repair of plants, buildings, grounds and approaches of all places where any of the hazardous employments are being carried on, operated or conducted."

An extreme instance of the coverage of casual or temporary

workmen would be the holding of persons, about to embark for the first time in a hazardous employment, liable for compensation to carpenters, masons, etc., employed in erecting the building or buildings in which it might be their intention to start the business. Even the erection of an entirely new and separate building, as an addition to or a substitution for an existing plant, would furnish a novel application of the incidentalness principle. A deputy state industrial commissioner awarded compensation, February 15, 1917, to a man who had lost an eye by the premature explosion of a blast while clearing away stumps and trees for the site of a building proposed to be erected by a company engaged in a hazardous employment. The company gave notice of appeal to the courts. Pending the appeal, the Commission on May 14, 1917, reopened the case. The company put in evidence a written contract for removal of the stumps and trees at fifty cents each. The injured man was a helper of the contracting worker. The Commission rescinded the award and the company withdrew the appeal. Thus does the independent contractor principle assert itself from time to time. The case in question is *Leland v. Seneca Falls Mfg. Co.*, Bul., vol. 2, p. 18; File No. 15433.

(3) *Salesmen and other outside employees.*—In two rulings of the same date, January 10, 1917, the State Industrial Commission specifically holds that the amendment to the definition of an employee effected by L. 1916, ch. 622, offsets the decisions in *Aylsworth v. Phoenix Cheese Co.*, *Tomassi v. Christensen* and *Sickles v. Ballston Refrigerating Co.*, published in Bulletin 81. In these two rulings the insertion of the phrase "principal business" in the definition is held to give coverage to garbage sorting as incidental to garbage removal, *Sacalli v. Marrone*, Bul., vol. 2, p. 91; S. D. R., vol. 12, p. 543, and to coal screening as incidental to the manufacture of brass beds, *Rzepczynski v. Manhattan Brass Co.*, Bul., vol. 2, p. 91. Since the accident to Sacalli the legislature of 1917 has amended Workmen's Compensation Law, § 2, gr. 13, to include garbage sorters. The award to the coal screener's dependents has been unanimously affirmed by the Appellate Division without opinion: 179 App. Div. 952, July 2, 1917. In its decision in *Dose v. Moehle Lithographic Co.*, above, page 105, the Appellate Division holds by way of *dictum* that the insertion of

the phrase "principal business" should make ice harvesting incidental to cheese making, delivery of meat afoot incidental to meat marketing and selling dresses incidental to dress making, in contravention of the decisions in the Aylesworth, Newman and Lyon cases, Bulletin 81, pages 83, 86, 141, 145. In the last named case, Lyon, an inside salesman of dresses stationed in a room adjoining quarters where the dresses were made, slipped on the floor of the factory which he had entered to procure a garment and received an injury.* The opinion in *Walsh v. Woolworth Co.*, above, page 65, has something to say about the new definition of the term "employee." The Appellate Division has later interpreted the Court of Appeals decision in the Dose case, above, page 107, as giving coverage to a collector for a brewery killed by robbers while collecting in a saloon. The opinion is as follows:

SPANG V. BROADWAY BREWING & MALTING CO., — App. Div. —, Mar. 6, 1918.

COCHRANE, J.: The employer was a manufacturer of malt liquors, which business is classified as hazardous within Group 27 of section 2 of the Workmen's Compensation Law. Charles Spang, the employee, was a collector and while in the performance of his duties as such collector in a saloon away from the plant of his employer he was shot and killed. The shooting was intentional and the purpose thereof was to secure the money which Spang had on his person belonging to his employer.

Under subdivision 4 of section 3 of the Workmen's Compensation Law, as amended by chapter 622 of the Laws of 1916, Spang at the time of his death was within the protection of the act. That amendment was intended to include an employee "in the service of an employer carrying on a hazardous employment even though such employee is not actually engaged in a hazardous employment." (*Matter of Claim of Dose v. Moehle Lithographic Company*, 221 N. Y. 401.) And by the plain language of the statute it is immaterial whether the shooting of Spang occurred at the plant of the employer "or in the course of his employment away from the plant." He was clearly "in the course of his employment" at the time of his injury.

The fact that the death of Spang was intentionally caused does not defeat the claim. He was killed as an incident of his employment because he had in his possession money belonging to his employer, which it was the purpose of his slayer to feloniously appropriate. An injury caused deliberately and willfully by a third party may be an "accidental injury" within the meaning of the act from the viewpoint of the employer and employee. (*Workmen's Compensation Law*, section 29; *Matter of Hellman v. Manning Sand Paper Company*, 176 App. Div. 127, affirmed 221 N. Y. 492; *Matter of Claim of Carbone v. Loft*, 219 N. Y. 579; *Matter of Claim of Diets v. Solomonwitz*, 179 App. Div. 560; *Matter of Claim of Yume v. Knickerbocker Portland Cement*

* The Appellate Division reaffirmed its decision in the Lyon case on the day that it handed down its decision in the Dose case: *Lyon v. Windsor & Davis*, 179 App. Div. 949, July 3, 1917.

Company, 3 State Department Reports 353, affirmed 169 App. Div. 905; *Matter of Claim of Slane v. Cording & Saleman*, 11 State Department Reports 631, affirmed 179 App. Div. 952; *Matter of Claim of Griffin v. Roberson & Son*, 176 App. Div. 6; *Matter of Claim of Heits v. Ruppert*, 218 N. Y. 148.)

The award should be affirmed. Award unanimously affirmed.

Whether the phrase "principal business" makes the far-extending movements of commercial travelers incidental to hazardous occupations of their employers remains for court interpretation to determine. Traveling salesmen operating vehicles, as in the cases of Gurnett and Remington, above, page 79, are now covered by the alternative phrase in the redefinition of an employee by L. 1916, ch. 622; that is, they are persons "engaged in one of the occupations enumerated in section two."

2. *Subsidiary or adjunctive work*.—An employee not at the moment of injury engaged strictly in his hazardous occupation may have compensation. Given the fact that he has an occupation hazardous under Workmen's Compensation Law, § 2, his occupations incidental thereto are to be regarded as hazardous. This, though they may not be hazardous while standing independent and alone. The principle has been thoroughly established and delimited by the cases heretofore reproduced in Bulletin 81, pages 82–91, 184–195. The following cases occurring since the publication of Bulletin 81 have received special consideration by the Commission and the Courts. They are presented according to the numerical order of the groups in § 2.

Group 13. *Waterworks, operation*.—Going to the depot to get some lead for use on municipal waterpipes is not incidental to the operation of waterworks: *Spinks v. Village of Marcellus*, 180 App. Div. 732, Dec. 28, 1917. The text of this case appears below, page 161.

Group 19. *Brick making*.—Repairing the machinery used for making brick is incidental to the manufacture of the brick: *Smith v. Washburn & Co.*, Case No. 18733, Sept. 6, 1917; — App. Div. —, Mar. 6, 1918.

Group 22. (1) *Boilers, operation*.—Splitting wood is incidental to the operation of boilers: *Siegfried v. Goldberg*, S. D. R., vol. 7, p. 452, Feb. 24, 1916. Compare Bulletin 81, page 195. The coverage of ordinary hot water heaters in houses is considered

above, page 62, in connection with a decision of the Court of Appeals reversing the award in this Siegfried case.

(2) *Elevators, operation*.—Repairing an elevator door is incidental to its operation: *Carey v. Frambro Realty Co.*, Bul., vol. 3, p. 44, Sept. 20, 1917; — App. Div. —, Mar. 6, 1918.

(3) *Window cleaning*.—Removing a shade preliminary to cleaning a window is incidental to the cleaning: *Tracy v. Mertens*, S. D. R., vol. 12, p. 562; Bul., vol. 2, p. 102, Jan. 24, 1917.

(4) *Apartment house engineering*.—The Commission denied death benefits in the case of an apartment house engineer and handy man who took care of the elevators, boilers, electric lights, etc., and who fell to the ground while opening a second story window that was stuck with paint; the Appellate Division affirmed the Commission's denial unanimously and without opinion: *Dodd v. Lancashire Corp.*, S. D. R., vol. 9, p. 281, May 23, 1916; 176 App. Div. 924, Dec. 29, 1916.

Group 27. *Breweries*.—Collecting money from a saloon or other debtor in the business is incidental to the manufacture of beer: *Spang v. Broadway Brewing & Malting Co.*, below, page 111.

Group 29. *Milling*.—Operating a rye thresher and cleaner may be incidental to a milling business: *Vincent v. Taylor Bros.*, above, page 80.

Group 41. *Operating vehicles*.—The Court of Appeals has reversed the order of the Appellate Division affirming without opinion the award in *Glatzl v. Stumpp*, the case of a florist's driver who was fatally hurt while adjusting a customer's window box. "It was not because Glatzl was the driver of the delivery wagon that he fell from the ladder," said the court. "Any other person adjusting the window box might have been injured in the same manner. The case of *Matter of Costello v. Taylor* (217 N. Y. 179), on which the attorney-general relies, does not authorize a recovery here." The full text of the Glatzl decision appears below, page 169.

The Appellate Division has unanimously and without opinion affirmed awards to a driver who lost an eye from a flying steel splinter while helping to repair the elevator by which he had been putting wood into a cellar: *Kasper v. Clark & Wilkins Co.*, S. D.

R., vol. 7, p. 454, Feb. 24, 1916; 175 App. Div. 958, Nov. 15, 1916, and to a driver for a bottling firm who crushed his fingers while removing half barrels of beer from his employer's basement: *King v. Gross & Co.*, File No. 7766, Jan. 31, 1917; 179 App. Div. 966, Sept. 25, 1917; but, with opinion, one justice dissenting, has reversed an award to a wood and coal yard driver injured while splitting wood. In the introduction to its findings in the wood-splitting case, the Commission had stated that the employee had backed his horse and wagon in and was splitting the wood and loading it upon the wagon: S. D. R., vol. 14, p. 610, Bul., vol. 3, p. 13, Sept. 5, 1917. The court's opinion is as follows:

CASTERLINE V. GILLEN, — App. Div. —, Mar. 6, 1918.

WOODWARD, J.: The facts in this case are that the employer was engaged in conducting a wood and coal yard at Port Jervis, at a time when the statute did not include such business as a hazardous employment. The employee appears to have been a general laborer, who drove team in delivering coal and wood whenever the occasion demanded, and who filled in his time when not thus employed in splitting or chopping wood, and doing such other work as was required around the yard, including the unloading of coal from cars. The claimant was injured while engaged in splitting or chopping wood, a chip or splinter flying and hitting him in the eye, and for this injury the State Industrial Commission has awarded him compensation. The insurance carrier appeals.

The employer's general business was not within the Workmen's Compensation Law at the time of this accident; it was not rated as a hazardous employment. It seems to have been held in some of the earlier cases that the operation of a vehicle, incident to an otherwise non-hazardous business, was within the statute, and the attempt is here made to extend the principle so as to embrace the case of an employee who is injured while splitting or chopping wood which he or some one else may at some future time be called upon to load in a wagon and deliver to a customer. "It were infinite for the law to consider the cause of causes, and their impulsations, one of another," says Lord Bacon (Bacon's Maxims, reg. 1), "therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degrees"; and it would seem that this is a proper place for the application of that principle; an incident to an incident of a non-hazardous employment is too remote for the foundation of an award under the Workmen's Compensation Law. Under the statute, as it existed at the time of this accident, an employer was defined as "a person * * * employing workmen in hazardous employments," (section 3, subdiv. 3), and an employee as "a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant," and clearly the employer was not conducting a statutory hazardous business, and the driving or operation of vehicles was only incidental to his business,

while the employee, at the time of the accident, was not engaged in a hazardous employment, as that term was defined in the statute.

There was some effort made to make it appear that the claimant was incidentally engaged in loading the wood, as he split it, into a wagon, but the claimant himself distinctly said that he could not be doing two things at a time and that he was engaged in splitting wood. But Group 41 does not contemplate an injury resulting from the incidental loading of a wagon under the circumstances of this case. Group 41 contemplates the operation of vehicles as the principal business or occupation of the employer for pecuniary gain.

We are clearly of the opinion that under the circumstances of this case there was no liability and that the award may not be sustained.

The award appealed from should be reversed.

The Appellate Division has decided in the following opinion that the dangers of the street are incidental to the operation of a vehicle, as well as getting on and off the vehicle and loading it with refuse:

PUTNAM v. MURRAY, 174 App. Div. 720, Sept. 13, 1916.

LYON, J.: The sole question at issue upon this appeal is whether the death of the deceased can be said to have arisen out of his employment. He was engaged in the occupation of driver in the business of teaming, trucking and livery. While working for his employer in collecting dirt from the streets of Syracuse, N. Y., he stepped upon a board containing a rusty nail as he was getting up into his wagon. The nail pierced his shoe and went into his foot. The wound became poisoned therefrom and as a result his entire system became infected with tetanus germs, causing his death. The State Industrial Commission found that the injuries were accidental and arose out of and in the course of his employment. The defendants challenge the correctness of the conclusion that his injuries arose out of his employment and cite in support of their contention the cases of *Matter of Newman v. Newman* (218 N. Y. 325); *Sheldon v. Needham* (7 B. W. C. O. 471); *Kitchenham v. S. S. "Johannesburg"* (4 id. 311); *Mitchell v. S. S. "Sawon"* (5 id. 623) and *Matter of De Filippis v. Falkenberg* (170 App. Div. 153); and the defendants contend that there can be no liability as the accident arose from a common risk to which any person was equally exposed who happened to travel that way on foot without regard to the nature of his employment.

The general distinction between the cases cited, and the case at bar is that in the former it was held that the injuries were not received while the employee was engaged in one of the hazardous occupations specified in the Workmen's Compensation Law, or in doing an act incidental thereto. In the case at bar the deceased was engaged in the operation on streets of a wagon drawn by horses, which was conceded a hazardous employment under Group 41 of section 2 (Consol. Laws, chap. 67; Laws of 1914, chap. 41.)* His duties were not limited to simply driving his team. They included also the loading of his wagon. (*Matter of Costello v. Taylor*, 217 N. Y. 179; *Matter*

* Since amd. by Laws of 1916, ch. 622 — [REPR.]

of *Dale v. Saunders Bros.*, 219 id. 59.) The Commission has found that one of the duties of deceased was going about the streets shoveling dirt into his wagon. One of the necessary incidents of driving about the streets was getting on and off his wagon. While the danger of stepping on the nail may be said to have been common to all persons using the street, an injury therefrom to a mere passer along the street, not engaged in a hazardous employment or in the performance of an act incidental thereto, would probably not afford a right to compensation under the act. The hazardous employment of the deceased required his continued presence upon the street in the discharge of the duties of his employment. The mere fact that a person not engaged in a hazardous employment was exposed to the danger of a similar injury should he chance to travel that way, furnishes no argument for a denial of the right of compensation to a person whose hazardous employment compelled his constant presence on the street. In the case of *M'Neice v. Singer Sewing Machine Company, Limited* (4 B. W. C. C. 351; 48 Sc. L. R. 15), the Court of Sessions, Scotland, held that where a salesman and collector riding in a street on a bicycle, in the course of his employment, was kicked on the knee by a passing horse and injured, the accident arose out of the employment. This case was cited, and the principle on which it was based, approved by the Court of Appeal, England, in the case of *Pierce v. Provident Clothing and Supply Co., Ltd.* (4 B. W. C. C. 242; L. R. [1911] 1 K. B. 997; 104 L. T. 473), in which that court quotes from the *M'Neice* case as follows: "The only question to be determined that has been argued before us is whether it arose out of his employment. Now, I think it did. I think that it was one of the ordinary dangers to which his employment exposed him, because it is quite clear from the statements before us that his employment as collector forced him to traverse the streets. And I think, therefore, that a danger which is an ordinary danger in the street—and I think that we are entitled of our own knowledge to know that the behaviour of a passing horse is one of the ordinary dangers of the street—is therefore a danger arising out of his employment. It is quite true that many members of the public are exposed to the same danger, but that does not seem to me to be the criterion. These many members of the public might be either parties who are in employment or who are not; but even if they were parties in employment, they might well be in the street, not in the course of their employment, and then there would be no liability. I refer to the ordinary case of a workman who is leaving the factory. After he has once got clear of the factory and is going to his own home in another part of the town, he would not then be injured in the course of his employment. But, here, the man in the course of his employment is compelled to go into the streets. I cannot myself distinguish between this case and the case of a coachman, who has to drive about the streets for his master's benefit and not for his own and is injured. I think the appellant was injured by a danger arising out of his employment." The court then adds, Cozens-Hardy, M. R., writing the opinion, in which Farwell and Buckley, L. JJ., concurred: "I respectfully desire to adopt that decision and to follow it in the present case on the first point that was argued, namely, that this accident did not give rise to a claim because any one else in the street was exposed to the same risk." I have quoted from this decision at some length as it seems to so aptly answer defendants' chief objection to an affirmance of the award.

I think the decision of the Commission was correct, and that the award should be confirmed. All concurred, except Howard, J., who dissented. Award affirmed.

Group 42. (1) *Structural carpentry*.—Repairing the employer's office is incidental to the real estate business: *Bredow v. Naughton & Co.*, S. D. R., vol. 8, p. 437, April 6, 1916; 175 App. Div. 958, November 15, 1916.

(2) *Bridges, repair*.—The Commission denied death benefits in the case of a bridge tender who was drowned while taking in danger signal lanterns; the Appellate Division affirmed the Commission's denial unanimously and without opinion: *Ruane v. City of New York*, Death File, No. 27891, May 24, 1917; 181 App. Div. 912, November 14, 1917.

(3) *Junk dealers*.—Breaking up a wheel is incidental to the junk business: *Levine v. Gold's Sons*, Bul., vol. 3, p. 78, November 15, 1917.

3. *Coming to or leaving work, noon interval, etc.*—According to court decisions, as a general rule accidental injuries to employees coming to or leaving work, in order to be compensatable, must occur (1) upon the employer's premises or at his plant, (2) within a reasonable time before beginning or after quitting work and (3) without intervening pursuit other than the employment. Illustrative cases have been presented in Bulletin 81, pages 74-82, 195-197.

The plant or premises may be very large in industries such as timber cutting. In *Bylow v. St. Regis Paper Co.*, below, page 197, a compensated case, the employee left his job to go to dinner and, having walked more than a quarter of a mile on his employer's lands, was run down by one of his employer's engines. Rights of way of steam railroads, street railways, etc., extend the employer's premises to practically indefinite distances. They are particularly the employer's premises as concerns track laborers. The Commission, sustained by the Appellate Division, has granted compensation to employees of this class injured on rights of way in the immediate neighborhood of their jobs while coming to or quitting work: Bulletin 81, pages 195-197. Commissioner Lyon, however, has declared: "An employee of a railroad who can, if he chooses, enter upon the track of his employer two miles and a half

from the place of his employment, but who has the option to proceed to his work by some other route not within the railroad hazard and whose hours of service do not actually begin until he arrives at the place of work, is not, while he is reaching his job, in my opinion, covered by the Compensation Law:" *Dowling v. N. Y. Central & H. R. R. Co.*, S. D. R., vol. 9, p. 321, June 14, 1916.

In the following case, the Appellate Division reversed an award to a street car conductor killed on his employer's right of way by one of his employer's cars as he alighted before the car depot within a few moments of his time for beginning work. The court made the point that he was a passenger and was injured in a public highway. The full text of its opinion is as follows:

MCCABE V. BROOKLYN HEIGHTS R. R. Co., 177 App. Div. 107, Jan. 9, 1917.

WOODWARD, J.: There is no dispute as to the fact that Valorous C. McCabe was an employee of the Brooklyn Heights Railroad Company, and, of course, this corporation operating a street surface railroad is engaged in a hazardous business under the terms of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). Mr. McCabe was, at the time of the accident in January, 1916, in the public highway on his way to commence work as a conductor, and was run down and killed by one of the defendant's cars. It seems that Mr. McCabe went to work at seven-one in the morning and made what was known as a "swing," and was relieved at ten-seventeen. He had no further duties to perform until twelve-thirty-two, but was required to be on hand five minutes before that time, or at twelve-twenty-seven. The deceased appears to have left the premises of the employer and on returning to his duties at twelve-twenty-seven he rode as a passenger upon one of the cars of the employer for a distance of nine or ten blocks. He was on his way to the station of the employer. He left the car before it reached the station, going out by the front door, and while crossing the public highway, twelve minutes before time for him to report for duty, he was struck by another car of the employer and killed. The State Industrial Commission has made an award in this case to the widow and son of the deceased. The employer, its own insurance carrier, appeals.

We are cited to many authorities outside of this jurisdiction which give some color to the contention that this award may be sustained, but it is to be remembered that there is a decided difference in the language of these various statutes; that while in the State of New York the injury must arise out of and in the course of the employment (sections 10, 3, subdiv. 7), others merely require that the injury shall occur in the course of the employment. The Wisconsin act, which affords most of the favorable authorities, provides that "Where, at the time of the accident, the employee is performing service growing out of and incidental to his employment" (Wis. Laws of 1911, chap. 50, as amended by Wis. Laws of 1913, chap. 599; Wis. Stat. [1915] section 2394-3,

subd. 2), which gives room for a broader construction. (See 1 Bradbury W. C. [2d ed.] 334.)

The decedent, while in the general employ of the appellant as a conductor, was not at the time "engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer." (Section 3, subdiv. 4.)* He was performing no service in the operation of the employer's railroad; he was merely a citizen on his way to work, using the employer's cars as those of any common carrier of passengers in reaching a point near his destination, and then stepping down into the public highway, where he was run over and killed, just as he might have been if he had been a groceryman, a lumberman or any other man. He had nothing whatever to do with the operation of the employer's railroad at the time of the accident; he occupied exactly the same relation to the employer that any other passenger would have occupied; and the rule of the statute is that in order to create a liability the injury must be sustained in connection with or incidental to the hazardous employment. (*Matter of Newman v. Newman*, 218 N. Y. 325, 329.) "The employee is not insured generally against accident while working for the street railway corporation. At home or on the street he may meet with accident not arising out of or in the course of his employment. The act does not cover such cases. The employee gets up in the morning, dresses himself and goes to work because of his employment, yet if he meets with an accident before coming to the employers' premises or his place of work that is not a risk of his occupation but of life generally. * * * He was not injured while on duty nor in his working hours nor on his way to or from his duty within the precincts of the company" (*Matter of De Voe v. New York State Railways*, 218 N. Y. 318, 320), and the statute has made no provision for the case now before us. It is true, of course, that under the statute (section 21) it is to be presumed that the case is within the law where there is no evidence to the contrary, but where the evidence shows that the accident occurred outside of the employment there is no room for presumptions, and the employer is still entitled to his property until it is taken from him by due process of law.

The award should be reversed and the claim disallowed. All concurred; Howard, J., not being a member of the court at the time of the decision; Sewell, J., not sitting. Award reversed and claim dismissed.

In the following case the Supreme Court, New York Trial Term, refused to set aside the verdict of a jury in favor of an elevated railway guard in an action for negligence against his employer. The guard had remained on a train at the end of his run and had been severely burned in a collision. The employer claimed that the Workmen's Compensation Law governed the accident to the exclusion of the action for negligence; the employee claimed that his status at time of the accident was that of passenger, not of employee.

* Since amd. by Laws of 1916, ch. 622.— [REP.]

PIERSON v. INTERBOROUGH RAPID TRANSIT Co., 102 Misc. 130, Dec., 1917.

BROWN, J.: The plaintiff was employed by the defendant as a guard in the operation of its cars on the Third Avenue Elevated railroad; his duties as guard ceased on the arrival of his train at Bronx Park station at two-ten P. M. on June 8, 1910; he had no duties to perform for the defendant in the course of or as incidental to his employment until four fifty-eight P. M. on that day; he remained on the train intending to return with it on its southerly trip, obtain his pay on arrival at One Hundred and Twenty-ninth street, provided too many men were not in line ahead of him at the car, and continue by the same train to Ninetieth street and keep an appointment with his dentist; he entered the forward passenger car of the train, took a seat near the middle of the car and began reading a newspaper when the train started. At about One Hundred and Fiftieth street the train on which he was riding ran into a train of the defendant standing upon the same track; plaintiff was caught in the wreckage of the collision and severely burned. It did not appear on the trial whether the plaintiff had paid his fare or not; it did appear that he was wearing his uniform and cap as a guard at the time of the accident. It did not appear that the wearing of the uniform was of any importance in determining his status. The plaintiff's verdict was upon the theory that he was a passenger and was entitled to rest his case upon proof of the collision. The defendant asserts that the plaintiff was an employee and bound to prove that the collision was not the fault of a fellow-servant; that the plaintiff is entitled to the relief provided by the Workmen's Compensation Act, and that that relief was exclusive.

There was no dispute as to any item of evidence touching plaintiff's status at the time of the injury, and it was held as a matter of law that the plaintiff was a passenger and entitled to maintain this action as such. The correctness of this holding is challenged by the defendant by this motion. The chief argument of the defendant is that the plaintiff, being an employee as guard, must be held to be an employee when off duty equally as when on duty and that the doctrine of *res ipsa loquitur* is of no aid to the plaintiff, citing many cases.

In *Marceau v. Rutland R. Co.*, 211 N. Y. 203, the plaintiff was a fireman at work upon the engine doing the things he was employed to do and of course was an employee.

In *Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 267, the deceased was employed to go to and from his work, upon the train upon which he was riding when killed; the train was furnished by the defendant for the purpose of transporting decedent and other employees of defendant to and from their work; the decedent was required to be on the train under his contract of employment; it was not a passenger train; it was an employee's train; decedent was not entitled to transportation as a passenger; he was being transported as an employee.

In *Henson v. Lehigh Valley R. R. Co.*, 194 N. Y. 205, the plaintiff was at work as a brakeman upon the train on which he was injured.

In *Gill v. Erie R. R. Co.*, 151 App. Div. 131, the plaintiff was employed at an annual salary, was traveling upon a pass the use of which by a person other than an employee was a misdemeanor, and the finding was that the plaintiff was engaged in his duties as an employee of the defendant at the time of his injury.

In *Connors v. International R. Co.*, 176 App. Div. 941, the car was not being used by the defendant as a passenger car at the time the plaintiff was injured; the defendant was not a carrier of passengers in the handling of the car.

In *McCabe v. Brooklyn Heights R. R. Co.*, 177 App. Div. 107, the deceased on returning to his duties as a conductor "rode as a passenger upon one of the cars of the employer for a distance of nine or ten blocks * * * He was performing no service in the operation of the employer's railroad; he was merely a citizen on his way to work, using the employer's cars as those of any common carrier of passengers in reaching a point near his destination. * * * He had nothing whatever to do with the operation of the employer's railroad at the time of the accident; he occupied exactly the same relation to the employer that any other passenger would have occupied."

It is believed that there is no hard and fast rule of law in this State that prevents under all circumstances an employee of a railroad company from becoming a passenger when off duty; that prevents an employee from ceasing to be an employee and becoming a passenger, thus entitling him to the same degree of care on the part of the railroad company to protect him from injury as is accorded a passenger.

The plaintiff was not on duty when hurt; he was not in the service of the defendant; he was not employed to be upon the train that collided with another of defendant's trains; he had no business on that train as an employee of the defendant; the defendant had no control over his occupation or conduct; the plaintiff was employed by the hour or trip, four round trips constituting one day's work, for which he was paid two dollars and thirty-five cents; he had completed the trip, divested himself of his character as an employee or servant, was not being paid by defendant, and had no duties of any character to perform for defendant for over two hours; he was a stranger to the defendant on that train; had he paid his fare, that he was a paying passenger would not have been questioned; he was in defendant's passenger car, seated, reading a newspaper, as any other passenger. There was no evidence that defendant permitted its employees when off duty to ride in its passenger cars when wearing their uniforms, or that when so riding such employees were riding at their own risk; no evidence was offered that employees so riding released defendant from liability by reason of defendant's negligence, and no evidence was offered that an employee when so riding was to be treated any differently than any other citizen.

"The law is well settled that if the master's negligence is a matter extraneous to his specific employment, or if the injury be received at a time when the servant is not engaged in his duties, then the servant occupies the position or status of a stranger. (*Vick v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 274.) He was at the time of the accident a stranger to the defendant." *Best v. N. Y. C. & H. R. R. Co.*, 117 App. Div. 741.

If a servant of a railroad corporation divests himself of his character as a servant or fellow-servant, and becomes a paying passenger on the cars of the railroad, he will doubtless acquire and possess all the rights of a passenger or of any third person unconnected with the master. *Ross v. N. Y. C. & H. R. R. Co.*, 5 Hun, 497; *affd.*, 74 N. Y. 617.

It was said in *McGucken v. W. N. Y. & P. R. R. Co.*, 77 Hun, 69, of a railroad employee traveling on a pass, to perform certain work, "He was a passenger — though a free passenger — and his place was in the passenger car."

The plaintiff is not entitled to any relief under the Workmen's Compensation Act. The amendment of 1916, chapter 622, while adding a new class of employees who theretofore had been excluded from its benefits, does not provide that a person not in the service of the employer is an employee. The statute still requires the applicant for relief to be in the service of the employer when injured.

There has not been cited any authority in this State squarely holding that an employee off duty riding as a passenger, solely in pursuit of his own pleasure or business, must as a matter of law be held to be an employee while so riding. In 6 Cyc. page 544, it is said, "But as it is customary to give free transportation to employees as a part of the consideration for their services, an employee so riding, not for the purpose of rendering any service but for his own pleasure or advantage, is a passenger." Citing authorities in many states. The only authority in New York that even superficially seems to hold otherwise is *McLaughlin v. Interurban St. R. Co.*, 101 App. Div. 134, in which case the injured plaintiff specifically alleged that he was an employee seeking benefits under the Employers' Liability Act.

In the case at bar every fact touching the plaintiff's status at the time of his injury being conceded, it was established as a matter of law that the plaintiff was a passenger at the time of his injury. The conclusion is reached that defendant's motion must be denied. Motion denied.

In the following case, the Appellate Division held that the dependents of a yard engineman killed while walking along his employer's tracks shortly after turning in his engine were not entitled to compensation. He had left one track, crossed a public highway and mounted another track when he was struck. The court said that he was a mere trespasser at the place of the accident. The full text of the opinion is as follows:

AMES V. N. Y. CENTRAL R. R. Co., 178 App. Div. 324, May 2, 1917.

WOODWARD, J.: The State Industrial Commission has certified the question: "Did the injuries which resulted in the death of William Ames arise out of and in the course of his employment with the New York Central Railroad Company within the meaning of the Workmen's Compensation Law?"

The facts found by the Commission are to the effect that on the 8th day of March, 1915, the day when William Ames received the injuries which resulted in his death, he resided in Albany, and was employed as a yard engineman by the New York Central Railroad Company; that on said day, at about six o'clock in the morning, the said William Ames had turned in his engine, having completed his work, and had also turned in his slip showing that his run had been completed. His engine was left by him in the freight yard about 100 feet from the public street, namely, Spencer street.

There were plenty of streets by which Ames could have left the yard for the purpose of going home, but, instead of making use of one of these highways, he walked along the tracks for a distance of 1,000 feet and crossed over another street and on to the tracks on the other side of the last-mentioned street, and was there struck and killed by a passing freight train. The purpose of Ames in going upon this second track, which appears to have been an elevated track of the New York Central lines, was supposed to be for the purpose of catching a passing freight train in order to board the same and ride to West Albany, where he could collect his pay. Ames, as the Commission certify the facts, had no authority from his employer to be at the place where the accident occurred and was not at that place on any business in behalf of his employer, but was there for purposes of his own.

We think the question must be answered in the negative. While there might be cases in which an employee in going for his wages would be considered as acting in the course of his employment, we think this is not such a case. Ames had closed his day's work and had left the premises of his employer; he had gained a public highway in safety, and then he climbed up some steps and gained entrance to the right of way of an elevated railroad conducted by the same company which employed him in the yards, which appear to have been at grade, and was struck by a Boston and Albany train, which makes use of this elevated track. He was employed by the New York Central Railroad Company, but his employment was not upon the line where the accident happened; he was a mere trespasser at the point where the accident happened, violating the spirit if not the letter of section 83 of the Railroad Law (Consol. Laws, chap. 49; Laws of 1910, ch. 481), and there is no justification for holding the insurance carrier liable for such an accident. He was not engaged in a hazardous employment for the employer; he was making use of the tracks of the New York Central railroad for a purpose for which they were not intended, and the loss must fall upon those who were dependent upon him. (*Matter of De Vos v. New York State Railways*, 169 App. Div. 472, 476; *affd.*, 218 N. Y. 318, 320; *Matter of Glatzl v. Stumpp*, 220 id. 71, 74.)

The question is answered in the negative. All concurred. Question certified answered in the negative.

If an employee lingers or loiters upon his employer's premises, he endangers his right to compensation for accident occurring while he is coming to or leaving work. The accident must occur within a reasonable time before the work begins or after it ends. Employees under the influence of liquor are apt to be loiterers. In *Dowling v. N. Y. Central & H. R. R. Co.*, referred to above, the employee staggered along, and finally sat down upon the track. In the following case a diver's attendant, having gone ashore for supper, came back in an intoxicated condition. He was not permitted to go to work and in the course of time returned ashore. The return was in the night over an unsafe trestle. He fell into

the water and was drowned. The Appellate Division reversed an award to his dependents. It held that the real quitting was the quitting for supper several hours before the accident and that the employee, though he had come back to the job, had not resumed his employment. It held, too, that his second going ashore was not "in the orderly and ordinary manner when the time for his departure properly and naturally arose" nor "in the performance of any duty to his employer." The opinion in *Kiernan v. Friedstedt Underpinning Co.*, reproduced in Bulletin 81, at page 195, was said not to be at variance. The full text of the decision is as follows:

POPE v. MERRITT & CHAPMAN DERRICK & WRECKING Co., 177 App. Div. 69, March 7, 1917.

COCHRANE, J.: John Pope, the husband of the claimant, was working for his employer in laying water pipes under the Narrows in New York harbor between Brooklyn and Staten Island. A trestle had been built from the Staten Island shore about one hundred feet into the water under which the employer was excavating at a depth of about fifty feet a trench in which the pipes were to be laid. About seventy-five feet from the end of the trestle a floating derrick was stationed. From this derrick divers went down into the water to perform the necessary work. It was Pope's duty to attend one of the divers on this derrick; to dress him properly in his diving equipment; assist him in entering the water; respond to his signals while in the water; assist him out of the water and relieve him of his equipment when he emerged. His hours of duty were from four o'clock in the afternoon until midnight. A small boat belonging to the derrick was used in going to and from the derrick and the employees frequently in going ashore rowed from the derrick in this small boat to the trestle and then proceeded along the trestle to the shore. On February 19, 1916, at about eight o'clock in the evening, Pope went ashore for supper and returned to the derrick in an intoxicated condition. His diver refused to allow him to assist in the work and the captain of the derrick locked Pope up in the forecastle of the derrick and took his place in the preparation of the diver for entering the water and in attending him while in the water. Shortly after eleven o'clock in the evening Pope came out of the forecastle and insisted on attending the diver who had come up out of the water, but was not allowed to do so by the diver and the captain. At about eleven-thirty, one of the other employees went ashore in the customary boat for some purpose in connection with the work and Pope got into the boat with the other employee who conveyed him to the trestle and placed him thereon. He was not seen thereafter until the following morning when his dead body was found in the trench under the trestle, he evidently having fallen therefrom and met his death by drowning. All of the foregoing facts appear from the findings of the Commission.

On June 21, 1916, the Commission having taken evidence, disallowed this claim on the ground that the accident to Pope did not arise out of and

in the course of his employment. On September 15, 1916, the Commission, without further evidence, reconsidered and changed its former decision and made the award now under review.

The Commission should have adhered to its first decision which was the correct one. The accident to Pope has been found not to have been occasioned solely by his intoxication. But that is not the only difficulty. The accident did not arise out of and in the course of his employment. In its opinion allowing the award the Commission says "that an employee on quitting work for the day is entitled to a reasonable opportunity to leave the employer's plant and place himself upon a public highway, and that if injured before reaching the public highway, provided he uses reasonable speed in leaving the plant, he is covered by the Compensation Law." With this statement of a general principle we are in full accord. But it has no application to the present case. Pope had quit work for several hours before the accident because of his intoxicated condition. He did not and could not use "reasonable speed in leaving the plant." Neither was he leaving the plant as a natural and ordinary incident of the conclusion of his hours of labor, because that would not occur until midnight. He had been locked up in the fore-castle of the derrick and the Commission has specically and very properly made the following finding: "Which precaution was made necessary by Pope's condition of intoxication, it being the fear of the captain that on account of the amount of ice on the deck Pope might fall into the water." So that very clearly there was an interval of several hours immediately preceding his accident when he was not in the service of his employer because of the fact that he had voluntarily and intentionally by the use of intoxicants disqualified himself for such service. His duty to his employer required him to remain on the derrick until midnight and he went ashore before that time, not in the performance of any duty he owed to the employer or incidental thereto, such as leaving the work in the orderly and ordinary manner when the time for his departure properly and naturally arose, but he left the derrick before the proper time to do so arrived because he had incapacitated himself for service and was not in the performance of any duty which he owed his employer. In the performance of such duty he would have been on the derrick attending the diver and would not have been on the trestle. He was there when he met his accident for the fulfillment of his own purposes because of his intoxicated condition. If he had been entirely sober and had gone ashore under the same circumstances the claimant would not have been entitled to an award, because going ashore under such circumstances would not have been in the line of his duty or incidental thereto, but for the accomplishment of some personal purpose. While under the presumption of the statute and the finding of the Commission his intoxication may place the claim in no more unfavorable position than if he had been sober, it does not make the case more favorable. The only point of the intoxication in this case is to explain why he was going ashore and to make it clear that in doing so he was not in the performance of any duty to his employer. In no just or reasonable sense can it be said that this accident arose out of and in the course of the employment, and while we have frequently announced our approval of a liberal interpretation of the statute, we think such liberality would be stretched to the breaking point were it to include this claim within the provisions of the statute.

Nothing decided in *Matter of Kiernan v. Friestedt Underpinning Company* (171 App. Div. 539) is at variance with the views here expressed. The question litigated on that appeal and the only question considered and determined was whether or not the claimant was an employee. It was contended that he was at the place of the accident merely seeking employment. The point here discussed was not raised or considered in that case.

The award should be reversed and the claim dismissed. All concurred. Award reversed and claim dismissed.

A hod carrier, upon quitting his work, lingered in the building to gather firewood for his own use at home. He fell to his death in attempting to descend a ladder. Though the accident happened before he had left his employer's premises, the Commission denied compensation to his dependents. Commissioner Lyon summed up the case as follows:

LIBERATORE V. KELLY CONSTRUCTION Co., Bul., vol. 2, p. 12; S. D. R., vol. 10, p. 574, Sept. 15, 1916, *in part*.

I think from all the evidence in the case, it must be found that Liberatore was injured at least ten minutes after the hour for quitting had been announced; that he was gathering wood for his own purposes after quitting time and that his death therefore resulted from an accident which did not arise out of and in the course of his employment. Indeed, the evidence to my mind shows that it was the carrying of the bag of wood, which itself probably caused the unfortunate accident. The testimony is not only that the ladder which Liberatore had to descend stood almost perpendicular, but that the rung next below the floor was only an inch and a half or two inches below the floor level, so that it was necessary to use exceeding care upon stepping on that first rung, in order not to lose one's footing. Taking this into account and also the fact that he was apparently bringing down with him a large bundle of wood, said to be three feet by two, and I think it is a fair inference that it was his load interfering with his ability to handle himself, and perhaps with his seeing where he was stepping which caused him to lose his balance and fall to the floor below.

I reach this conclusion with a good deal of hesitancy, because the case of the widow and children seems to be a hard one. I am quite clear, however, that the accident did not arise out of and in the course of Liberatore's employment, and I advise that an award be denied.

In *Murphy v. Ludlum Steel Co.*, a negligence action with peculiar features, the employee lost his life while coming to work. His home, in a house belonging to his employer, was upon premises continuous with his employer's plant. His wife was a co-employee. They walked to and from the factory upon a road that bordered the employer's grounds. As they emerged from

their home one morning on their way to work a live wire of the plant which had fallen in the yard killed the husband. The wife chose to bring an action for negligence. The theory of the action was that the husband, in connection with the accident, was the employer's tenant and not his servant. The employer's attorney set up the Workmen's Compensation Law as a bar to the action. The court submitted the case to the jury which decided that the case was one in negligence and brought in a verdict in favor of the wife for \$5,000. The action having been tried before Justice Chester in the Supreme Court of Albany county, the employer's appeal lay to the Appellate Division in the Third Department which is also the forum for appeals from the State Industrial Commission's rulings in compensation cases. Upon appeal, the Appellate Division, Presiding Justice Kellogg dissenting with opinion, affirmed the judgment. It held that the phrase "upon the premises" in Workmen's Compensation Law, § 3, subd. 4, means "not any lands which the employer owns, but rather the immediate premises or grounds upon which the plant is located" and that in carrying his wife's basket the husband was not doing his employer's work. The dissenting opinion emphasized the unity of the family in relation to the employment and the fact that the electric current which killed the husband was an instrumentality of the employer's plant. The text of the case is as follows:

MURPHY V. LUDLUM STEEL Co., — App. Div. —, Mar. 15, 1918.

H. T. KELLOGG, J.: This is a negligence action in which damages resulting from the death of the husband of the plaintiff are sought to be recovered. Deceased was killed by the falling of a wire which carried a current of electricity of high voltage. The wire was maintained by the defendant, and it is not seriously contended that in reference to its maintenance there was freedom from negligence. The chief contention is that the deceased at the time of the accident was the employee of the defendant, and that recovery must be sought under the Compensation Act.

The deceased was employed by the defendant as a janitor of an office building. The mills, offices and certain tenement houses of the defendant were all situate upon a tract of land of about seventy-five acres. One of the tenements was occupied by the deceased and his wife. It was separately fenced off, so that deceased possessed his own lawn, and his own private way to the public street. All the buildings constituting the plant were more than eight hundred feet away. In order to get to the office building of which he was janitor, deceased would pass through his own yard to the street, down the street, and then upon the premises of the defendant. Deceased paid the defendant a rental of \$10 a month for his house. At the time of the accident

he was in his own front yard on his way to the office building, and the wire which touched and killed him fell upon his premises.

The business of the employer and the occupation of the deceased was hazardous. The deceased, however, was not engaged in his hazardous occupation "upon the premises or at the plant" of his employer within the meaning of section 3, subdivision 4, of the Compensation Act. It has been held that workmen on their way to and from the plant, not actually working, but about to work, or having just worked, if still "upon the premises" are protected. Evidently the premises meant are not any lands which the employer owns, but rather the immediate premises or grounds upon which the plant is located. Where, as in this case, a workman lives in a house rented of the employer from which, to get to the plant, he must go out upon a public street, he is not while within his own door yard, though on his way to work, "upon the premises of the employer" within the meaning of the act.

Was the deceased, though away from the plant and premises of the employer at the moment of the accident, acting "in the course of his employment?" He was carrying a basket of linen to the plant, at the request of his wife, who conducted a restaurant for the defendant in the office building of which the deceased was janitor. They left their house together at about ten minutes to eight in the morning. The wife started with the basket from the door, but before they left their premises handed it over to the deceased with a request that he carry it. It is contended that deceased was employed to assist his wife, and that in carrying the basket he was therefore doing his master's work.

In finding a verdict for the plaintiff the jury necessarily determined that deceased was not so employed. That determination was sufficiently supported by the proof. The wife of the deceased had been employed for several months prior to the employment of the deceased. They were not employed together or at the same time. The wife testified that at the time of hiring of the deceased she was present and not a word was said about his assisting her; that he was to act as janitor, to take care of the office, to sweep it, to clean it, to wash windows and to cut the grass in front of the office; that he was to do no work in reference to the laundry or her work therein. She said that he did no such work and never carried her basket of washing; that usually he went to work at ten minutes to eight and she at ten; that this was the first occasion when going to work together he carried her basket. For the defense one witness testified that he told the deceased, when hiring him, that he was to help his wife in any way possible. Another witness testified that he frequently saw deceased carrying baskets of linen from his house to the office, but when pressed admitted that he did not know what the baskets contained. This is all the testimony given upon the subject. For us to decide that the two latter witnesses, rather than the wife should be credited, is to usurp the functions of the jury. The evidence was ample to support a finding that the husband in carrying the basket was not doing work which he was employed to do and was not acting "in the course of his employment."

The judgment should be affirmed, with costs.

JOHN M. KELLOGG, P. J. (dissenting): The defendant has a large steel plant at Colonie, N. Y., of about seventy-five acres, upon which are the

mills, workshops, office buildings, electric appliances, transformer house and tenements for housing certain of the employees.

The plaintiff and her husband were employed at the office building and resided about 836 feet from it. In front of the plant was a road, along which, and on the defendant's property at the street line, was one of its electric light wires carrying 550 volts. The husband was due at the office about eight o'clock in the morning. At about ten minutes to eight, the plaintiff and her husband started for the office building along the usual route, which necessarily went under the electric wire, and while enroute and upon the defendant's property and plant, the electric wire fell, hitting him and causing his death.

The plant is operated by electricity. An electric company delivered to the defendant at its transformer house near the office building, an electric current of 10,800 volts, which the defendant there reduced to 550 volts and carried it over its uncovered wires to the various places on the plant where work is to be done. Such wires are not usually covered. The wire causing the death ran from the transformer house to a pole outside of the house of the purchasing agent on the plant, and at this pole the current was reduced to 110 volts and taken into the house for lighting purposes. It does not appear why the reduction did not take place at the transformer house rather than at the pole, but we must assume that in some way it was in the interest of the business to carry the high voltage along the street and make the reduction at the pole. None of the other houses for the employees had any use of the electric current. It is evident that this high tension wire was, by a severe wind the night before, brought in contact with the branches of a tree and fused, one end falling upon the ground and the other hanging from the tree. By the judgment appealed from the plaintiff has recovered damages for the death of her husband on the ground that it resulted from the defendant's negligence.

It is clear, under section 11 of the Workmen's Compensation Law, that the action cannot be maintained if the accident to the intestate was fairly within the purview of that law. (*Shanahan v. Monarch Engineering Co.*, 219 N. Y. 469; *Winter v. Peter Doelger Brewing Co.*, 175 App. Div. 796.) That law is to be interpreted liberally for the protection of the employee and the employer who has complied with its terms. It was a part of the contract. (*Matter of Ziegler*, 218 N. Y. 544.) The defendant had complied with the provisions of the law; therefore, if death benefits can be awarded the widow under the Workmen's Compensation Law, this action cannot be maintained.

The Workmen's Compensation Law must not be limited to the mere moments when the employee is actually at work; he is within its protection when he is upon the employer's premises and on his way to or from work unless he has turned aside for other purposes. (*Bylow v. St. Regis Paper Co.*, 179 App. Div. 555; *Leslie v. O'Connor*, 220 N. Y. 672; *Di Paolo v. Crimmins Construction Co.*, 219 N. Y. 580; *Bradbury's Workmen's Compensation*, 3d Ed., 473.)

The facts above stated, standing alone, bring the case fairly within that law, and this action cannot be maintained unless the facts about to be mentioned change the situation.

The plaintiff and her husband lived in one of the houses at the plant.

The wire, which caused the death, passed over the premises in front of that house and alongside of the road. In passing from the house to the road, in order to get to the office building, it was necessary for the occupants of the house to pass under the wire. It is claimed that the death came to the tenant by the negligence of the landlord rather than to an employee from the hazards of the employment. The trial court took that view of the case, but left it to the jury to determine whether in carrying the basket of laundry hereinafter referred to the decedent was doing an act of courtesy to his wife or a service to the company, holding, in substance, that the case was not within the Compensation Law, unless the decedent at the time was performing a service for the company other than that of going to his work. This view is too narrow, it reverses the presumption in favor of the claim being within the law and is too close a refinement upon the relation of the parties and sacrifices substance to technicality.

The deceased employee met his death upon the premises of the employer while going to his work and from a hazard of the employment. If we are in error upon this point, nevertheless the evidence shows that the accident occurred in the course of and arising out of the employment. Before the husband entered the employ of the company the wife was employed by it in serving a mid-day meal at the restaurant in the office building, and also was performing the general duties of cleaning, dusting and caring for the offices in the building at \$7 per week. But the works were being enlarged, the office force was increased, new rooms were opened up in the office building for use, and the services were too much for her to perform alone. By an arrangement between the plaintiff, her husband and the company, she was to continue to serve the mid-day meal at the restaurant and assist him as might be required by him in the performance of his duties as janitor, for \$9 per week. He, for his services as janitor, dusting, cleaning, caring for the office building, taking care of the walks, the lawn around the plant, building the fires in winter, shovelling snow and the general duties of a janitor, was to receive \$10 per week. The employer was to have \$10 per month for the use of the house. It was understood that the dusting, cleaning, scrubbing, caring for the windows and the general work in the offices must be performed outside of business hours. The office force arrived at the building about a quarter after eight in the morning and left about a quarter after five or later in the afternoon. Plaintiff ordinarily went to her work about ten o'clock in the morning. Flour and other material belonging to the defendant were kept at the house, and the plaintiff frequently prepared soups for service at the restaurant at their house and also did certain baking at their house. The napkins, dishcloths and linen used at the restaurant were taken to the house and laundered by a woman there and taken back to the office by the plaintiff or her husband, and sometimes by the children of the laundress. The plaintiff frequently went to Albany to market for the restaurant, and when packages and boxes arrived for the restaurant, the husband opened them and put the things in their proper places, sometimes rendering her other assistance, for it is evidence that he frequently carried things for the restaurant between the office building and the house and the company knew of these usages.

At the time of the accident a basket of laundry for the restaurant was

to be carried from the house to the restaurant, and the plaintiff asked her husband to carry it. He took it and they started along the usual route for the office to begin work. She was going to Albany for supplies for the restaurant. As they were leaving the lawn the husband was hit by the wire and killed.

The defendant, by contract made with the husband and wife, engaged their services at the office building and was to house them. It probably felt that the work in the restaurant and in the other part of the building could be done more satisfactorily by a husband and wife than by strangers, and that each would have an interest in seeing that the work was properly done and give reasonable assistance to the end, and she, in suggesting the employment of her husband, undoubtedly had the same view. The work called for by the contract of employment is usually performed by the janitor and his family. It was necessarily understood that the husband and wife, in the performance of their services to the defendant, would show the courtesies and attentions and render the assistance each to the other which usually are incident to that relation. They were employed as husband and wife and were expected to render the services as such. The wife has the right, with the consent of the husband, to make a separate contract for her services outside of the household and receive her wages therefor, and in such a case it is presumed the contract is in her sole business and for her sole benefit. (Section 60, Domestic Relation Law.) It is evident that this contract was of a somewhat different nature. The husband and wife together made a single contract for their services and housing and it is not entirely clear whether if the defendant defaulted in paying their wages that the husband could maintain an action for the \$19 per week less the \$10 per month for housing; or whether the wife could maintain a separate action for \$9 per week and escape paying for any part of the housing; or whether a joint action could be maintained for the \$19 per week, subject to a reduction of \$10 per month for the housing. (*Holcomb v. Harris*, 166 N. Y. 257; *Birkbeck v. Ackroyd*, 74 N. Y. 356; *Porter v. Dunn*, 131 N. Y. 314-317.)

Those questions must be determined, when necessary, by a consideration of all the circumstances and all the inferences which may arise from the contract and the relations of the parties and the acts done. We express no opinion upon them, but conclude that under the presumptions raised by the Workmen's Compensation Law, section 21, that it may be said, for the purposes of that law at least, that the husband had a certain duty to see that the work at the restaurant was properly performed and, if he performed his other duties and the wife was unable or indisposed to carry the laundry or to perform similar services, that it was his right and duty under the contract to carry the laundry and to perform similar services with reference to the restaurant business. By doing such acts he did not abdicate the employment and occupy the position of a stranger to the defendant.

We have seen that some of the food for the restaurant was prepared at their home, over their stove and with their equipment, which we assume he owned. Evidently the husband and wife treated the contract as a mutual affair, for the only rent paid was paid by her, assumably from the general fund or from the earnings of both. She assisted him in his work and he

assisted her more or less in hers. The fact that the defendant made the contract with both, and that the work was to be performed at the same time and place and under the same circumstances, indicates that each in a way was to act with the other in the performance of the duties required by the contract which they had made and that each was to render assistance to the other in carrying out the contract. The fact that after the husband's death the wages formerly paid to both were paid to her, and that she continued to reside in the house, employing such assistance as she desired at her own expense, indicates that in a way the work in and about the office building was treated as one job. We must assume that the parties did not contemplate that the work called for by the agreement was to be done by each as a stranger to the other and to the work of the other. The husband and wife, in a way, in the making and execution of the contract, were treated more as one person than as two separate employees who were strangers to each other and were engaged in separate jobs. A single contract provided that all the work mentioned at the office was to be performed by this family, and it mattered little who did a particular service or whether each did a particular part of a particular service. As head of the family, and a party to this agreement, the husband was charged with a certain duty with reference to the laundry, and apparently under the contract it was fairly within the purport of the agreement that the laundry, the soup and the other materials were to be carried back and forth when necessary without regard to which one of the contracting parties carried them. If either performed the work, the contract was being fairly performed. We cannot say that that duty devolved upon the wife as cook and meal server any more than it devolved upon him as the person having the general charge of the office building and restaurant. He may have carried the basket to relieve his wife from the burden, but it was his right and duty towards her, and it was his right and duty towards the employer to see that the basket was properly delivered at its destination.

If we assume that the wife was carrying the laundry from her house to the restaurant, and another employee, en route for the office to begin his work, as an act of courtesy, had taken her burden at the street line and, while taking it, had been killed by the wire, he would be within the terms of the act. (*Matter of Waters v. Taylor Co.*, 218 N. Y. 248; *Matter of Martucci v. Hills Brothers Co.*, 171 App. Div. 370.) It is difficult to see how the husband can be treated otherwise.

In *Leslie v. O'Connor & Richmond, Incorporated*, 220 N. Y. 672, the injured employee was the manager of a livery stable. The third and fourth floors above the stable were used as tenements, the top floor was occupied by him, and he "while going down stairs from his apartment fell and cut his forehead." It was held that the injury arose out of and in the course of his employment. In that case we find from the record that the employee at first received his wages and paid for the apartments, but later he was not charged for the apartment; in other words, his salary was increased by the amount he had been paying in rent.

In this case, while the employees paid for the use of the house, the fact remains that none but employees could be housed at the plant. They were occupying it so that they would be at all times near the office building to attend to their duties. The occupation was for the direct convenience and

profit of the employer. If they had not paid rent they probably would have received \$10 per month less compensation. Whether they received full wages and paid for the housing, or had less wages and were housed free, is immaterial, as it does not change substantially the relation of the parties. The husband and wife were the employees of the defendant and, as a part of their contract, were to be housed on the premises, and he has met his death by a hazard of the employment. Refinements as to the technical relation of the parties are not necessary or profitable.

We have seen that the authorities distinctly hold that if an employee is injured in a hazardous employment upon the premises of the employer, while going to or from his employment, he is within the law. He must equally be within the law if, while going to the plant, he is injured solely by a hazard arising from and connected with its operation.

If we assume that an employee en route to the plant to begin work is injured by an explosion at the plant, resulting from a hazard of the business, just before he arrives upon the property of the employer, it would seem that his injury would be compensatable. Ordinarily, it is quite immaterial whether the injury is at the plant or upon the property of the employer. The question is,—did the injury arise out of and in the course of the employment? If the employee is away from the plant while performing a duty relating to his hazardous employment, he is within the law. Where it is held that an employee is within the act while going to his work and receiving an injury while on the premises of the employer, where the injury does not arise from the hazard of the business, his presence upon the premises is necessary to justify the conclusion that the injury arose out of and in the course of the employment. But if the employee is injured while going to his work, and from a hazard of the employment itself, it is immaterial upon whose premises the accident happens, for he is within both the letter and the spirit of the law.

But if we are to give the matter a more technical consideration, we may well say, when we are speaking with reference to the electric wire and the current carried by it, that the defendant, in the operation of its plant, was in possession of the place where the decedent was killed, and that the rights of the decedent in the premises was a mere housing, which gave him no independent rights in the lot in conflict with the use the employer was making of the premises. He and the employer each had a partial use of the lawn. If we treat the decedent as a tenant, it is only in a qualified sense and not in a way to free the defendant from liability. If, after hours, the employee, while sitting at his stove, had been killed by the fall of the chimney of the house, a different question would arise. The operation of the plant and the risks of the employment would not then have contributed to the injury. There would then be a question whether a landlord's duty had been performed towards him. The chimney had no use except as a part of the house and had no connection with the plant or its operation. Quite probably such an injury would not arise out of and in the course of the employment. But the electric-light wire was not embraced in the occupancy. The decedent was in no way connected with the wire or its use; the wire was there only as a part of and an instrumentality of the plant, and while there subjected him at all times to the risks of the employment, which was distinct from any risk growing out of or connected with the house or lawn. The operation of the plant alone caused his death; if the

plant had been shut down no injury could have befallen him. The wire was maintained and the current sent through it by his employer, in its capacity as such and not as an owner of the house. As the electric wire and current related solely to the plant outside of the premises occupied by the plaintiff and her husband, the premises must be considered as a part of the plant when we speak of them with reference to the electric wire and current. It is not quite clear, and perhaps not very material, whether there was a sidewalk in front of the premises and whether the wire was between the sidewalk and the road or on the lot at the roadside. Wherever it was, it was not a part of the premises occupied by the decedent but was a part of the employer's premises.

This law gives compensation without regard to fault, and in determining whether a case is fairly compensable we are to lay aside the question of fault and consider that the rule of the case will apply to other cases where there can be no remedy outside of this law. There is less confusion if we consider the case without regard to fault and assume that no liability exists unless the case is within this law. We are not construing the law against the employee or his widow. The case may not be free from doubt, but a rule must be established which will be enforced equally in cases where there is negligence and in cases where there is none, so that the statute must have a broad and liberal interpretation for the benefit of the employee as well as the employer and to bring within its provisions cases fairly within its spirit. The object of the law was to charge upon the ultimate consumer the losses from accident which would otherwise fall upon the injured employee, to give the employee a speedy and sure remedy and to save the employer who complies with it from other claims and actions. It was known that the ordinary action to recover damages was unsatisfactory, resulting in delays and expense, and frequently was disastrous to the employer or employee, and often to both. This statute was intended to do away with the delays and uncertainties, and to provide a remedy which may summarily be administered.

The act wisely provides that the question of fault does not enter into the merits of the claim. For that reason we have not considered, and it is unnecessary to consider, whether or not actionable negligence has been shown. That is beside the question. The only question is,—do the facts assisted by the presumption that the claim is within the Compensation Law, entitle the wife to compensation thereunder. In my judgment she was entitled to compensation and for that reason cannot maintain this action.

The judgment and order should therefore be reversed and the complaint dismissed, with costs.

In the following decision, the Appellate Division, two justices dissenting, reversed an award of death benefits for a noon interval accident that occurred within the building upon which the employer was working but not within his jurisdiction nor in connection with the work he was doing:

MANOR V. PENNINGTON, 180 App. Div. 130, Nov. 14, 1917.

WOODWARD, J.: The conclusions of fact made by the Commission are to the effect that on the 23d day of February, 1917, William Manor was employed by Alfred Pennington; that the latter was a general contractor, with an office for the transaction of business at Plattsburgh; that the employer, at the time of the accident resulting in the death of claimant's intestate, "had a contract for some construction work on the main and second floors of a garage in Plattsburgh, same being the property of Hannan & Henry Garage Co., and William Manor was working on that job." The conclusion continues: "On said date William Manor and three other men at the noon hour went down to the boiler room to eat their dinner. The boiler room was in the cellar of the garage and at about 12:50 P. M., and just before the men were ready to go upstairs to continue with their work for the afternoon, the boiler exploded and William Manor thereby received burns from which he died the same day. "Upon this basis of fact the State Industrial Commission has made rulings of law holding that the case comes within the provisions of the Workmen's Compensation Law, and that the claimant, decedent's father, is entitled to an award during his dependency.

How can it be said that this accident was one "arising out of and in the course of his employment?" (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 10, Id. § 3, subd. 7, as amd. by Laws of 1916, chap. 622.) The employer's contract was for doing some work on the first and second floors of an existing garage. The forenoon's work had been done and the men had left the work and had gone out for dinner; the evidence is that William Manor had been away from the premises, and that he returned and went down into the boiler room in the basement, to await the time for going to work at one o'clock, and at ten minutes before one o'clock the boiler belonging to the garage, not to the employer, exploded, with the result as stated. The wholly uncontradicted evidence is that the employer made no use whatever of the basement; his contract did not relate to that part of the building, and if the men went down into that basement to eat their dinner they were as much out of the jurisdiction and control of the employer as though they had crossed the street and entered some other building. The employer was in possession of the first and second floors for the purposes of the work, but his possession did not extend to any other part of the building, and the men, by electing to go into the basement rather than to some other place for eating their dinner, could not impose the duties of an insurer upon the employer during the time that they were lawfully and properly absent from the place of their employment. Manor was not an employee because he was not engaged in performing any of the work for which he was employed. (*Matter of Bargey v. Massaro Macaroni Co.*, 218 N. Y. 410, 413); his injuries did not arise out of his employment in any other sense than that he was, probably, in that locality because he was employed upon the first and second stories of the building, but he was not at the time doing anything for the employer, any more than he would have been if he had been waiting in the office of a local hotel for the expiring of the dinner hour. The accident which happened was not due to any risk growing out of the performance of the employer's contract; it was such a risk as arose from the conduct of the garage by its owners, with which the employer had no relation, and the employee could have been

performing no service for the master. "Employee," as now defined for the purposes of the Workmen's Compensation Law, "means a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or conducting a hazardous employment upon the premises or at the plant, or in the course of his employment away from the plant of his employer" (§ 3, subd. 4, as amd. by Laws of 1916, chap. 622), and this accident did not occur upon the premises or at the plant of the employer, but upon the premises or at the plant of the Hannan & Henry Garage Company, where neither the employer nor the employee had any rights, except by the license of the owners; it occurred "away from the plant of his employer," but not "in the course of his employment;" he was performing no work whatever; he was awaiting the hour to return to his employment in a part of the premises which were in the possession and control of third persons, and the law does not extend its protection to one thus situated.

The award should be reversed. All concurred, except KELLOGG, P. J., and LYON, J., who dissented. Award reversed and claim dismissed.

The foregoing cases resulting in denial of compensation may be compared with the following cases resulting in award of compensation.

The Appellate Division unanimously and without opinion affirmed awards to an elevator man who came late to work, unlocked his elevator door and was hit by the elevator as it descended under operation of another: *Lynch v. Anderson*, Case No. 60299, July 2, 1917; 181 App. Div. 911, November 14, 1917; and to an employee who entered the premises upon which his employer was erecting a building and was injured before beginning work while on his way to a toilet in a nearby building: *Dubin v. Hefferman*, Claim No. 3801, May 2, 1917; 181 App. Div. 909, November 14, 1917. The Commission awarded compensation for the unwitnessed death of a hod carrier who had been waiting during a rainy forenoon about the building that his employer was erecting and who fell from an upper floor to which he had gone presumably in expectation that the work delayed by the rain was about to begin: *Campanella v. Stola Construction & Building Co.*, S. D. R., vol. 9, p. 385, August 15, 1916.

A steam shovel engineer, having finished a road job, loaded his shovel upon a train in the evening and set out upon his own motorcycle in order to be at his new place of work next morning. He met with an accident on the way. The insurance carrier claimed that his day's work had ceased when he saw the shovel on the

train; the Attorney-General, that it was not to cease till he arrived at the new scene of labor. The Appellate Division unanimously and without opinion affirmed an award of compensation: *Cummings v. Johnson Construction Co.*, S. D. R., vol. 9, p. 369, July 19, 1916; 178 App. Div. 942, May 2, 1917.

An employee was injured in a collision while being conveyed in his employer's automobile with fellow employees to their place of work. The Appellate Division affirmed an award in this case unanimously and without opinion: *Savinsky v. Hicks & Sons*, Case No. 32173, April 6, 1917; 181 App. Div. 910, November 14, 1917. In a similar case, an employer engaged a liveryman to transport three of his employees regularly about two or two and a half miles to and from their place of work. Skidding of the liveryman's automobile killed two, and injured the third workman. The Commission awarded compensation. The principle of the award is stated in the following ruling:

KEATING et al. v. THOMPSON & STARRETT Co., Bul., vol. 2, p. 229, July 5, 1917.

LYON, Commissioner.: I suppose there is no rule in compensation more thoroughly established than the one which holds that an injured workman ordinarily is not entitled to compensation if his injury happens to him before he reaches his employer's plant or after he has left it, at all events, unless he is upon some errand or duty for his employer at the time of injury. Like most rules, however, this has to have an application which is reasonable and fair in the case of extraordinary conditions and circumstances. I am quite clear that these cases are compensatable and that they can be so held without violating the general rule already referred to.

I think under conditions such as are here outlined, we may well hold that the term of employment is constructively extended as is also the plant of the employer, to cover the injured workmen while on the way to and from their place of work, if injured while upon a means of transportation furnished by the employer and by him paid for, the same being as it manifestly is here, a portion of the contract either expressed or implied. It is not denied that these men were permitted and indeed expected to go from Port Washington to the place of their labor by the means provided by the employer. The fact that they boarded at a long distance from the place of employment would, I think, be sufficient to hold that the time of their employment would be extended to cover the length of time necessary to reach their place of employment by the means of transportation furnished by the employer.

Many adjudicated cases, I think, fully sustain a finding here that these cases are compensatable, although perhaps not on the precise theory here outlined. In the *Matter of Donovan*, 211 Mass., page 77, an employee was engaged to work about two miles from his home. He, in common with other employees had, with the knowledge and the consent of the employer, been accustomed to ride to and from the vicinity of his place of employment in a

wagon furnished by his employer. Mr. Donovan was injured while so riding in this wagon at the end of his day's work. An award of compensation was sustained, the court saying:

The finding of the Industrial Accident Board that Donovan's transportation was "incidental to his employment" fairly means, in the connection in which it was used, that it was one of the incidents of his employment, and that it was an accessory, collateral or subsidiary part of his contract of employment, something added to the principal part of that contract as a minor, but none the less a real feature or detail of the contract. Whatever has been uniformly done in the execution of such a contract by both of the parties to it, may well be regarded as having been adopted by them as one of its terms.

In *Cremins v. Guest*, 1 B. W. C. 160, where the employer furnished a train to carry the working men to and from their work, it was held that a workman about to enter the train and who was pushed off the platform and killed during a rush of workmen, had suffered an accident while the relationship of master and servant existed, and that the widow as a dependent was entitled to recover.

In *Holmes v. G. N. Railway Co.*, 2 W. C. C. 19, it was held that where the employer contracts, either expressly or impliedly, to provide free carriage by train to the workmen to his place of employment, the employment will be held to begin when the workmen enter the train. Therefore, in the case of an accident the workmen are entitled to compensation.

In the *Matter of William Gerow*, Op. Sol. Dept. C. & L. page 217, it was held that a claimant employed in the Panama Canal Zone and who while going from his work and riding on an engine belonging to the United States government and sustained injuries while on the engine, was under the Federal Compensation Law.

Honnold in his work on Workmen's Compensations Laws, quotes the following from a California case:

Where an employer undertakes to transport his workmen to and from their homes, or to or from any specific place of arrival and departure for the place of employment, his employees are on the premises of employment, when they step into the vehicle of transportation furnished by the employer and so remain until they step out of it, either going or coming.

In *Walton v. Tradger Iron & Coal Company*, 8 B. W. C. 592, a collier living six miles from the pit where he worked, traveled free of charge to and from his work on a train provided by a railway company at the instance of his employers. In getting into the train for the journey home he was killed by accident, and it was held that the accident arose out of and in the course of his employment.

Such seems the trend of the decisions and I think they are applicable to the present cases, and I, therefore, advise an award.

On the 5th day of July, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

Other cases in which the Appellate Division has affirmed awards to employees injured while being carried to or from work in vehicles provided by the employers are *Schultz v. Metz Bros.*, Case No. 18262, June 18, 1917; 181 App. Div. —, December 28, 1917; and *Littler v. Fuller Co.*, Case No. 23951, Sept. 14, 1917; 182 App. Div.—, Jan. 18, 1918; 223 N. Y. Rep. —, May 7, 1918.

Two cases of award to stevedores for injuries incurred while leaving the vessels upon which they had been at work are *Lee v. Smith & Sons Co.*, S. D. R., vol. 10, p. 584, Bul., vol. 2, p. 14, September 15, 1916, in which the employee was said to have disobeyed orders not to jump from the ship to the dock, and *Turratt v. Ocean Steam Navigation Co.*, S. D. R., vol. 11, p. 629, December 5, 1916, in which the employee had been discharged or laid off for an altercation and was assaulted by a co-employee before he reached shore.

A woman employed by a retailer of women's clothing to alter garments was awarded compensation for injuries due to slipping on her employer's stairs while she was returning from lunch: *Smith v. Gold*, S. D. R., vol. 9, p. 376, July 20, 1916. This case was reversed upon appeal as to one week's compensation, apparently for want of coverage.* The Appellate Division, unanimously and without opinion, affirmed an award to an oiler of machinery in a mill who was waiting upon the plant of his employer during a noon interval for instructions as to his afternoon's work and whose hand got caught in a machine which started suddenly while he was looking it over: *Stivins v. Buffalo Cereal Co.*, Case No. 19653, August 14, 1917; — App. Div. —, March 6, 1918. This case may be compared with the Manor case, above, under this title. Injuries to employees in connection with the duty of posting or procuring the employer's mail during the noon interval are noticed below, page 148.

4. *Assault by another than injured employee.*—Accidents to employees are divisible into those in which but one person, the injured employee, participates and those in which two or more persons, including the injured employee, participate. Cases of the second class are presented under this subtitle and the two subtitles following. They involve various conditions and circumstances. The uninjured party may be a fellow workman or an outsider. The injury may be intentional or unintentional. Unintentional injury may originate in horseplay, or may not. Where it so originates, the injured employee may or may not initiate or take part in the horseplay. Intentional injury may follow upon assault

* The Appellate Division's decision was made in November, 1916. The court reporter failed to publish notice of it because of informality of the proceedings. The employer had failed to appeal from an earlier award for ten weeks within the time limit.

by the injured employee or upon assault by the uninjured party. An injured employee may or may not commit assault in the line of duty.

The relation of assault to employment is thoroughly illustrated by the cases in Bulletin 81, pages 99, 100, 205-217. Two court cases in which the injury to the employee was due to assault by outsiders but in which appeal was taken on other points than assault are *Hellman v. Manning Sandpaper Co.*, above, page 95, and *Dietz v. Solomonwitz*, below, page 278. In a third court case, *Spang v. Broadway Brewing & Malting Co.*, the text of which appears above, page 111, a robber shot a collector; the Appellate Division in affirming an award to his dependents cited numerous precedents and said: "The fact that the death of Spang was intentionally caused does not defeat the claim. He was killed as an incident of his employment because he had in his possession money belonging to his employer, which it was the purpose of his slayer to feloniously appropriate. An injury caused deliberately and willfully by a third party may be an 'accidental injury' within the meaning of the act from the viewpoint of the employer and employee."

Two Commission rulings are of interest here:

A driver was taking his team to the stable. A fellow employee jumped upon the wagon to ride part way home. A third person, having a grudge against the fellow employee because of discharge from employment, fired at him but hit the driver. In advising an award, Commissioner Lyon said: "I do not think the intention of the assailant is controlling nor that the fact that the injured workman was innocent of anything offensive to the assailant can change the necessity for granting him compensation for the injury which took place while he was within his employment and which, in my opinion, arose out of the employment. Stokes was injured while in the actual performance of his work as a truckman, and the assault grew out of differences between the employer and his employees": *Stokes v. Reardon*, S. D. R., vol. 11, p. 615; Bul., vol. 2, p. 42, November 22, 1916.

An employee engaged in loading a steamship operated a winch in such a way as to anger a co-employee who assaulted him without serious consequences. Their superior discharged or laid off

both of them. Thereupon, before they were clear of the vessel, the assaulting employee repeated his assault, breaking his co-employee's jaw and otherwise disabling him. In advising an award, Commissioner Lyon said: "I think there can be no question but that had the assault been committed by Murphy before the men were discharged, the claimant would be entitled to compensation under the rulings of this Commission and of the courts. The altercation began over the operation of the winch which the claimant was using, and the only inference is, that the final assault grew either out of that fact, or out of the fact that Murphy had been discharged for the part he had in the first altercation. The two assaults, therefore, to my mind, are so connected that they must both be held to have grown out of the employment": *Turatt v. Ocean Steam Navigation Co.*, S. D. R., vol. 11, p. 629, December 5, 1916.

5. *Assault by the injured employee.*—Willful intention to injure another is a bar to compensation, according to Workmen's Compensation Law, § 10. An employee may attack another in the exercise of police functions or in the guardianship of his employer's property, in which case compensation is allowable. All depends upon the willful intention to injure or kill. The four following court cases of assault by employees resulting in their own injury illustrate the two phases of the subject.

Two employees of the same firm got into an altercation as to which should load his motor truck from a railroad car first. One assaulted the other. A return blow broke his neck. In advising that the decision of a deputy be rescinded and an award made, Commissioner Lyon cited *Carbone v. Loft* and other precedents and said: "The question when an injury growing out of an assault of a workman is compensatable, is often a very close one and extremely difficult of determination. The decision in such case seems to turn upon the question whether the assault was in connection with the employer's work and in some sense in the employer's interest. If it be so, the case would seem to be compensatable, otherwise not": *Stillwagon v. Callan Bros.*, Bul., vol. 3, p. 99, Dec. 11, 1917. The Appellate Division, however, reversed the award, May 8, 1918, with opinion, one justice dissenting.

Two employees were carrying material in a factory. As they

passed each other, the load of one accidentally struck the other. In anger the latter kicked the former who retaliated with a push. The attacking employee fell over a box and broke two ribs. The injury terminated fatally. The Commission awarded compensation. The Appellate Division reversed the award, Justice Kellogg dissenting. The court held that the injury arose from no causal connection with the work but from an attempt to gratify personal animosity. The ruling opinion and the dissenting opinion are as follows:

GRIFFIN V. ROBERSON & SON, 176 App. Div. 6, Dec. 29, 1916.

COCHRANE, J.: This case presents the inquiry as to whether a workman who in anger commits an assault upon a fellow-workman and as a result thereof receives an injury is within the protection of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). Unless such injury arose "out of" the employment within the meaning of subdivision 7 of section 3 of the act, the claim cannot be sustained. (See § 10.)

Under the facts as found by the Commission, Griffin was the aggressor. He became angry over a slight and unimportant incident which the Commission has characterized as an "accident" and in his anger committed a crime by assaulting his fellow-servant and thereby was himself injured. It has been held in different cases that when a servant in the course of his employment is assaulted by another he may sometimes be entitled to compensation. Such was the case of *Carbone v. Loft*, decided without opinion by this court (174 App. Div. 901) and by the Court of Appeals (219 N. Y. 579). This is on the theory that the injured servant is protecting his master's property or promoting his master's interest, or that the assault on him was in some way incidental to the duty which he owed his master. But what duty to the master requires a servant to commit a crime? When Griffin lost his temper and assaulted Cartwright he was not promoting or enhancing in any legitimate sense the interest of his employer, but he stepped outside the scope and sphere of his employment to serve a personal mental condition.

In *Matter of Heitz v. Ruppert* (218 N. Y. 148) it was said: "The injury must be received (1) while the workman is doing the duty he is employed to perform, and also (2) as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work. * * * The employer may be badly or carelessly served by two men engaged in his work, and yet it may be inferred, when one injures the other in a quarrel over the manner of working together in a common employment, that the accident arose out of the employment and was not entirely outside of its scope, if it was connected with the employer's work and in a sense in his interest." Now in this case it was not "a natural incident of the work" nor was it in any sense in the interest of his employer that Griffin lost his temper and as a result thereof assaulted his fellow-employee. This case is clearly distinguishable from the *Heitz* case, because in that case it did not appear as a matter of law

that Heitz was the aggressor or violated any legal or ethical propriety. The altercation in which he became engaged was in connection with his work and in the interest of his employer, and it cannot be said as a matter of law that Heitz in the occurrence which caused his injury manifested any animosity or did anything more than to remonstrate with his fellow-servant for what the former considered an improper method in the performance of the work.

In *Matter of De Filippis v. Falkenberg* (170 App. Div. 153), Mr. Justice LYON has with much care and labor collated many cases bearing on the question of the right of an employee to compensation. Most of them are cases where the accident arose as the result of horse play or sportiveness. It has generally been held in such cases that acts arising therefrom are outside the scope of the employment. The case at bar is very similar in its essential and controlling features to the case of an accident arising out of horse play. Diametrically opposite motives, it is true, occasion the injurious acts in the two classes of cases, but in both classes of cases the purpose is to gratify a personal desire. In one class of cases the motive is a spirit of frivolity or playfulness. In the other the motive is anger, animosity or vindictiveness. But in both the purpose is not to serve the master's interest, but to serve a momentary personal emotion of the employee. Whether the stirring of the mind be due to sportiveness or to vindictiveness, it is in both cases personal to the employee and the purpose of the act which brings about the injury is to serve that impulse of the employee and such act neither in fact does nor is it intended to subserve the interests of the master nor is it in any proper sense incidental thereto.

In the *De Filippis Case* (*supra*) it was said: "A test spoken of in the case of *Plumb v. Cobden Flour Mills Co., Ltd.* (7 B. W. C. C. 1), as a sound and convenient test in determining whether the injury arose out of the employment is whether it is in the scope or sphere of the employment. The injury in the case at bar was not a peril of the service, nor was it reasonably incidental to the employment. It was not an assault which had its origin in the nature of the employment, nor was in any way whatever connected with the master's work. In *Matter of McNicol* (215 Mass. 497) the court said: 'It [an injury] "arises out of" the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment.'

Applying the test of the foregoing principle to the present case it seems quite clear that this claim does not measure up to such test. The injury was not a peril of the service nor reasonably incidental thereto. It arose wholly from a voluntary act of Griffin entirely unnecessary, and not in the protection or advancement of the master's interest nor connected therewith. It was nothing more or less than the gratification of his personal feeling of animosity. No reasonable inference can be drawn which legitimately or fairly demonstrates that the injury to Griffin was an incident of his work. There was no causal connection between the work and the injury which resulted from the independent and affirmative and unjustifiable act of

Griffin. This seems to have been clearly an injury which did not arise "out of" the employment. It was rather *outside* of the employment and one which grew out of a situation inaugurated by the injured employee himself for his individual purpose.

The award should be reversed and the claim dismissed. All concurred, except KELLOGG, P. J., who dissented in an opinion.

KELLOGG, P. J. (dissenting): Griffin was clearly within the course of his duty when Cartwright ran against him with the rails he was carrying. Griffin was disturbed and angered, and kicked towards Cartwright, and Cartwright pushed him, with the result that he received the injuries. The injury did not result from the kick but from the fall after Cartwright pushed him. We assume that the entire incident was over in a moment. It was not an unnatural or an unusual thing for a workingman hit by another while at work to instinctively kick out at the man causing the injury. It was in the interest of the employer that Griffin should be allowed to pass without any interference from another employee, and his kick was a remonstrance against the interruption he received in the performance of his duty. The Commission finds that the act of Cartwright in hitting Griffin was purely an accident. There is nothing to show that at the moment Griffin considered it an accident. Cartwright created an emergency by running into Griffin with the rails, and probably the fact that Griffin was hit called forth the kick without any particular volition upon his part. He did the natural thing to resist force with force. As the Commission says, he was angry; but it was an anger of the moment created by the act of Cartwright. The question is not whether Griffin, when suddenly hit, was negligent in hitting back, because the question of fault does not enter into consideration here. It is only claimed that by hitting back he abandoned and lost his rights as an employee. Perhaps Griffin did not do the wisest thing in kicking at Cartwright; it nevertheless was a natural thing to do. All reasonable presumptions are in favor of the claim. If Griffin had let the matter pass, and at a subsequent time, in cold blood, had made an assault upon Cartwright and received injuries causing his death, compensation could not follow. But here the first assault was made by Cartwright, although as it now appears it was accidental. In a way Griffin was defending himself.

"Altercations and blows may, however, arise from the act of a fellow-servant while both are engaged in the employer's work and in relation to the employment. The employer may be badly or carelessly served by two men engaged in his work, and yet it may be inferred, when one injures the other in a quarrel over the manner of working together in a common employment, that the accident arose out of the employment and was not entirely outside of its scope, if it was connected with the employer's work and in a sense in his interest." (*Matter of Heitz v. Ruppert*, 218 N. Y. 148, 153.)

Change the circumstances slightly, and in the way in which it might have appeared to Griffin, and there can be no serious question but the claim is within the act. Supposing that Cartwright, while Griffin was carrying the rails according to his duty, had assaulted him, and Griffin had kicked back, and then Cartwright had given him a push which eventually caused his death. The only difference between the case supposed and the real case is that the Commission finds that Cartwright's act was accidental. There is

nothing to show that Griffin considered it accidental, or that he did anything other than would be done by the ordinary man who was hit under like circumstances. The facts that Griffin cannot speak, and that the dividing line is so narrow here, make it proper to indulge in the presumption that the claim is within the act. In the *Heitz Case* (*supra*) it is true that when in the yard Guth sprinkled water upon Heitz after Heitz told him he was putting too much upon the horses. They then separated and went about their respective employments. Shortly after they met in the plant, and as they passed, Heitz touched Guth upon the shoulder, saying: "George, don't do that again." It may have been in a friendly or an unfriendly way. Guth apparently considered it a challenge. Heitz undoubtedly intended it as such. He wanted Guth to understand that he could not safely take liberties with him again. In a way he invited the assault which resulted in his injury. It was assumed to be justified or excused by what had taken place previously. Guth slapped the claimant upon the shoulder, and, as the claimant turned around, Guth's finger came in contact with his eye. The court held that the injury was in the course of and arising out of the employment.

In *Matter of De Filippis v. Falkenberg* (170 App. Div. 153), since affirmed by the Court of Appeals (219 N. Y. 581), the award was reversed because some one, without cause or provocation, stuck a pair of scissors through a knot hole hitting claimant's eye. That was held not to be an injury received in the course of and arising out of the employment. It had no connection with the employment, but arose from horseplay, or an assault unconnected with the employment.

Between these cases is the dividing line, and it seems to me this case naturally falls on the side of the *Heitz* case. I, therefore, favor an affirmance. Award reversed and claim dismissed.

An outsider came visiting among the employees of a brewery during work hours. He hung around and talked to the fireman of the engine. The engineer objected to his presence. Words ensued. The engineer became vituperative and finally seizing a wrench attacked the visitor who knocked him down. As in the Griffin case, above, the injury terminated fatally. The Commission denied compensation and the Appellate Division unanimously affirmed the denial: *Ludwig v. Groh's Sons*, S. D. R., vol. 8, p. 426, April 1, 1916; 181 App. Div. 907, November 14, 1917.

An Italian stayed away from work. The engineer of his employer, to whom he was subordinate, informed upon him. The employer docked his pay. He sharpened a knife with threat to kill the engineer. Having repeated the threat with a vile epithet in the engine room in the engineer's hearing, the latter approached him. An unwitnessed combat followed and the engineer was stabbed fatally. The Commission denied compensation, September 18, 1916, upon a finding of Commissioner Lyon that the

engineer "in a moment of anger attempted to forcibly throw the Italian out of the engine room, and for that purpose was the aggressor in the assault:" Bul., vol. 2, p. 9. Three months later, December 20, 1916, it reopened the case and awarded compensation, Commissioner Lyon saying: "I am of the opinion that we cannot go too minutely into the question of which one of the two actually brought on the melee, which resulted in Mr. Slane's death. Certainly there is no evidence in the case tending to show that Mr. Slane intended to do any serious bodily harm to his slayer. He undoubtedly had a right to have the man removed from the engine room over which he, Slane, had control and there is no evidence that he used any appreciable force to eject him from the room, but the inferences, from the facts proven, are that his assailant was ready at the first opportunity to make the assault with the knife which he had already sharpened, and which he carried about his person for the purpose. In my opinion a fair balancing of all the probabilities and the drawing of the necessary inferences from the facts established are sufficient to warrant a finding that the assault upon Mr. Slane arose both out of and in the course of his employment and it cannot be found that the deceased had the wilful intention to bring about the injury or death of himself or of his assailant." Bul., vol. 2, p. 64; S. D. R., vol. 11, p. 631. The attorney for the insurance carrier, having appealed the case, argued before the Appellate Division that the engineer was an angry aggressor acting without thought of duty to his employers. The testimony, he said, showed that the engineer had caught the Italian by the ear; the Griffin case was analogous. In reply, the Attorney-General argued that any interest of the employer, however slight, sufficed to bring the case within the statute, that it was the engineer's duty to give his employer knowledge of his subordinate's absence upon request, and that the engineer was a quasi-policeman licensed by the police department and responsible for the boiler which the malicious conduct of his enemy might render dangerous. The evidence, he said, showed that the engineer had not rushed to the encounter and that the Italian had purposely drawn him behind the boiler out of sight of another employee who was present. Since no person knew what happened there, the presumption of

the law favored the deceased employee. The Appellate Division affirmed the award unanimously and without opinion: *Slane v. Cording & Salzmann*, 179 App. Div. 952, July 3, 1917.

6. *Unintentional injury by another than injured employee.*—In many cases of unintentional injury of employees by other persons, the question of incidentalness does not arise. This is true of the third party court cases presented below, pages 264–283, and of *Leland v. Seneca Falls Mfg. Co.*, noticed above, page 110. The Court of Appeals has affirmed unanimously and without opinion the award in the Markell case cited in Bulletin 81, page 98. Its published memorandum states the facts and the appellant's arguments as follows:

MARKELL v. GREEN FELT SHOE Co., 221 N. Y. Rep. 493, May 8, 1917.

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the third judicial department, entered December 1, 1916, affirming an award of the state industrial commission made under the Workmen's Compensation Act. Claimant while employed as foreman for the defendant felt company and in the discharge of his duties received injuries resulting in the loss of an eye through the act of an employee of a machinery company who had been repairing machines in defendant's plant and who, approaching claimant in a dark room, placed his arms about claimant's neck and drew his head forward onto a lead pencil in his pocket in such manner that the lead penetrated the eyeball. Appellants contended that the injury did not arise out of the employment for the reasons that it was not received as a natural incident of the work and was not due to a risk connected with the employment; that it was due to a risk to which the claimant was exposed in common with any other person; that the act causing the injury was in effect skylarking or horse-play, and was outside the scope of employment of the machine company's employee.

In the following opinion, reversing an order of the Appellate Division, the Court of Appeals holds that the injury unintentionally inflicted by a coemployee was not incidental to the employment. The Commission's ruling, S. D. R., vol. 9, p. 330, June 15, 1916, had been unanimously affirmed by the Appellate Division without opinion, 175 App. Div. 963, November 29, 1916. The facts, which may also be consulted in the ruling, are briefly stated in the text:

SAENGER v. LOCKE, 220 N. Y. 556, May 1, 1917.

ANDREWS, J.: Felix A. Locke was engaged in the millinery business and in the making of hats and feathers in New York city. This was a hazardous employment. Edna Saenger was one of his employees.

On February 11th, 1916, while working in the millinery department she had some difference with her boss with regard to her work. As a result she became nervous and hysterical and fainted.

Two of her co-employees rushed to get water and ammonia. They returned, one with a glass of ammonia and one with a glass of water. In some way these glasses became mixed and the ammonia was thrown into the face of Edna Saenger, causing the injuries for which an award was made her.

Clearly the injuries so received by her were accidental and arose in the course of her employment but they did not arise out of such employment.

If she had fainted because of fumes present in the work room and so falling had injured herself, a different question would have been presented; but the claimant fainted because of her physical condition and even if her faintness might have been said to have resulted from her quarrel with her boss with regard to her work, the fainting was in no proper sense connected with the accident.

The accident was caused by a co-employee mistaking the two glasses containing ammonia and water, not because the ammonia was exposed and an error arose as to its nature or use. The employee who obtained it knew precisely what it was.

The employer had not furnished the ammonia as medicine for his employees nor had he authorized in any way its use by them as a medicine.

A fainting such as is shown in this case and help such as was given is not a natural incident to the business. It has no more connection with it than if a physician had been called in and having been handed glasses of ammonia and water had made the same mistake.

In *Matter of De Filippis v. Falkenberg* (170 App. Div. 153; *affd.*, 219 N. Y. 581) an employee was injured by being struck in the eye by scissors thrust through a partition by a fellow-servant as a practical joke. Such an injury did not arise out of the employment. Where injuries from quarrels between fellow-servants the rule is that where the quarrel arose out of matters pertaining to the business, then the accident arises out of the employment. Where the quarrel is an independent affair having no connection with the master's work, then it does not. (*Matter of Heitz v. Ruppert*, 218 N. Y. 148.)

As said in the case last cited, the injury must be received as a natural incident of the work. It must be one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work. Such is not the case.

The order of the Appellate Division should be reversed and the claim dismissed, with costs in Appellate Division and in this court against the industrial commission.

HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, and POUND, J. J., concur; McLAUGHLIN, J., not voting. Order reversed, etc.

7. *Posting or procuring employer's mail.*—Carrying the employer's mail is incidental to other employment and brings within the law's coverage noon-interval or after-hour injuries not otherwise compensatable. The Appellate Division has affirmed awards for two such accidents unanimously and without opinion.

In one case, a skidding accident killed a clerk of a cutlery company who daily went for the mail and his lunch in his employer's automobile, driven by a fellow employee: *Woolley v. Geneva Cutlery Co.*, File No. 18487, April 6, 1917; 181 App. Div. 909, November 14, 1917. In the other, the woman bookkeeper of a milling plant, who regularly mailed letters of her employer on a railway train at noontime, bumped her head on a loading platform belonging to a party other than her employer as she was returning by a usual short cut from performance of such duty: *Swanick v. Saratoga Milling & Grain Co.*, File No. 19563, June 13, 1917; 181 App. Div. 911, November 14, 1917.

8. *Casual tasks performed out of hours.*—Akin to carrying mail are other errands within or out of hours. A packer in a cigar factory occasionally delivered cigars to his employer's customers. When he did so after hours, his employer gave him the price of a drink and car fare. One Saturday evening when the plant was not in operation he was passing the factory and, noticing lights, entered to ask his employer to reinstate a former employee. The employer, in turn, asked him to deliver two boxes of cigars. As he left with the cigars he fell down the factory stairs and lost his life. The insurance carrier argued that the delivery of the cigars was a casual accommodation, voluntarily undertaken, and was no part of cigarmaking. The Appellate Division, without opinion, one justice dissenting, affirmed an award to the packer's widow and daughter: *Grieb v. Hammerle*, Death File No. 6676, January 5, 1917; 181 App. Div. 911, November 14, 1917. The Court of Appeals sustained the Appellate Division with opinion holding that it made no difference that Grieb's service might have been gratuitous and after hours. "It was not mere friendship," the court said, "it was the relation of employer and employee, that led the one to request the service and the other to render it. If such a service is not incidental to the employment within the meaning of this statute, loyalty and helpfulness have earned a poor reward." The full text is as follows:

GRIEB V. HAMMERLE, 222 N. Y. 382, Jan. 29, 1918.

CARDOZO, J.: The award is for death benefits to the widow and minor child of one Grieb, an employee (Workmen's Compensation Law [Cons. Laws, ch. 67], § 16). The employee was a cigar packer in the city of Syracuse. He was

a piece worker, receiving \$1.25 for packing a thousand cigars. When not busy packing, his custom was to deliver cigars to customers if so requested by his employer. He did this frequently during working hours. Sometimes he did it after working hours, and then his employer gave him car fares and the price of a drink.

On Saturday, September 30, 1916, Grieb left the factory in the afternoon about four o'clock. In the evening, he passed by with two friends, who had been fellow-employees. They saw a light in the factory, and went upstairs. They found the employer tying up two boxes of cigars. He had called that evening at the Amos hotel, had been asked by the proprietor to deliver some cigars, and had gone to the factory to get them. After some talk about other matters, the employer asked Grieb to deliver the boxes at the hotel, and to take the bill with him, presumably for collection. Grieb consented, and received the boxes and the bill. He left his employer and his two friends in the factory. On his way downstairs, he fell, and was killed.

The argument is made that the injury did not arise out of or in the course of the servant's employment. I think that is too narrow a view. If Grieb had been injured during working hours, it would make no difference that his service was gratuitous. If the service was incidental to the employer's business and was rendered at the employer's request, it would be part of the employment within the meaning of this statute. Any other ruling would discourage helpful loyalty (*Hartz v. Hartford Faience Co.*, 90 Conn. 539). In that case a shipping clerk whose duty was to keep the books, lent a hand of his own motion in the delivery of merchandise. His claim for compensation was sustained. We do not need to go so far. We cannot doubt that in the case cited the claim would have been valid if custom or special request had established the approval of the employer. To hold otherwise would lead to strange conclusions. It cannot be that an employer may ask a clerk to assist mechanics in repairing dangerous machinery, and then be heard to say that because the service was gratuitous, the employee, if injured, is outside the pale of the employment. *Pro hac vice*, by force of custom or request, the employment is enlarged (*Lane v. Lusty*, 1915, 3 K. B. 230; *Mann v. Glastonbury Knitting Co.*, 90 Conn. 116). We have already held that in determining the relation of employer and employee, the payment of wages is not the sole test (*De Noyer v. Cavanaugh*, 221 N. Y. 273). We should hold the same thing now.

It is plain, therefore, that Grieb's service, if it had been rendered during working hours, would have been incidental to his employment. To overturn this award, it is necessary to hold that the service ceased to be incidental because rendered after hours. That will never do. The law does not insist that an employee shall work with his eye upon the clock. Services rendered in a spirit of helpful loyalty, after closing time has come, have the same protection as the services of the drone or the laggard (*Larke v. John Hancock M. L. Ins. Co.*, 90 Conn. 303, 308). But the argument is that because the employee had left for the day, and had then returned, his rights are different. Why he returned, we do not know. Perhaps it was idle curiosity. Perhaps the unexpected light which he saw in the factory after closing, made him feel that investigation was due in the interest of his employer. At all events, when he reached there, he found business in progress. His employer had prepared cigars for delivery, and was writing out the bill. What Grieb then

undertook to do with his employer's approval was just as much a part of the business as if it had been done in the noonday sun. He was not only to deliver the cigars. He was also to collect the money. That is the plain implication of the request that he should take the bill with him. Moreover, it is a fair inference that he expected to return, and bring the money back, for he did not take his companions with him, but left them behind. How far he had to go we do not know. There is no evidence where the Amos hotel is situated. There is nothing to show that the employee would have passed it in going to his home. I do not say that the case would be different if such things had been proved. It is enough to say that they are not here. This case is not one where the servant goes out primarily on his own business or for his personal convenience, and only incidentally and by the way does something for the master. All the circumstances point to the conclusion that Grieb left the factory on the fatal errand for the sole purpose of helping the master in the transaction of the master's business. It was not mere friendship, it was the relation of employer and employee, that led the one to request the service and the other to render it. If such a service is not incidental to the employment within the meaning of this statute, loyalty and helpfulness have earned a poor reward.

I do not think our law commits us to so harsh a holding. A service does not cease to be part of an employment because it is occasional or trivial. The Master of the Rolls said in *McDonald v. Owners of Steamship Banana* (1908, 2 K. B. 926, 929): "If I send my domestic servant in the evening with a letter to a friend, and he is knocked down by a motor omnibus on his way to or from my friend's house," there will be liability under the English statute. The statement, when made, was a dictum, but a recent case in the House of Lords (*Dennis v. White & Co.*, 1917 A. C. 479), reviewing all the precedents, and sweeping aside many fine-spun distinctions, makes it clear that the dictum was sound and just. (See also *Hughes v. Bett*, 1915 S. C. 150, cited in *Dennis v. White & Co.*, *supra*, at p. 484.) We should interpret and apply our own statute in the same large spirit. I cannot doubt that if it is thus read, the claimant's case will be found within it.

To reach this conclusion, there is no need to attempt a precise or comprehensive definition of the term employment. One must leave such problems to be worked out by the process of exclusion and inclusion in particular cases, rather than by "a fixed standard of measurement" (*Stewart & Son v. Longhurst*, 1917 A. C. 249, 258). It is enough that here the employee was in the general service of the employer; that the service rendered was incidental to the business; that it was one which this employee had been accustomed to render upon request; and that the errand was the cause of his presence on the stairway. The inference is legitimate that it was not the comradeship of friends, but the tacit sanctions of a relation of power and dependence, which prompted the master's request and the servant's acquiescence.

The order should be affirmed with costs. Hiscock, Ch. J., Cuddeback, Pound, Crane and Andrews, JJ., concur; Collin, J., not voting. Order affirmed.

9. *Accommodating another.*—If doubt exists as to compensatableness of an injury incurred by an employee while accommodating his employer, as in the above case, compensation for

an injury incurred while accommodating a fellow employee or an outsider is more doubtful. A boy of seventeen, employed in a factory, undertook upon her request to rescue a young woman co-employee's slipper which she had dropped out of a window of the factory onto a glass-roofed marquee about the door. A pane of glass broke and cut one of his arms so severely as to necessitate amputation. In advising denial of award Commissioner Lyon said: "It is probably true that an accident caused by an employee doing something which an employer might reasonably expect him to do under the circumstances would be compensatable even though not arising out of any act of specific benefit to the employer. Thus we recently held that an employee who was injured while watching other employees putting out a fire in the plant was covered by compensation insurance, although he had no duty to be at the spot where he was injured at the time, on the general theory that an employee might reasonably be expected to be in the vicinity of a fire in the plant itself, whether assisting in putting the fire out or not, but I am unable to see how an employer, unless gifted with unusual imagination, could for an instant have anticipated that one of his employees would climb out of a window and walk on a glass marquee, for the purpose of removing a slipper, when there were other methods of doing it with perfect safety": *Holmes v. United States Printing Co.*, S. D. R., vol. 12, p. 557, January 24, 1917.

A laborer for a private firm which was installing electrical appliances near the barge canal fell into a lock and was drowned. The insurance carrier asserted that he had abandoned his employment at request of a state employee and was helping operate the lock. The Attorney-General argued that the evidence did not overcome the presumption of Workmen's Compensation Law, § 21. The Appellate Division affirmed an award in the case unanimously and without opinion: *McDermott v. Lupfer & Remick*, Death Claim, No. 11547, Sept. 11, 1917;— App. Div. —, March 6, 1918.

10. *Procuring a newspaper.*—A supervisor of traffic on a street railway loop, having stepped from his employer's right of way to look after a newspaper which he had hidden in a chamber leading to an unused railway tube, hurt himself by a fall from a ladder

within the chamber. The Commission denied him compensation for the reason that "he went there for purposes of his own entirely disassociated from the duties of his employment": *McGuire v. Brooklyn Heights R. R. Co.*, S. D. R., vol. 10, p. 631, Bul., vol. 2, p. 30, October 25, 1916.

11. *Watching a fire.*—While an employee was standing close to an accidental fire in his employer's plant, watching the efforts of his fellow employees to put it out, a heavy molding fell upon his foot, crushing his great toe. The injury terminated fatally. The Appellate Division affirmed the Commission's award of death benefits unanimously and without opinion. "It is probably true," said Commissioner Lyon, "that there was no active duty upon the deceased to be present at or assist in the putting out of the fire, but where fire occurs in a manufacturing plant, I do not think that an employee who leaves his actual place of duty for the time being to assist or even be present at the attempt to quench the fire, by that act takes himself out of his employment. Surely there are some things which an employee may do without forfeiting his right to compensation, even if his duties do not require the performance of the act, and I think it would be too harsh a rule to hold that an employee who goes to the place of a fire in the plant, by that act, takes himself out from under the protection of the statute": *Rzepcynski v. Manhattan Brass Co.*, S. D. R., vol. 12, p. 540; Bul., vol. 2, p. 91, January 10, 1917; 179 App. Div. 952, July 2, 1917.

12. *Doing own laundry work.*—An employee in a hotel laundry, together with other hotel employees, received board, room, stipulated wage and permission to use the laundry after hours for laundering her own clothes. While in the laundry one evening washing her clothes, she broke her wrist. Commissioner Lyon advised that an award be made to her, saying: "The plaintiff's wage return consisted of several items: a money consideration, board and lodging and an opportunity to use the plant of the employer in doing the claimant's own laundry work. I suppose it goes without saying, that such an employee is under just as much necessity, under modern conditions, to have her laundry work properly attended to, in order to make herself presentable, as she is to wear suitable clothing, and it seems to me that in carrying out this provision of the contract, the plaintiff might be held

in some sense to be working out her own payment for her labor. If she had been injured while doing work, at the instance of her employer, for other employees of the hotel, there would probably be no question but that she was in the course of her employment, as much as though she had been doing work for the hotel proper and I am not able to distinguish such a case from the case where as part of her regular employment, she is engaged in doing her own laundry work. The case seems to be somewhat analogous to the case where an employee, after business hours goes to his employer's premises for the purpose of collecting wages and receives an injury. In these cases I think it is usually held that the accident arose out of and in the course of employment." The Appellate Division affirmed her award, two justices dissenting: *Daly v. Bates & Roberts*, Bul., vol. 3, p. 9, September 5, 1917; — App. Div. —, March 15, 1918. The case was argued in the Court of Appeals, May 29, 1918.

13. *Falling asleep*.—A policeman found a night watchman about 2 o'clock in the morning lying mortally injured at the bottom of a freight chute on his employer's plant. According to Commissioner Lyon there was doubt whether his injuries were due to his falling asleep and pitching out of a second story doorway or to his tumbling in an effort to keep an eye on a loaded truck in the yard: Bul., vol. 2, p. 129, Mar. 15, 1917. The Commission, however, found in plain terms that he had dozed off and fallen down the chute. It held that the dozing was not unreasonable under the circumstances and awarded death benefits on the ground that the injuries were incidental. The Appellate Division affirmed the award but the Court of Appeals reversed it. The higher court held that the watchman's mishap was not a natural incident of his work and that his acts were directly contrary to the object and purpose of his employment. The opinions of the two courts are as follows:

GIFFORD v. PATTERSON, 179 App. Div. 420, July 2, 1917.

KELLOGG, P. J.: The claimant's husband, a night watchman, was required to go through the plant during the night time and to regularly punch a time clock. The night was very warm, and while making his rounds he placed a chair near the doorway upon the second floor, sat down to rest and dozed off, lost his balance and fell out of the window down the chute and was found injured upon the pavement. He died at a hospital on July 17, 1916, eight days after the injury. It is contended that by falling asleep he had aban-

doned his employment and for that reason a death benefit cannot be allowed under the Workmen's Compensation Law. Between his rounds he was not required to remain standing or to keep moving. He, therefore, sat in the chair as an employee and in the performance of his duty. The fact that he accidentally fell asleep, or dozed off, does not deprive him of his rights as an employee or defeat the award. Compensation is made without regard to fault, and contributory negligence is not a defense. It was probably an act of carelessness to permit himself to fall asleep while on duty; it cannot, however, deprive him of his position as an employee. The award should be affirmed. Award unanimously affirmed.

GIFFORD v. PATTERSON, 222 N. Y. 4, Nov. 20, 1917.

CHASE, J.: Charles W. Gifford, a night watchman, employed by T. G. Patterson, Inc., a corporation engaged in the business of manufacturing packing boxes, received injuries July 9, 1916, which resulted in his death. A claim was filed by his widow for compensation under the Workmen's Compensation Law. The State Industrial Commission (two of the commissioners dissenting) made her an award. The determination of the Commission has been affirmed by the Appellate Division of the Supreme Court. The material facts as found by the Commission are as follows:

" * * *. The duties of Charles W. Gifford were to watch the premises during the night time and to go around the building for that purpose and to regularly punch a time clock. In the front of the building there was a chute running from the second floor to the pavement, down which it was customary to send the goods to be put on the wagons.

"2. On said date, at about 1.45 A. M. Charles W. Gifford was found by a policeman at the bottom of the chute lying in a pool of blood. Prior to being so found Charles W. Gifford had obtained a chair and was sitting in a doorway on the second floor at the top of the chute, it being a very warm night. He dozed off and lost his balance and fell out of the window down the chute, carrying with him the chair on which he had been sitting. The fall caused a fracture of the right femur and elbow and a gash in the head and an injury to the right hip. He was taken immediately to the hospital and died there on July 17th of shock occasioned by the said injury. The dozing in his chair by Charles W. Gifford just prior to the said fall was not an unreasonable act under the circumstances and did not constitute an abandonment of his employment, but amounted, at the most, to negligence only.

"3. * * *.

"4. The injuries which resulted in the death of Charles W. Gifford were accidental injuries and arose out of and in the course of his employment."

The statement in the last paragraph of the second finding and in the fourth finding are conclusions based upon specific findings of fact. Such conclusions do not purport to be and are not in fact based upon presumptions authorized by section 21 of the Workmen's Compensation Law.

We think that as matter of law the conclusions of the Commissions are not justified by the facts found. (*Matter of Glatz v. Stumpp*, 220 N. Y. 71, 75.) The duties of Gifford were to "watch the premises * * * and to go around the building for that purpose." The findings show that he abandoned his duty and after first obtaining a chair sat therein on the second floor of the

building at an open doorway and sitting therein "dozed off" and fell down a chute and received the injuries from which he died. He was employed to watch the premises. Instead of doing so he prepared for himself a comfortable position and slept. If, in connection with his employment, he was authorized or permitted to procure a chair and spend a portion of his time therein "dozing off" in the doorway, it was not shown before the Commission. His injury was not received as a natural incident of his work. It was not a risk connected with his employment or arising out of and in the course of his employment. The acts of Gifford as found by the Commission, instead of being in the course of his employment, were directly contrary to the object and purpose for which he was employed.

When an employee is injured through some act of his own, not an incident to his employment, and not authorized or induced by his employer in connection with his employment, the injury does not arise out of and in the course of his employment within the meaning of subdivision 7, section 3 of the Workmen's Compensation Law. (See *Matter of Heitz v. Ruppert*, 218 N. Y. 148; *Matter of Saenger v. Looke*, 220 N. Y. 556; *Spooner v. Detroit Saturday Night Co.*, 153 N. W. Repr. 657.)

The order should be reversed and the determination of the State Industrial Commission annulled, with costs against the State Industrial Commission in this court and in the Appellate Division.

Hiscock, Ch. J., Cuddeback, McLaughlin, Crane and Andrews, JJ., concur; Cardozo, J., not voting. Order reversed, etc.

A watchman set to guard an unoccupied residence was found by a policeman on an upper floor stretched out on a pile of old blankets and bed material and dead from asphyxiation. The house was on fire from a sheet iron furnace that he had placed in the room. The Commission awarded death benefits to his dependents but later rescinded its action and dismissed the claim upon the recommendation of Commissioner Lyon, who said: "A watchman who is employed for that service and no other, I take it, is expected to do some watching. In this case the undisputed evidence is, that Nelson had made up for himself a bed, that he built the fire in order to warm the room and then deliberately went to bed instead of staying on watch. I am disposed to think that any accident which happened to him while in bed and asleep, under these circumstances, did not arise out of his employment": *Nelson v. Scheier & Kohn*, Bul., vol. 3, p. 51, October 18, 1917.

14. *Slipping on a public highway*.—Two trunk factories stood on opposite sides of a public street. They were under the same ownership and management. An employee of one lettered the trunks for both. He slipped upon snow and ice in the street and incurred injuries that terminated fatally, while crossing from one

to the other. The Appellate Division held that the determining factor relative to compensation was not "whether the accident occurred in a public highway, but whether the employee was there in the performance of his duties." The case may be compared with *Putnam v. Murray*, above, page 115, in which a driver cleaning a street ran a rusty nail in his foot and died of tetanus. The full text of the opinion unanimously affirming an award by the Commission is as follows:

REDNER V. FABER & SON, 180 App. Div. 127, November 14, 1917.*

WOODWARD, J.: There is but one question to be decided upon this appeal from an award of the State Industrial Commission. H. C. Faber & Son is a corporation engaged in manufacturing commercial trunks, with its factory located on Meadow street, Utica. Diagonally across this street the A. W. Winship Company, a second corporation, is engaged in the manufacture of personal trunks. Both corporations are owned by the same stockholders and are carried on by a single executive organization. The Faber Company had in its employ a general utility man, the claimant's husband, who performed services for both corporations. Among his duties was the work of lettering trunks. On the 20th day of January, 1916, he was directed by the superintendent of the Faber Company to go across to the Winship factory and to there letter a trunk. For this purpose Redner left the Faber factory and went to the Winship factory, where he performed the service, and started to return to the Faber factory. When he had reached a point near the curb line, in front of the Faber factory, he slipped upon the snow and ice in the street and received injuries from which, in connection with other complications, he died some six months later.

The point urged upon this appeal is, that the fall, having occurred in a public highway, that the injury was not one "arising out of" Redner's employment (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 3, subd. 7; *Id.*, § 10); that it was merely a street accident, to which every one using the highway was equally liable. It must be admitted that there are English authorities which seem to sustain this contention, and some of our own cases have refused to sustain awards where the accidents have occurred in the highways after the termination of the hours of employment, but we think none of them have gone to the extent we are asked to go in the present case. The evidence indicates that while the location of the accident was technically a public highway it was in fact practically a part of the premises of these two corporations; it was not generally used for street purposes. The presumption would be, in the case of an ordinary highway, that the fee vested in the abutting owners, subject to the easement for public passage, and that the owners of the fee had a right to make any use of such highway consistent with the public use, so that the determining factor is, not whether the accident occurred in a public highway, but whether the employee was there in the performance of his duties. If he was there in the discharge of the obligations of his employment the accident would arise out of such employ-

*Affirmed by Court of Appeals with opinion, 223 N. Y. 379, May 14, 1918.

ment as certainly as though he had reached a point within the factory and had there slipped and sustained his injuries. This highway was a part of the place provided for him to work in, and even at common law it was probably the duty of the Faber Company to use reasonable care to see that this place was reasonably safe for the purposes to which it was devoting the street, and we are fully persuaded that, under the circumstances here disclosed, it was a matter of absolute indifference who owned or controlled the highway. It was as necessary for the decedent to cross this highway in doing the work appointed as it was for him to cross the room in which he was employed in the factory, and the liability would clearly extend to him if injured in either case while actually employed.

While it may be true that the Workmen's Compensation Law was primarily designed to compensate for the real tragedies inherently involved in the so-called hazardous occupations, our courts have gone too far in sustaining these awards to now hold that only such accidents are covered as arise out of the special hazards of the business. If the general scope of the business in which the injured party is employed, so that he is subjected to the risks incident to such business, is within the statute, then the protection is extended to him throughout the course of such employment even though the particular accident was not such as to come within the major employment, and whether such an injury occurs in the street in front of the employer's premises, made use of for such employment, or in the factory building itself, can make no difference in the application of the law.

The award should be affirmed. Award unanimously affirmed.

15. *Slipping on floor of workplace.*—Instances of compensation awards for injuries caused by slipping on the employer's stairs or floors are cited in Bulletin 81, p. 197. A scrub woman in a railroad station slipped and fell on the oiled floor while carrying a heavy pail and wringer. The insurance carrier argued that she was not injured through a hazard of her employment. The Appellate Division affirmed her award of compensation unanimously and without opinion: *Hawthorne v. N. Y. Central R. R. Co.*, Claim No. 15873, Mar. 29, 1916; 181 App. Div. 908, Nov. 14, 1917. A supervisor of subway construction in New York City slipped on a marble slab and hurt himself while taking a bath on his employer's premises. The Appellate Division unanimously affirmed his award of compensation with opinion which is presented under the following subtitle.

16. *Washing up.*—If an employee's work covers him with dirt and he is under the necessity of cleansing himself in order to go on with his duties, an accident while he is taking a bath is compensatable. The following opinion of the Appellate Division unanimously affirming an award is illustrative:

SEXTON V. PUBLIC SERVICE COMMISSION, 180 App. Div. 111, November 14, 1917.

KELLOGG, P. J.: The claimant was supervising the construction of a part of the subway in New York city, which work was being performed by Booth & Flinn, Limited, contractors. His work was principally in the tunnel of the subway, except at the end of the month, when he worked on estimates. He was directed by the engineer in charge to survey all the supports under the railroad tracks, underneath the decking in the subway, at Whitehall and Stone streets, and while so engaged on July 14, 1916, he became very dirty and his clothes became covered with dirt and filth, which necessitated their being thrown away. He left the subway in this condition about eleven-fifteen o'clock A. M. and it was his duty then to repair to the engineer's field office, about a block away, and make up the estimates, but apparently he could not go in his then condition; it was necessary for him to remove the filthy garments and the filth from his person. In most such offices a shower bath is provided for the men similarly engaged; no such regular bath was provided here, but two or three days before the accident the claimant and his assistant engineer had improvised a shower bath at the office. This bath was provided by the engineer in charge. The claimant wanted to take his bath in the boiler room, but the engineer directed him to use the shower bath. While standing on a marble slab claimant's foot slipped and he received the injuries complained of. It is urged that the injuries did not arise out of and in the course of his employment.

It is plain that if the claimant was taking a bath for his own pleasure or comfort, and sustained an injury thereby, it would not arise out of and in the course of his employment in building the subway. But the evidence and findings show that the nature of the employment was such that the employee became very dirty "and covered with dirt and filth and horse manure and everything," to such an extent that he had to throw away his clothes when he got through, and the bath was a necessity arising out of the employment and to enable him to continue it. Leaving the subway at eleven-fifteen A. M., it was his duty to go to the field office and continue his work; but he could not continue his work in the field office in his dirty, filthy condition, and it was, therefore, his duty to the employer to wash up as soon as possible and begin his work in the field office. His work as a subway builder continued until the filth and dirt which smeared him while working there was removed so that he could perform other duties. The nature of the bath shows its real purpose; he was standing on the marble slab and an assistant engineer with a hose was throwing water over this person. We conclude, therefore, that it was a duty of and an incident to his employment that he should be washed in order to continue his employment and that the Commission committed no error in finding that the injury arose out of and in the course of his employment.

The Public Service Commission is composed of State officials, but upon those State officials is devolved by law the duty of superintending and directing the building of the subway for the city of New York. (Laws of 1907, chap. 429, as revised and amd. by Laws of 1910, chap. 480, being Consol. Laws, chap. 48, and Laws of 1891, chap. 4, as amd.) The field offices were used by the Commission with reference to the subway work, and the claimant was employed by the Commission solely with reference to that work and he was

paid for his work by the city upon certificates of the Commission, or its representatives. The city of New York cannot perform the physical acts of building the subway; it must do it through contractors or employees, and its relations with the contractors and employees must be sustained by some official or representative of the city, and it is immaterial whether the representative of the city doing this work for the city was the Public Service Commission or a city official or an employee of the city. Under the amendment by chapter 316 of the Laws of 1914 to subdivision 3 of section 3 of the Workmen's Compensation Law (Consol. Laws, chap. 67, Laws of 1914, chap. 41, and by the addition of group 43 to section 2 of the act by chapter 622 of the Laws of 1916, the city is liable if it is engaged in a hazardous business irrespective of the definition of the word "employment" in subdivision 5 of section 3.

We conclude, therefore, that the city of New York, under the statutes, was engaged in the hazardous employment of subway construction under group 13 of section 2 of the Workmen's Compensation Law. The award should, therefore, be affirmed. Award unanimously affirmed.

17. *Relief of nature.*—Employees engaged in erecting a building used a toilet in the cellar of a nearby building with the consent of their employer. While one of them was on his way thither an iron door fell upon his fingers. The Appellate Division unanimously affirmed his award of compensation: *Dubin v. Heffernan*, Claim No. 3801, May 2, 1917; 181 App. Div. 909, Nov. 14, 1917. Other cases of this class are noticed in Bulletin 81, pages 197, 198.

18. *Jumping upon a passing vehicle.*—An employer was repairing a ship. His foreman sent an elderly employee with some materials weighing about fifteen pounds from the plant to the vessel, a distance of over a mile. He told him to get there quick and, if opportunity offered, to jump upon a passing wagon or car. The street cars covered but three blocks of the route. The employee, having solicited a ride on a truck or wagon, fell while getting off and broke his leg. Carrying the materials, said the Attorney-General, was as much a part of his employment as if he had been carrying them across a yard from one foundry to another; urgency and weight of the burden caused the accident. The Appellate Division unanimously and without opinion affirmed an award to the injured workman: *Farrell v. Terry & Williamson Steamship Works*, File No. 11666, June 8, 1917; 181 App. Div. 909, November 14, 1917. The case may be compared with *Peers v. DeCarion & Co.*, Bulletin 81, p. 92, in which the Commission denied compensation; also with the following case:

SPINKS v. VILLAGE OF MARCELLUS, 180 App. Div. 732, December 28, 1917.

KELLOGG, P. J.: The injured employee was at work for the village by the month. He was employed as street commissioner and policeman. He looked after the streets, the lights and the engine house, "the water, the electric poles, everything that was contained in the corporation." He describes the accident as follows: "I was going to get some lead from the depot. The truckman was going down and I saw him and I got on the sleigh. When I got off the sleigh to go over to the depot my foot caught in the sleigh and threw me. When he was coming back to the depot he was going to stop and get the lead. * * * I was going to use it on water pipe." The accident happened, on January 8, 1917, "at the road that goes to the depot. He was going up the hill and I was to stop him when he came back to get the goods."

The truckman evidently was going up the hill beyond the road leading to the depot. He was not *en route* for the depot when the accident occurred, but when he returned from the trip which he was making for himself or another, he was to leave the main road upon a signal from the claimant and go to the depot. The accident happened when the claimant was getting off the truck at the juncture of the main road and the road leading to the depot. The distance from where the claimant got on the truck to the depot was about three village blocks. Apparently the truckman was not in the service of the village when the accident happened. The claimant was riding for his own convenience and the truckman was to be employed in bringing the lead from the depot if the claimant signaled him.

It cannot be said that the village was engaged in operating a vehicle, or that the claimant received his injury while engaged in an employment declared hazardous by the Workmen's Compensation Law. The risks he was subjected to were the ordinary risks which any person assumed in riding with a truckman. The fact that the claimant at times was acting as street commissioner and at other times was engaged in fixing the water works or the electric light appliances does not change the situation. (*Matter of Glatzl v. Stumpp*, 220 N. Y. 71; *Matter of Gleisner v. Gross & Herbener*, 170 App. Div. 37; *Wincheski v. Morris*, 179 id. 600, 166 N. Y. Supp. 873.)

The award should, therefore, be reversed and the claim dismissed. All concurred. Award reversed and claim dismissed.

19. *Using instruments other than those provided by the employer.*—A helper on a truck hurt his hand with a skid procured from a dock. His employer contested his claim for compensation on the ground that he took himself out of his employment by not using the skid provided with, and carried with, the truck. The Commission, nevertheless, made an award, which the Appellate Division affirmed unanimously and without opinion: *Conley v. Hickey*, Case No. 6547, April 26, 1917; 181 App. Div. 911, November 14, 1917.

20. *Hiring men and procuring supplies.*—A foreman of town highway work was severely injured when the automobile in which

he was riding came into collision with a fence while he was out on Sunday looking for laborers and supplies. The Appellate Division, two justices dissenting, held that these pursuits were incidental to his employment as foreman. The opinion is as follows:

LANIGAN V. TOWN OF SAUGERTIES, 180 App. Div. 227, Nov. 28, 1917.*

LYON, J.: The State Industrial Commission has found as conclusions of fact that in September, 1916, the town of Saugerties, Ulster county, N. Y., was engaged in the construction, repair and maintenance of highways and bridges within the town; that the claimant Michael Lanigan was employed by the town as a foreman on the work; that his superior was Raymond Ten Broeck, the town superintendent of highways, who had authority to employ and discharge all employees and to purchase the materials necessary for the work; that said superintendent and claimant usually planned the work together, and on Sundays laid out the work for the coming week; that the scarcity of labor compelled the superintendent to work short-handed; that on September twenty-fourth, being in need of laborers in order to start a stone crusher the next day for use in road building, and Sunday being a favorable day for hiring laborers, and being also in need of sluice pipe for road work, said superintendent, who on Saturday had directed claimant to report to him on Sunday, went, pursuant to appointment, in an automobile owned, operated and used by him in his employment as superintendent of highways, to meet a man for the purpose of purchasing some sluice pipe; that from there they started for the claimant's house, where they were to have supper and then go down to engage laborers, whom claimant knew, for the following day's work; that while traveling along the highway at dusk a flash of light, apparently from an approaching automobile, blinded them, and in attempting to avoid a collision their automobile was steered from its course and collided with the fence along the highway, wrecking the car, killing Ten Broeck, and severely injuring the claimant; that the claimant was paid for each day of actual work, including Sundays, and that two of the pathmasters had also worked on Sundays and had been paid therefor upon presentation of their bills. The Commission also found that the claimant was an employee of the town within the meaning of the Workmen's Compensation Law, and made the award in his favor from which this appeal has been taken. In view of the contention that the law does not apply to the claimant it has seemed best to thus fully recite the findings of the Commission which are supported by the evidence.

At the time of the accident the occupation of road building carried on by a town was a hazardous occupation. (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 2, groups 13, 43, as amd. by Laws of 1916, chap. 622.) The town represented by its superintendent of highways was an employer. (Id., § 3, subd. 3.) Claimant being engaged in a hazardous occupation was an employee. (Id., § 3, subd. 4.) Assisting in procuring men and material for the performance of the work was incidental to claimant's employment as foreman. It would seem, therefore, that the case is at least fairly within the decision in *Matter of Larsen v. Paine Drug Co.*, (218 N. Y. 252) in which it was said: "Where, as in this case, an employee is injured while

*Affirmed by Court of Appeals, 223 N. Y. Rep. —, May 14, 1918.

performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed."

I think the award should be affirmed. All concurred, except Kellogg, P. J., and Sewell, J., dissenting. Award affirmed.

21. *Diversion during idle moment.*—The operator of a tannery color machine stopped his machine and went to another room to get some material. While he was away, his helper, having nothing to do, stepped to an elevator shaft about seven feet distant and looked down. The descending elevator fractured his skull, killing him immediately. The Commission awarded death benefits. Upon appeal the insurance carrier argued that his going to the elevator and looking down was a deviation from duty prompted by mere curiosity. The Attorney-General replied that it was just as reasonable to surmise that he approached the elevator to cool off or to go to the lavatory, and that an employee is not reasonably glued to the exact spot of work. The Appellate Division affirmed the award unanimously and without opinion: *Hubinak v. Endicott, Johnson & Co.*, S. D. R., vol. 8, p. 507, May 18, 1916; 175 App. Div. 958, November 15, 1916. There is diversion from the employer's business in the Chludzinski and Siersted cases under the two following sub-titles. In the Chludzinski case the court suggests that an accident to an employee who has left his work-room "at an idle moment for a change or air or scene" is compensatable.

22. *Smoking during work hours.*—In the following opinion the Appellate Division holds that "smoking in the factory during business hours by an employee, when not prohibited, cannot deprive him of the benefit of the law;" the court unanimously affirms an award to the dependents of an employee whose clothing caught fire by an unwitnessed accident.

CHLUDZINSKI V. STANDARD OIL CO., 176 App. Div. 87, Dec. 28, 1916.

KELLOGG, P. J.: The Commission states that it certifies to the court the question as a question of law. It has, however, determined, as a matter of fact, that the death resulted from accidental injuries which arose out of and in the course of the employment. We interpret the question to mean whether there is evidence to sustain their findings of fact, for in the absence of such evidence their findings would be an error of law.

The deceased, while in the employ of the Standard Oil Company at its

refinery at Buffalo, during business hours, about three forty-five in the afternoon, while dressed in his working clothes, met his death by a fire communicated in some way to the inflammable flannel shirt he wore. In the course of the business the flannel shirts of all the workmen become saturated with oil and are very inflammable. Apparently he was not intoxicated at the time, and evidently there was no wilful intention on his part to bring about his injury or the death of himself or others. He may have been careless and remiss in his duties; but compensation is awarded without regard to fault, and under the presumption of section 21 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) that the case comes within the law "in the absence of substantial evidence to the contrary," upon the facts stated the award would follow of course.

But it is urged that facts now to be mentioned furnish "substantial evidence to the contrary" and establish that the case is not within the law and that the injury did not arise out of and in the course of the employment.

Adjoining the workroom in which the decedent was employed was a locker room in which each employee had a locker in which to keep his street clothes when at work and his work clothes at other times. For some unknown purpose the decedent left his workroom and entered the locker room, closed the door after him and was there five or six minutes; then he rushed out of the room with the left front side of his shirt abaze. He died from the results of the burning the same day. The locker room had formerly been used as a test room, but all the testing apparatus had been removed except a Bunsen burner, over which there was an iron hood with a six-inch ventilator pipe through the roof. This burner was formerly used for flashing oil, but at the time of the accident was used occasionally for heating samples of oil in the wash tanks and occasionally for heating glue for repairs. But the decedent had no duties with reference to the burner; it was for the special use of two men in the repair shop. The locker which was used by the decedent was about two feet from the end of the hood over the burner and about four and one-half feet from the burner itself. The burner was lighted at the time the decedent entered the room and after the accident. A burnt match stick was found upon the floor. Direct contact with the burner could not be had by accident, as the hood protected it from handling or touching except by design or intent. In the absence of a rule prohibiting the men from going to the locker room during working hours it cannot be said that the decedent had no right to enter that room, or that he ceased to have all the benefits of an employee while there. He might have entered the room at an idle moment for a change of air or scene; or perhaps to get from his street clothes a pencil, a knife or some memorandum with reference to his work. Many reasons might have made it proper, and in the due course of his employment, for him to enter the room at the time. We cannot under the law indulge in any presumption against him. The burnt match stick on the floor does not necessarily connect itself with the decedent. Two men worked in this room from time to time; the employees generally went through it in the morning, at noon and at night. If the burnt match suggests that the decedent may have been smoking, it is not fatal to the claim. Smoking was not prohibited, and if an employee had a leisure moment there was no reason why he might not smoke. Smoking in the factory during business hours by an employee, when

not prohibited, cannot deprive him of the benefit of the law. It might indicate negligence when we remember that he wore an inflammable flannel shirt; but compensation is awarded without regard to fault, and the question of negligence or contributory negligence is not before us. Evidently at times much heat was generated by the burner; perhaps when entering the locker room he found it necessary to regulate the flame in the burner. The decedent's locker was near the hood. Possibly a spark from the burner, or the heat from the burner, may have caused the fire. These are all matters of speculation, but under the rule that the claim is presumed to be within the law, in the absence of substantial proof to the contrary we are not required to speculate and draw unfavorable inferences. We find no substantial proof to the contrary and, therefore, conclude that the award was properly made, and answer the question in the affirmative.

All concurred. Award affirmed; question answered in the affirmative.

23. *Horseplay*.—A fireman stepped out on the sidewalk in front of his boiler room. A passerby with whom he was acquainted and with whom he frequently "indulged in sportive fooling or horseplay," called him by a nickname. He pursued his tormentor through a doorway and was hit in the eye by the door as it swung back. In advising denial of compensation Commissioner Sayer said: "An employee who is not on his employer's premises, where he should have been, but is on the public highway, and is injured while chasing a man in the adjoining building, cannot be stated to be engaged in any business of his employer": *Sullivan v. Beach Gasper Co.*, Bul., vol. 3, p. 82, November 19, 1917.

Accidental starting of his employer's elevator crippled a boy for life. He had been sent out on an errand. His route led past the elevator which stood open. The operator was away. He testified that he pushed the buzzer and entered the elevator with intent to fool the operator, but later retracted this statement and said that he entered the elevator under boyish impulse or playfulness. The Commission denied him compensation: *Siersted v. Leinhos, Engelke & Bock*, S. D. R., vol. 14, p. 704, Bul., vol. 3, p. 121, November 27, 1917.

24. *Exposure to unusual risks*.—If an employee faints or otherwise loses control of himself and falls while working high on the framework of a building, does the special or unusual falling risk of his work entitle him to compensation? The Attorney-General raised this question in *Santacroce v. Sag Harbor Brick Works*, Case No. 70213, October 10, 1917, and cited British workmen's

compensation decisions as precedents for an affirmative answer. In the Santacroce case, a brickmaker working on top of a stack of bricks fifteen feet high, was seized with vertigo or some similar disorder and was injured by a fall to the frozen ground. The Commission awarded him compensation. The Appellate Division affirmed the award on the ground that he was in good health and had fallen because of dizziness due to his elevated position. The text of the court's opinion has been presented above, page 49.

F. *Pecuniary gain*.—Workmen's Compensation Law, § 3, subd. 5, originally restricted compensation to "employment only in a trade, business or occupation carried on by the employer for pecuniary gain." Amendments of the law have established three exceptions to this pecuniary gain limitation: (1) public employment; (2) employment covered by mutual agreement of employer and employee; and (3) employment in connection with a trade, business or occupation carried on by the employer for pecuniary gain. In the third instance, the phrase "or in connection therewith" was inserted in § 3, subd. 5, by L. 1917, ch. 705, effective July 1, 1917, and has not yet been subjected to judicial interpretation.

1. *Workers repairing buildings, installing machinery, etc.*—The enumerated list of Workmen's Compensation Law, § 2, involves the possibility of a single employer's being engaged in two or more hazardous employments. A baker usually operates a delivery wagon. Bakeries are covered by group 34 and operation of vehicles by group 41 of Workmen's Compensation Law, § 2. Since many employments are left out of the list, the situation also involves the possibility of a single employer's being engaged in a non-hazardous and a hazardous employment; for example, a grocer operating a delivery wagon. Conceivably a big manufacturer of shoes may own and operate a printing press for preparation of his advertising matter in which case it may be held either that he is engaged in the two hazardous employments of shoe-making and printing or that his printing is incidental to his shoe-making. Usually, however, he contracts with owners of newspapers or other periodicals for his advertising. The party with whom he contracts may be an employing printer or may have no employees. Such a shoe-making employer may keep regularly in

his employ one or more carpenters and machinists to make boxes for shipment of his goods, to attend to their shelving and to keep the machinery and building used for their making in repair. Instead of keeping such employees constantly on his payroll, he may occasionally and temporarily call in carpenters or machinists, paying them by the day, hour or job. The employees called in may or may not be on the payrolls of contracting carpenters or plumbers.

These various possible combinations are a background for the Rheinwald, Bargey, Larsen and Gleisner cases heretofore presented in full text in Bulletin 81. In the Rheinwald and Bargey cases, the Appellate Division rejected the independent contractor solution arrived at by the State Industrial Commission relative to such temporary or casual employees and substituted for it a double doctrine of non-incidentalness and non-pecuniary gain. The Rheinwald case did not reach the Court of Appeals; the Bargey case did reach it.* The Court of Appeals approved the non-incidental and non-pecuniary-gain doctrine. Under the heading "Workers repairing buildings, installing machinery, etc.," above, page 99, the non-incidental part of this doctrine has been traced to its outcome. The non-pecuniary gain part remains to be traced here. The courts held that the Massaro Macaroni Company, when it engaged Bargey to do carpentry work upon its factory building, did not thereby involve itself in the carpentry business for pecuniary gain or profit, though it was undoubtedly making macaroni for pecuniary gain or profit. Two cases decided by the Appellate Division on the same day with the Bargey case, November 10, 1915, involved carpentry work and appear in the outcome to have contradicted it in principle. This contradiction relative to one of them, the Larsen case, has been presented above, page 102. The other, *Gleisner v. Gross & Herbener*, is the case of a janitor who occasionally did carpentry work upon his employer's building but was hurt while on his way to hang out a flag. The letting of the building, an apartment house, was for pecuniary gain but was not a hazardous occupation. The Appellate Division in

*After having been sent back to the Commission the Rheinwald case was again subjected to appeal and at last reached the Court of Appeals, which without opinion on March 19, 1918, approved of the denial of compensation to Rheinwald's dependents, not on authority of its own affirmation of the Appellate Division's order reversing the award in the Bargey case, but on the original ground of denial by the Workmen's Compensation Commission, namely, that Rheinwald was an independent contractor.

its opinion as much as said that had Gleisner been injured while doing carpentry work he would have been entitled to compensation. Structural carpentry is covered by Workmen's Compensation Law, § 2, gr. 42. Though Gleisner like Larsen was a regular employee while Bargey was a temporary or casual employee, consistency with the Bargey opinion might require the Gleisner opinion to have held that Gross & Herbener, the owners of the apartment house, were not in the carpentry business for pecuniary gain or profit, though undoubtedly letting the apartment house for pecuniary gain or profit. Something of the failure of the Bargey and Gleisner opinions to harmonize is indicated in *Adler v. Thomashefsky Theatre Co.*, decided by the State Industrial Commission, July 11, 1916, about a month after the Court of Appeals denied award to Bargey. Both opinions were referred to in the Adler ruling. The operation of a theater was not a hazardous employment. Commissioner Lyon, who wrote the ruling, was of opinion that the Bargey decision forbade an award to Adler: S. D. R., vol. 9, p. 348. The non-pecuniary-gain doctrine figured in three Appellate Division decisions handed down on the same day, November 15, 1916. The accidents in all three of these had occurred before the amendment of L. 1916, ch. 622, redefining an employee. In two of them, *Schmidt v. Berger*, S. D. R., vol. 7, p. 432, February 10, 1916; 175 App. Div. 957, and *Bredow v. Naughton & Co.*, S. D. R., vol. 8, p. 437, April 6, 1916; 175 App. Div. 958, the court held without opinion that an apartment house superintendent hurt while planing the top of a door and a handy man for a real estate corporation hurt while fitting a pane of glass into a partition were entitled to compensation; in the other, *Coleman v. Bartholomew*, 175 App. Div. 122, the text of which appears below, page 193, the court held with opinion that a casual employee hurt while repairing a farm barn was not entitled to compensation. From the Schmidt decision Justices Kellogg and Howard dissented on authority of the Bargey case.* In the Coleman opinion the Bargey case was cited as governing and the Schmidt case was referred to. In the Bredow case the decision was unanimous.

On authority of the Court of Appeals' decision in the Bargey

* For reversal of the Appellate Division's order by the Court of Appeals, see below, page 174.

case the award in *Lupke v. Simon* was vacated by the State Industrial Commission, November 22, 1916 (S. D. R., vol. 11, p. 617).

In *Glatzl v. Stumpp*, decided by the Court of Appeals, January 30, 1917, an important *dictum* held that an employer engaged in a non-hazardous employment for pecuniary gain was responsible for compensation to his employee injured in a hazardous employment though the accident might have happened before the redefinition of an employee by L. 1916, ch. 622. This decision is interesting also for Judge Pound's dissenting remarks and interpretation of the effect of the amendment redefining an employee. The full text of the majority and minority opinions is as follows:

GLATZL V. STUMPP, 220 N. Y. 71, Jan. 30, 1917.

CUDDEBACK, J.: The State Industrial Commission made an award in this case to the widow and minor children of Franz Glatzl, deceased, under the Workmen's Compensation Law, and the determination of the Commission has been unanimously affirmed by the court at the Appellate Division.

The following are substantially the findings of the Commission on the facts of the case: On November 8, 1915, Franz Glatzl was employed by G. E. M. Stumpp who was engaged in the florist business. The duties of Glatzl were to drive a delivery wagon and if necessary to assist in delivering goods, such assistance to be rendered to a man who went on the wagon for the purpose of making deliveries. On the date mentioned Glatzl drove his employer's wagon to No. 4 East Sixty-fourth street in the borough of Manhattan, where some flowers were to be delivered. Arriving at that place the other man on the wagon delivered the flowers, and Glatzl and the other man proceeded to adjust a window box in the house. For this purpose Glatzl got up on a ladder in front of the house, and while working there he lost his balance and fell into the front areaway, and the window box fell on top of him, causing a compound fracture of left thumb and lacerations of the same. On or about November 17th the wound showed evidence of infection. On November 24th Glatzl died from tetanus, which had developed as a result of his injury.

The Workmen's Compensation Law in its enumeration of hazardous employments covered by the act mentions the following: "The operation otherwise than on tracks, on streets, highways or elsewhere, of cars, trucks, wagons or other vehicles." It has been said that the employer of Franz Glatzl was engaged in carrying on the business of a florist, which is not a hazardous employment under the act, and that Glatzl, his employee, was not, therefore, protected in any degree by the statute. We do not accept that view. It is true that the business of florist is not mentioned in the act as a hazardous employment, but in this case, as incident to his business, the florist undertook to deliver to his customers the flowers which they purchased, and in carrying on that branch of the business he operated a wagon on the streets and highways of the city. That was within the words of the statute a hazardous employment, and Glatzl was hired to drive the wagon. If the

injury which he received had arisen out of and in the course of that employment it would seem plain that a case under the statute was made out. (*Matter of Larsen v. Paine Drug Co.*, 218 N. Y. 252.) Then the widow and children would be entitled to the award, but Glatzl was not engaged in such service when he fell.

I can observe no connection between the driving of the delivery wagon by Glatzl and his fall from the ladder which resulted in his death. In order to charge the employer with liability under the Workmen's Compensation Law the court must be able to see that the hazards which accompanied the duties of the employee have turned against him to his loss and damage. If there is only a casual or remote connection between the hazard of the employment and the loss — if the one does not flow naturally from the other — the liability is not established. It was not because Glatzl was the driver of the delivery wagon that he fell from the ladder. Any other person adjusting the window box might have been injured in the same manner. The case of *Matter of Costello v. Taylor* (217 N. Y. 179), on which the attorney-general relies, does not authorize a recovery here.

The industrial commission found in detail the circumstances of the accident in which Glatzl was injured, and also found in substance that the work which he was doing when injured was incidental to driving the delivery wagon. The determination of the Appellate Division affirming the award of the commission was unanimous, and it has been said that the unanimous affirmation prevents this court from reviewing the question whether the work of the decedent when injured was or was not incidental to the operation of the delivery wagon. That was simply a conclusion drawn from the facts found in detail, about which there was no dispute at the Appellate Division and about which there is no dispute in this court. We have, therefore, power to review the determination made at the Appellate Division. (*Otten v. Manhattan Ry. Co.*, 150 N. Y. 395.)

The order of the Appellate Division should be reversed and the determination of the State Industrial Commission annulled, with costs against the State Industrial Commission.

POUND, J. (concurring in the result): As it is clear that Glatzl was not engaged in the occupation of a driver or in doing anything incidental thereto when he was injured, the decision of the question whether he was protected in any degree by the Workmen's Compensation Law is unnecessary to the proper disposition of the case; but I am decidedly of the opinion that under the Workmen's Compensation Law (Laws 1914, ch. 41) as it was at the time of the accident unless the employer was engaged in an enumerated hazardous trade, business or occupation his employees did not have the benefit of the law.

Compensation was provided for injuries sustained or death incurred "by employees engaged in the following (forty-two enumerated) hazardous employments." (Section 2.) But "employee" meant "a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same." (Section 3, subd. 4.) "Employer" meant a person " * * * employing workmen in hazardous employments." (Section 3, subd. 3.) "Employment" included "employment only in a trade, business or occupation carried on by the employer for pecuniary gain." (Section 3, subd. 5.)

If employment means employment only in a hazardous trade, business or occupation *carried on by the employer*, the test of liability for compensation is the trade, business or occupation of the employer. The florist's business is not classified as hazardous; therefore his employees were not protected. Employment as a driver by a florist is not employment in the occupation of operating wagons or other vehicles for that is not found to be the florist's occupation.

If the business of the employer in certain cases may be such that it may be said that he operates wagons as a part thereof, although his principal business is non-hazardous, that does not help Glatzl for the findings are that his employer was engaged in the florist's business and there is no finding that the employer was engaged in the occupation of operating wagons.

While I think that the law originally did not contemplate the occupation of the employee as a test, it does so now, for by Laws of 1916, ch. 622, "employee" is defined to mean *either a person engaged in one of the occupations specified or who is in the service of an employer whose principal business is that of carrying on a specified hazardous employment*.

Chase, Collin, Hogan and Cardozo, JJ., concur with Cuddeback, J.; Hiscock, Ch. J., and Pound, J., concur in result; Pound, J., in memorandum. Order reversed, etc.

On February 21, 1917, the State Industrial Commission awarded compensation to a carpenter injured while casually employed in extending the shelves of a retail merchant's store: *Geller v. Republic Novelty Works*, S. D. R., vol. 12, p. 582. This accident had occurred June 20, 1916, twenty days after the amendment of L. 1916, ch. 622, redefining an employee, went into effect. In its ruling the Commission cited the majority and minority opinions of the Court of Appeals in the Glatzl case, appearing above, and held relative to pecuniary gain that there was a distinction between Geller's work and Bargey's work "in that the very thing which the injured workman was doing in the present case had reference to better facilities for carrying on the general business of the employer, whereas in the Bargey case it was held that Bargey was constructing a partition which had nothing to do with the macaroni business." *

Two weeks later, March 7, 1917, the Commission awarded compensation to a regularly employed carpenter of a department store who had been injured before L. 1916, ch. 622, became effective: *Caine v. Greenhut & Co.*, S. D. R., vol. 13, p. 515.

On March 22, 1917, the Appellate Division reversed an award to the fireman and handy man of a firm that let out floor space in

* For reversal of the Commission's award by the Appellate Division, see below, page 180.

its building. The fireman and handy man had been injured after L. 1916, ch. 622, became effective by collapse of a step-ladder while he was taking down some partitions: *Stavorako v. Cassidy's, Ltd.*, S. D. R., vol. 11, p. 602, Nov. 16, 1916; 177 App. Div. 941, March 22, 1917.

On April 11, 1917, in awarding compensation to a regularly employed handy man hurt while doing some plumbing for an employer whose business was buying, repairing and selling dilapidated houses for profit, Commissioner Lyon said in part:

CUTTER v. SNAVLIN, Bul., vol. 2, p. 152, Apr. 11, 1917, *in part*.

The accident in the present case is alleged to have occurred since the first of June, 1916, at which time the amendment to the Compensation Law went into effect, which the Commission has held largely did away with the effect of the decision of the court in the Bargey case.

The doubts concerning the coverage of an employee injured in a hazardous employment in the employ of an employer engaged in a non-hazardous employment, such as Glatzl, driver for a florist, Caine, carpenter for a department store, and others above, were resolved by the decision of the Court of Appeals, May 1, 1917, in *Mulford v. Pettit & Sons*. Mulford was killed while riding a motorcycle as collector and salesman for a firm dealing in coal, feed and lumber. The accident happened July 31, 1915, almost a year before L. 1916, ch. 622, became effective. The Appellate Division sustained an award in the case without opinion: 175 App. Div. 958, November 15, 1916. For the Court of Appeals, Justice Pound, author of the minority opinion in the Glatzl case, wrote the majority opinion sustaining the Commission's award to Mulford's beneficiaries. His opinion was unanimously supported except that Judge Hiscock did not vote. He suggested that the prevailing opinion in the Bargey case did not "seem wholly consistent with the reasoning in the prevailing opinion in the Glatzl case." He held that "'pecuniary gain,' as used in the statute merely means that the employer must be carrying on a trade, business or occupation for gain in order to come within the act." The decision in full is as follows:

MULFORD v. PETTIT & SONS, 220 N. Y. 540, May 1, 1917.

POUND, J.: Deceased was a salesman for A. S. Pettit & Sons, Inc., a corporation engaged in the business of dealing in lumber, coal and feed, a non-hazardous occupation not covered by the Workmen's Compensation Law. His

employer furnished him with a motorcycle on which to ride about the country for the purpose of taking orders and collecting accounts. While he was engaged in this occupation he was struck by a railroad train and killed. An award has been made to his widow and minor child for compensation under the provisions of group 41 of section 2 of the law (Cons. Laws, ch. 67), which reads as follows:

"The operation, otherwise than on tracks, on streets, highways, or elsewhere of cars, trucks, wagons or other vehicles, and rollers and engines, propelled by steam, gas, gasoline, electric, mechanical or other power or drawn by horses or mules."

Deceased was engaged in the operation of a vehicle propelled by gasoline. (*Matter of Wilson v. Dorfinger & Sons*, 218 N. Y. 84, 87.) The operation of such vehicle is hazardous, and if that is the only consideration deceased's dependents are protected by the provisions of the Workmen's Compensation Law, whether the motorcycle was used to carry goods or to carry the salesman who took the orders for the goods. In *Matter of Glatzl v. Stumpp* (220 N. Y. 71) I stated in a memorandum on page 75 my views of the application of the statute where an employer's business is not classified as hazardous, although the employee's occupation is hazardous. The prevailing opinion in that case is to the effect that driving a delivery wagon for a florist is a hazardous employment and that if injuries arise out of and in the course of that employment a case is made out although the business of a florist is not a hazardous employment under the act. If this rule, which, however, is *dictum* in the *Glatzl* case, is correct, this award should be upheld. In the *Bargey* case there is a suggestion (218 N. Y. 410, at p. 413) that the test is whether the employer is carrying on a hazardous business for profit which may seem not wholly consistent with the reasoning in the prevailing opinion in the *Glatzl* case. Of course, the employer in this case was not in the business of operating a motorcycle for gain. Its business was not the operation of motorcycles in any sense. I think, however, that "pecuniary gain," as used in the statute, merely means that the employer must be carrying on a trade, business or occupation for gain in order to come within the act. If, in that connection, the purpose of using the motorcycle is profit, that is enough. (*Herbert v. Shanley Co.*, 242 U. S. 591.) The deceased in this case operated the motorcycle as an incident to his employer's business. In the *Bargey* case we held that deceased, a carpenter making repairs on a building used in the manufacture of macaroni, was not covered by the act because the employer's occupation was the preparation of macaroni and that the employer was not engaged therein. The question presented in this case was not considered in the opinion, although it was said that the macaroni company was not engaged in the repair of buildings for pecuniary gain.

The order should be affirmed, with costs. Chase, Hogan, Cardozo, McLaughlin and Andrews, JJ., concur; Hiscock, Ch. J., not voting. Order affirmed.

The decision of the Appellate Division reversing the award in *McNally v. Diamond Mills Paper Co.*, the text of which appears above, page 101, was handed down May 2, 1917. The accident had occurred December 18, 1915. This case was similar to the

Bargey case in that the employments of both the employer and the employee were hazardous and in that their relation was casual. Bargey was putting in a partition; McNally was installing an engine.

On May 8, 1917, one week after its decision in the Mulford case, the Court of Appeals reversed the Appellate Division's order which had sustained without opinion the Commission's award in *Schmidt v. Berger*, referred to above, page 168. The Mulford and Schmidt cases are alike in that both employers were engaged in non-hazardous employments. Mulford's employer was a retailer of lumber, feed and coal; Schmidt's employer was landlord of an apartment house. They are alike also in that both Mulford and Schmidt were regular employees. As noted, a minority of the Appellate Division in the Schmidt case voted for reversal of the award on authority of Bargey. In its opinion the Court of Appeals does not mention this minority action. It seems to base its reversal solely upon want of coverage, for the reason that an isolated act in planing wood cannot be included in the words "structural carpentry" or "construction, repair and demolition of buildings," though it refers under parenthesis to Bargey. The text is as follows:

SCHMIDT V. BERGER, 221 N. Y. 26, May 8, 1917.

CHASE, J.: The appellant Berger is the owner of an apartment house at 108-10 West One Hundred and Eleventh street, New York city. The claimant was employed by her as a superintendent of the building and incidental to that employment he made ordinary repairs on such building. While so employed he found that a basement door "bound at the top" and did not open or shut freely. He mounted a stepladder and while standing thereon commenced with a carpenter's tool called a "plane" to cut away a part of the door and thus prevent such binding, and while so engaged fell off the stepladder and broke his arm. The industrial commission gave him an award and the Appellate Division of the Supreme Court has affirmed the same, although two of the justices did not concur in the decision.

The employment of claimant is conceded, and it is also conceded that the injury was accidental, and arose out of and in the course of his employment. He was not, however, engaged in a hazardous employment within the meaning of the Workmen's Compensation Law, carried on by the defendant Berger for pecuniary gain, at least he was not so employed at the time he was injured. (*Matter of Sheridan v. Groll Construction Co.*, 218 N. Y. 633.)

It is urged in behalf of the claimant that he was engaged in a hazardous employment enumerated in group 42 of section 2 of the Workmen's Compensation Law. If so, the work that he was engaged in at the time of the accident must be included in the words "structural carpentry" or "construction, repair and demolition of buildings." The words quoted when read and

construed in connection with the other parts of said group 42 do not include the work being done by the claimants as stated.

The words "structural carpentry" must be construed together and cannot be separated. They do not include an isolated act in planing wood. (See *Matter of Heitz v. Ruppert*, 218 N. Y. 148, 151.) Neither was the act of the claimant in planing the top of the door included within the words "construction, repair and demolition of buildings." (*Matter of Bargey v. Massaro Macaroni Co.*, 218 N. Y. 410, 413.)

The order of the Appellate Division should be reversed and the claim dismissed, with costs in this court and in the Appellate Division to the appellants against the State Industrial Commission.

Hiscock, Ch. J., Hogan, Cardozo, Pound, McLaughlin and Andrews, JJ., concur. Order reversed, etc.

According to opinion reproduced above, p. 105, the Appellate Division in *Dose v. Moehle Lithographic Co.*, July 2, 1917, held that the Bargey decision continued in force notwithstanding the amendment of L. 1916, ch. 622, redefining the term employee. Next day after this decision, July 3, 1917, the same court, without opinion, reversed an award upon authority of Bargey, McNally and similar opinions in the case of a carpenter injured January 29, 1915, while helping to rebuild a hotel that had been partly destroyed by fire: *Pelton v. Johnson*, S. D. R., vol. 12, p. 551, January 22, 1917; 179 App. Div. 949, July 3, 1917, and upon authority of the Dose opinion in the case of a painter injured January 6, 1917, while painting an extension to a slaughter house: *Bogart v. Lehman*, Case No. 3182, February 28, 1917; 179 App. Div. 949, July 3, 1917. In the Bogart case the Attorney-General pleaded the redefinition of an employee by L. 1916, ch. 622.

The Bargey opinion figured, September 25, 1917, in the reversal by the Appellate Division of awards to the beneficiaries of two men killed by the explosion of a fly wheel: *Bacon v. McCarthy & Townsend*, S. D. R., vol. 11, p. 638, December 27, 1916; 179 App. Div. 965, September 25, 1917; and *Tillburg v. McCarthy & Townend*, S. D. R., vol. 12, p. 531, January 8, 1917; 179 App. Div. 593, September 25, 1917. The court based the Bacon reversal without opinion upon the Tillburg reversal. The opinion in the Tillburg case is as follows:

TILLBURG v. MCCARTHY & TOWNSEND, 179 App. Div. 593, Sept. 25, 1917.

WOODWARD, J.: McCarthy & Townsend were engaged in the production of oil and gas on the 7th day of November, 1915, at or near Allentown. On

that day one Bacon, the man employed by McCarthy & Townsend to pump one of their wells, and whose employment only required a small part of his time, for which he was paid seven dollars per month, found Frank Tillburg at the village post office and requested Tillburg to help him. Tillburg said he would, and the two men started in the direction of the McCarthy & Townsend oil lease. Tillburg appears to have had no regular occupation, but picked up odd jobs about the village, and sometimes helped about oil leases. Shortly after the two men disappeared in the direction of the lease an explosion was heard, and people running to the scene found both Bacon and Tillburg dead; the fly wheel of the gasoline engine, used in pumping the oil well, had exploded, producing the above result. It appears that the purpose of this incidental employment of Tillburg was to assist Bacon in putting a fly wheel upon the engine, and it is supposed that after the fly wheel was in place the engine was started up and that the explosion occurred by reason of the displacement of a bolt.

We think there is no merit in the contention of the insurance carrier that Tillburg was not in the employ of the owners of the lease; Bacon appears to have had authority to hire such incidental help as might be necessary in the operation of the lease. The difficulty we find in approving of this award is the fact that at the time of this accident, in the year 1915, the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) did not classify the operation of oil and gas wells as hazardous; the amendment of the act, by chapter 622 of the Laws of 1916, to include such operation in group 18 of section 2, serves to emphasize the fact that McCarthy & Townsend, in 1915, were not conducting a hazardous business under the statute. It is suggested, however, that at that time group 22 of section 2 included "operation and repair of stationary engines and boilers, not included in other groups," and that the purpose of Tillburg's employment was the repair of the gas engine upon this lease. The suggestion would not be without force, except for the fact that McCarthy & Townsend were not engaged in the operation or repair of stationary engines for pecuniary gain; this repair of the gas engine was incident to an occupation which the law did not at that time regard as hazardous. Tillburg was engaged by McCarthy & Townsend, and because they were not engaged in a hazardous occupation, as defined by the statute, their employee could not come within the definition of an employee as used in the Workmen's Compensation Law. An employee under that act "means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer," and a hazardous employment means "a work or occupation described in section two of this chapter." (Workmen's Compensation Law, § 3.) In *Matter of Bargey v. Massaro Macaroni Co.* (218 N. Y. 410) this question appears to have been finally disposed of, and it is fatal to this award.

The award should be reversed. All concurred, except Lyon and Cochrane, JJ., who dissented. Award reversed and claim dismissed.

On October 23, 1917, came the Court of Appeals' decision reversing the Appellate Division's order in *Dose v. Moehle Lithographic Co.*, the text of which appears above, page 107. The

decision seems to hold in effect that the amendment to L. 1916, ch. 622, redefining the term employee, nullifies the Bargey opinion and, as concerns pecuniary gain, assimilates casual employees like Bargey and McNally to the same status with regular employees like Larsen and Mulford.

On November 14, 1917, the Appellate Division handed down decisions affirming awards in four cases that had been argued relative to pecuniary gain. It affirmed unanimously without opinion the awards in the cases of two regularly employed carpenters, the one working for an apartment store, *Caine v. Greenhut & Co.*, S. D. R., vol. 13, p. 515, Bul., vol. 2, p. 125, March 7, 1917, 181 App. Div. 907, November 14, 1917, noted above, page 171, and the other for a nursery firm, *Savinsky v. Hicks & Sons*, Case No. 32173, April 6, 1917; 181 App. Div. 910, November 14, 1917; also in the case of a regularly employed salesman for a wholesale footwear firm who had been killed while operating his own automobile in his employer's service, *Gurnett v. Ross Co.*, S. D. R., vol. 13, p. 535, Bul., vol. 2, pp. 41, 126, March 14, 1917; 181 App. Div. 910, November 14, 1917. The Appellate Division affirmed unanimously with opinion an award in the case of the regularly employed janitor of an apartment house who fell to the street while cleaning a window, citing as the bases of its action the opinion in *Mulford v. Pettit & Sons* and the amendment redefining an employee. The text of this decision is as follows:

ZUBRADT V. SHEPARD ESTATE, 180 App. Div. 20, Nov. 14, 1917.

LYON, J.: The employer estate was engaged in operating apartment houses in the city of New York for pecuniary gain which was a non-hazardous occupation. The claimant was the janitor. One of his duties as such was to clean the windows. This employment was classified by the amendment of 1916 (chap. 622, amending section 2, group 22), which went into effect June first of that year, as hazardous. In November, 1916, while engaged in cleaning a window he fell to the street, sustaining serious injuries. At the hearings before the State Industrial Commission objection was made by the insurer to the making of an award upon the ground that the employer's business was not one classified as hazardous under the Workmen's Compensation Law. The Commission properly disregarded the objection and made the award. It was held in the case of *Matter of Mulford v. Pettit & Sons* (220 N. Y. 540), as to an accidental injury happening in July, 1915, that an employee while engaged in a hazardous employment which was incidental to the non-hazardous business of his employer was entitled to compensation. By the amendment of subdivision 4 of section 3 of the Workmen's Compensation Law by chapter 622 of the Laws of 1916, the doubt which had

existed previously to the *Mulford* decision, as to the proper construction of the subdivision, under facts similar to those presented by the case at bar, was removed, the amendment providing "'Employee' means a person engaged in one of the occupations enumerated in section two."

Exception was also taken by the insurer to the amount of the award of seven dollars and seventy-nine cents per week. While owing to the nature of claimant's compensation for services some difference of opinion may exist as to the proper method of computation, we are satisfied that the award does no injustice to the appellant, and is practically correct.

The award should be affirmed. Award unanimously affirmed.

The point of pecuniary gain does not appear to have been raised in connection with awards to beneficiaries of salesmen affirmed by the Appellate Division at about the same time with its affirmation of the Gurnett award: *Benjamin v. Rosenberg Bros.*, S. D. R., vol. 13, p. 525; Bul., vol. 2, pp. 126, 147, March 13, 1917; 180 App. Div. 234, November 28, 1917; *Remington v. Briggs Bros. & Co.*, Bul., vol. 2, p. 164, May 14, 1917; 179 App. Div. 966, September 27, 1917.

Two weeks after the Zubradt decision, November 28, 1917, the Appellate Division, two justices dissenting, reversed an award to a workman casually called in to plaster an apartment house bathroom. The ruling majority cited the decision of the Court of Appeals in *Schmidt v. Berger*, above, page 174, as governing and took no notice of the decision of the Court of Appeals in *Dose v. Moehle Lithographic Co.*, above, page 107. The dissenting justices cited the decisions of the Court of Appeals in the *Mulford* and *Dose* cases as governing. The majority and minority opinions are as follows:

SOLOMON v. BONIS, 181 App. Div. 672, Nov. 28, 1917.*

KELLOGG, P. J.: The findings show that the employer was the owner and operator of an apartment house. "There was some plastering to be done in one of the bathrooms in said apartment house and Bonis, the employer, sent for Solomon to come to do the plastering at 75 cents per hour, and directed him to purchase whatever material was needed and to pay for the same, and agreed to reimburse him for such outlay. The total payment made by Bonis to Solomon in respect to this work was \$3. It was customary for Bonis to send for Solomon whenever he had any plastering work to be done and to pay Solomon on the above mentioned basis." While plastering Solomon fell and received the injury for which compensation has been made. *Matter of Bargey v. Massaro Macaroni Co.* (170 A. D. 103; 218 N. Y. 410), seems to settle this question in favor of the appellants. It is true that the *Bargey* case was commented upon and distinguished in

*Affirmed by Court of Appeals without opinion, 223 N. Y. Rep. —, May 14, 1918.

Matter of Mulford v. Pettit & Sons (220 N. Y. 540). In that case it was only decided that a salesman, in a non-hazardous employment, who uses a motorcycle in making his trips, and is injured thereby, is operating a vehicle within group 41 of section 2 of the Workmen's Compensation Law. The *Mulford* case in no way limits or qualifies the *Bargey* case. This is made plain by *Matter of Schmidt v. Berger* (221 N. Y. 26), in which the *Bargey* case is cited with approval, and which holds that the superintendent of an apartment house who made ordinary repairs upon it, while mounted on a stepladder engaged in cutting away a part of a door to prevent "binding," was not in a hazardous employment. That case has much force here, as managing an apartment house was not, at the time of the accident, a hazardous employment. (See also *Matter of Kammer v. Hawk*, 221 N. Y. 378.)

After the decision of the *Bargey* case subdivision 5 of section 3 of the Workmen's Compensation Law defining "employment" was amended. When the *Bargey* case arose subdivision 5 of section 3 defined "employment" as including "employment only in a trade, business or occupation carried on by the employer for pecuniary gain. * * *" The amendment of 1917 (Laws of 1917, chap. 705) added after the word "gain", "or in connection therewith." The effect of that amendment is not before us: it may be that it qualifies the *Bargey* case so that under the facts in that case, the employer being engaged in a hazardous business, carpenters at work in the factory would be deemed within the protection of the Workmen's Compensation Law. That, however, we need not consider. Aside from the effect of that amendment, and the amendment of subdivision 4 of the section, the *Bargey* case is in full force, and that and the *Schmidt* case are decisive here.

The award should therefore be reversed and the claim dismissed. All concurred, except LYON, J., dissenting, with opinion, in which WOODWARD, J., concurred.

LYON, J. (dissenting): The question presented by this appeal is whether a person injured October 8, 1916, while engaged in a hazardous employment incidental to a non-hazardous business carried on by his employer for pecuniary gain, is covered by the Workmen's Compensation Law as amended by chapter 622 of the laws of 1916. The claimant was a plasterer and was engaged in the hazardous occupation of repairing the plaster in one of the bathrooms of the employer's apartment house. These repairs were incidental, and in fact indispensable to conducting the non-hazardous business of operating an apartment house. The case thus falls within the decision of *Mulford v. Pettit* (220 N. Y. 540). The cases of *Matter of Bargey v. Massaro Macaroni Co.* (218 N. Y. 410); *Matter of Schmidt v. Berger*, (221 id. 26) and *Matter of Kammer v. Hawk* (221 id. 378) related to accidents occurring prior to June 1, 1916, the date when the above mentioned amendments took effect. A partial effect of such amendment is pointed out in the recent case of *Dose v. Moehle Lithographic Company* (221 N. Y. 401). (See also concurring memorandum per Pound, J., in *Glatzi v. Stumpp*, 220 N. Y. 71-76.) The award should be affirmed. WOODWARD, J., concurred. Award reversed and claim dismissed.

Upon December 21, 1917, the Court of Appeals reversed the order of the Appellate Division in the Bogart case, noticed above,

page 175, and directed an affirmation of the Commission's award.

Upon December 28, 1917, the Appellate Division, one justice dissenting, reversed the award in the Geller case, noticed above, page 171, upon authority of Bargey, Schmidt and other decisions cited in the text of its brief opinion, which is as follows:

GELLER v. REPUBLIC NOVELTY WORKS, 180 App. Div. 762, Dec. 28, 1917.

KELLOGG, P. J.: The employer was not carrying on a hazardous business. It became necessary to have additional shelving in its store. The work would require an employee about three days. The injured employee was a carpenter who worked by the hour for any one requiring his services. He had worked upon the shelving for two days and was at work upon the last shelf when, on June 25, 1916, he fell from a stepladder and was injured. If we assume that he was engaged in structural carpentry at the time of the injury, it does not follow that the employer was carrying on such hazardous employment. A casual engagement of a carpenter by the hour to repair a store or office does not make the proprietor of the store or office one engaged in structural carpentry. (*Matter of Bargey v. Massaro Macaroni Co.*, 170 App. Div. 103; *affd.*, 218 N. Y. 410; *Coleman v. Bartholomew*, 175 App. Div. 122; *Matter of Schmidt v. Berger*, 221 N. Y. 26; *Matter of Kammer v. Hawk*, *Id.* 378.) We conclude that the employer is not liable for an accident happening to an employee in such casual service. The award should be reversed and the claim dismissed. All concurred, except LYON, J., dissenting. Award reversed and claim dismissed.

Upon March 6, 1918, the Appellate Division, unanimously and without opinion, affirmed awards in the cases of a regular employee of a retail furniture dealer and repairer who worked in his employer's repair shop and who fell from a window of his employer's establishment while he was painting its windows and window sashes, *Eckhard v. Flint & Horner Co.*, Death Case, No. 50101, July 26, 1917; — App. Div. —, March 6, 1918; and of a regular employee of a shoe company who worked in its painting department and who fell from a ladder while painting a boot upon a sign in front of one of its retail stores, *Kohlhaus v. Regal Shoe Co.*, Claim No. 56218, November 16, 1917; — App. Div. —, March 6, 1918.

Upon March 12, 1918, the Court of Appeals reversed the order of the Appellate Division and affirmed the Commission's award in *McNally v. Diamond Mills Paper Co.*, the case of a casual employee called in to help install machinery. The texts of the decisions in the McNally case are presented above, pages 101-104.

In its McNally opinion the Court of Appeals says that the Bargey case has been misread. The accident to McNally, like the accident to Bargey, occurred under the law as it stood prior to the amendment of L. 1916, ch. 622, redefining the term employee. The Bargey precedent appears to be left without a leg to stand upon.

This topic should not be concluded without calling attention to the amendment of L. 1917, ch. 705, to Workmen's Compensation Law, section 3, subd. 13, which has provided that "‘manufacture,’ ‘construction,’ ‘operation’ and ‘installation’ shall include * * * all work done in connection with the repair of plants, buildings, grounds and approaches of all places where any of the hazardous employments are being carried on, operated or conducted."

2. *Social clubs, etc.*—Organizations not primarily created or operated for pecuniary gain may nevertheless bring themselves within the compensation law's scope by engaging in profit-yielding enterprises. A country club selling timber from its lands or an automobile association maintaining a garage and repair shop may not, as a membership corporation, plead *ultra vires* as exemption from liability to compensate its injured employees. The Industrial Commission and the courts have said that such liability depends upon the scale of operation and the continuity of the enterprise. It is a question of degree, says the Court of Appeals. Illustrative cases are *Kaempfer v. Automobile Club of America* and *Uhl v. Hartwood Club*.

In the ruling in the Kaempfer case Commissioner Lyon quotes at length documentary evidence relative to the Automobile Club of America and concludes:

KAEMPFER V. AUTOMOBILE CLUB OF AMERICA, S. D. R., vol. 10, p. 591; Bul., vol. 2, p. 10, Sept. 15, 1916, *in part*.

This club, then, in effect, operates a garage and machine shop precisely as any garage or machine shop would be conducted by a private individual for personal gain. It buys and sells large quantities of material at a profit; it does an immense business in the repair of automobiles, charging a profit on the materials used, hiring a large number of men for one price and charging the owner of the automobile a larger price for the men's services, out of all of which it is paying off some obligation to the club and accumulating a very considerable profit throughout the year.

It is undisputed that the claimant was injured in the regular course of his employment in this machine shop and that he worked under precisely the same hazard as other workmen in similar machine shops carried on by private

individuals. There would, therefore, seem to be every reason for holding that the claimant is entitled to compensation for his injury unless the statute forbids it. It is quite evident that the question is not without its difficulties. No doubt the owner of an automobile might have a private repair shop of his own, where he or his own chauffeur could make repairs to his own car, and such repair shop would not be held to come within the Compensation Law, owing to the provision relative to pecuniary gain. It is probably true that two or more owners of cars might operate a private garage in the same way, but when it comes to a proposition of a very large number of such owners, establishing a regular machine shop, hiring men for no other purpose than repairs, charging a profit on the men's labor, as well as upon the material used, and using that profit to pay off the underlying expense of establishing a machine shop itself, the proposition seems to come at least within the spirit of the law, if it does not within the letter.

The fact that the Automobile Club of America is formed under a charter which does not give it the right to operate for pecuniary gain, to my mind, is not controlling if it be found, as I think, it must be, that it is in fact operating a portion of its plant for pecuniary gain.

The *Uhl* case was heard by the Commission July 11, 1916, and reheard September 29, 1916: S. D. R., vol. 9, p. 360; Bul., vol. 2, p. 27. It was carried to the Appellate Division and the Court of Appeals. Both courts affirmed the award. The full texts of the majority and minority opinions in the Appellate Division and memorandum in the Court of Appeals are as follows:

UHL v. HARTWOOD CLUB, 177 App. Div. 41, March 7, 1917..

LYON, J.: The employer, the Hartwood Club, was a membership corporation organized in 1893 to acquire and maintain tracts of land, ponds and streams of water within this State as a fishing and hunting preserve, and as a pleasure resort for its members; to sell and convey to its members suitable sites for the erection of cottages, with suitable outbuildings; to erect and maintain a clubhouse and other suitable buildings in order to fit the preserve for the purposes of residence, recreation and social enjoyment, "and to do all things necessary for and incidental to the purposes above set forth." The constitution of the club provided for the sale and transfer of membership shares; for the forfeiture of membership rights; for the sale at public auction of the real and personal property of a forfeiting member, and for declaring dividends from any surplus revenues of the club.

The club became the owner of about 6,000 acres of land situated within the counties of Orange and Sullivan, in this State, a large part of which was covered with timber. From time to time the club sold from its woodland standing trees which were manufactured into lumber, and got out and sold railroad ties and telegraph poles. Trees also and down timber were cut by employees of the club and sold by it to the occupants of the cottages for firewood at a profit of about ten per cent above the cost of cutting. Cutting trees on this large tract was carried on a good part of the year, the club keeping two or three men at work at it most of the time. The receipts from

the sales of firewood and timber, ties and telegraph poles went into the treasury of the club, and were expended in the upkeep of the property, and in rendering unnecessary or in reducing assessments upon the members for the general maintenance of the club property. The profits and other receipts from such sales might also under the constitution of the club be distributed to the members of the club as dividends.

In January, 1916, the husband of the claimant was an employee of the club as a general utility man and had been such for about four years. While engaged with two other club employees in cutting down trees he was killed by a falling tree which had been felled by one of his fellow-workmen. The purpose for which the trees then being cut were to be used was not shown. The secretary of the club testified that it was impossible to tell the destination of any particular tree; that the trees were both loaded on wagons and cut into cordwood, "and they order up so many cars, and nobody can tell where any particular tree went to." Other evidence also indicates that some of the shipments of logs and cordwood were made by rail.

The insurance policy issued by the carrier stated the business of the employer as follows: "Country club, club-house and other buildings, grounds, hunting, fishing and pleasure resort, including ice harvesting, forestry and logging operations." Forestry is defined by Webster as "The art of forming or of cultivating forests; the management of growing timber." It would appear from the evidence that cutting timber was at times necessary to keep the woods in shape. The maintenance of the property of the club was within the declared purposes of the organization. Perhaps these trees were "going back" and good management required that they should be cut and sold while yet of value. The presumption is that the claim comes within the provisions of the Workmen's Compensation Law. (See Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 21.)

The State Industrial Commission found that on the day the deceased received his injuries he was employed as a lumberman by the Hartwood Club, a domestic corporation engaged in the operation of a country club, and in connection therewith in the business of ice harvesting, forestry and logging at Hartwood, N. Y., and that the club conducted such business for pecuniary gain. The Commission thereupon made an award in favor of the widow and child of the deceased. From such award this appeal has been taken.

The two grounds of appeal are: *First*, that deceased was not engaged in a hazardous employment under the Workmen's Compensation Law, and, *second*, that the work was not being carried on for pecuniary gain. The point is also made, which to an extent embraces the other two, that a membership corporation could not be an employer and the deceased an employee within the provisions of the Workmen's Compensation Law. As to the first two grounds of appeal, the appellants base their right to a reversal of the award upon the cases of *Matter of Bargey v. Massaro Macaroni Co.* (218 N. Y. 410); *Matter of De La Gardelle v. Hampton Co.* (167 App. Div. 617), and *Matter of Mihm v. Hussey* (169 id. 742). In neither the *Bargey* nor *Mihm* case was the occupation in which the employee was engaged at the time of sustaining the injury one carried on by his employer for pecuniary gain. In the *De La Gardelle* case the employment was not one designated as hazardous under the Workmen's Compensation Law. These authorities are, therefore, not applicable.

As to the last ground urged for reversal, while the Hartwood Club was a membership corporation, and hence not created for business purposes, its right as a corporation or association to become an employer, and of the deceased to become an employee in a hazardous employment, is recognized by the Workmen's Compensation Law (§ 3, subds. 3 and 4).^{*} While by the Membership Corporations Law (§ 40) a membership corporation may be created "for any lawful purpose, except a purpose for which a corporation may be created under any other article of this chapter, or any other general law than this chapter," I cannot believe that any membership corporation which sees fit to engage in a hazardous business, carried on by it for pecuniary gain, can be heard to plead in defense of the claim for compensation of an employee injured in such employment, that it had no legal right to engage in such employment, nor to employ its injured or deceased employee therein. The fact that engaging in such occupation was *ultra vires* furnishes no immunity whatever, either to the employer or insurance carrier. The Workmen's Compensation Law makes no such exemption in favor of either.

In the case of *Kenney v. Union Railway Company* (166 App. Div. 497) we held that the Workmen's Compensation Law does not exclude from its benefits employees who have obtained employment in violation of section 939 of the Penal Law, which provides that: "A person who obtains employment * * * by * * * aid * * * of any false statement in writing, as to his * * * previous employment * * *, is guilty of a misdemeanor."

In the case of *People ex rel. Coney Island Jockey Club v. Sohmer* (155 App. Div. 842; *affd.*, 210 N. Y. 549) we held that where a corporation chose to avail itself of the advantages of having the title to land taken, held and conveyed by it, it was estopped to claim as against the State that it had no franchise authorizing it to deal in real property, and hence was not liable for the payment of franchise taxes.

In the case at bar the insurance carrier has received and retained the premiums upon a policy issued under the Workmen's Compensation Law in protection of the Hartwood Club and of its employees while engaged in the business of forestry and logging; that is, while engaged in a hazardous employment for pecuniary gain. (§ 2, group 14; § 3, subd. 5.) The insurance carrier cannot now be heard to say that it should not be called upon to make payment of the indemnity provided to be paid by the policy upon the ground that the club had no right to engage in those occupations for pecuniary gain.

It was held in the case of *Milborne v. Royal Benefit Society* (14 App. Div. 406) that where an incorporated benefit society assumes the risks and liabilities of a similar society and receives from a certified holder of the latter all subsequent assessments necessary to keep the risk in force, it becomes liable to the certificate holder and is estopped from insisting that the contract by which it assumed the risks of the other society was *ultra vires* and that the certificate holder did not acquire any right as against it to enforce the obligation it had assumed.

It was held in the case of *Usher v. New York Central & Hudson R. R. Co.* (76 App. Div. 422; *affd.*, 179 N. Y. 544) that where a division superintendent of the defendant acting beyond the scope of his authority, had made a contract with one of its employees who had been injured in the service of the

^{*} Since amd. by Laws of 1916, chap. 622 —[RMP.]

company to employ him for life as a flagman at a certain crossing, that the corporation when sued for a breach of the contract could not set up *ultra vires* as a defense of the action.

In view of the conclusions above reached I have not considered it necessary to discuss the question as to whether the Hartwood Club had in fact the legal right to do by virtue of its incorporation and incident to the exercise of its powers just what the Commission has found that in fact it did do.

The award of the State Industrial Commission should be affirmed.

All concurred, except WOODWARD, J., who dissented, in an opinion, in which COCHRANE, J., concurred.

WOODWARD, J. (dissenting): I dissent on the ground that the Hartwood Club, a membership corporation, could not be an employer, and that Henry Uhl could not be an employee, under the definitions of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 3, as amd. by Laws of 1914, chap. 316).^{*} A membership corporation may be created "for any lawful purpose, except a purpose for which a corporation may be created under any other article of this chapter, or any other general law than this chapter" (Memb. Corp. Law [Consol. Laws, chap. 35; Laws of 1909, chap. 40], § 40), and as provision is made for corporations of a business character, under the various provisions of the general laws, it follows that a membership corporation is not created for a "trade, business or occupation" to be carried on "by the employer for pecuniary gain." This is peculiarly so when we remember that by the provisions of section 10 of the General Corporation Law (Consol. Law, chap. 23; Laws of 1909, chap. 28) "no corporation shall possess or exercise any corporate powers not given by law, or not necessary to the exercise of the powers so given;" and as there is no power given in the Membership Corporations Law to carry on any business for pecuniary gain the mere fact that the corporation may have cut and sold trees for lumber or cordwood does not bring it within the contemplation of the Workmen's Compensation Law. The purpose of this club was to purchase lands and adapt them to the purposes of cottage sites for members, and, as an incident to such purposes, it would be called upon to cut more or less timber, which might be sold and the revenues turned into the treasury to be used for the purposes of the club, but this was not for pecuniary gain, within the meaning of the Workmen's Compensation Law. This expression means a "trade, business or occupation carried on by the employer for pecuniary gain"—for profit—and not a mere incidental sale of timber for an agreed price.

The club in question had 6,000 acres of land and employed several men, just as the owner of a large farm with a woodlot might do, and the statute provides that it shall "not include farm laborers or domestic servants." The employer was not by law authorized to carry on any "trade, business or occupation" for "pecuniary gain," and it was not, therefore, within the law, any more than an individual would be who was maintaining a forest preserve for his personal pleasure, and who incidentally cut and sold timber from the tract in fitting and preserving it for the primary purpose. His employees would come within the classification of "farm laborers or domestic servants" rather than "employees" as defined in the Workmen's Compensation Law. COCHRANE, J. concurred. Award affirmed.

^{*} Since amd. by Laws of 1916, chap. 622 — [REP.]

UHL V. HARTWOOD CLUB, 221 N. Y. Rep. 588, July 11, 1917.

Per Curiam. The commission has found that the appellant was engaged in the operation of a country club and in connection therewith in the business of ice harvesting, forestry and logging; that it conducted this business for pecuniary gain; that Uhl was at the time of his death employed by it as a lumberman and while so employed was killed.

We think there was ample evidence to support these findings.

Whether a club or an individual owning a tract of woodland is or is not engaged in forestry and logging for pecuniary gain is a question of degree. It could not be said that the owner of a city lot who cut a tree and sold the timber was so engaged. Nor where a farmer here and there felled trees on his farm. But where the owner of a large tract of woodland cuts and sells the lumber upon it regularly, although that work may be incidental to his main business, he comes within the definition of the statute.

The order appealed from should be affirmed, with costs. CHASE, COLLIN, CARDOZO, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ. concur. Order affirmed.

In this connection may be noticed the amendment of L. 1918, ch. 635, to Workmen's Compensation Law, § 2, gr. 14, excepting from the law's coverage "operations solely for the production of fire wood in which not more than four persons are engaged by a single employer." The amendment is due to war conditions.

3. *Experimental work.*—In the course of experimental work with patented flooring material, with a view to making it marketable, a handyman lost an eye from a flying steel chip. In awarding him compensation, Commissioner Lyon said: "While that company was not engaged in the conduct of a business for specific gain, it was engaged in the business with the hope of ultimate gain if the experimentation should turn out to be a success": *Galelli v. Magnesite Products Co.*, S. D. R., vol. 7, p. 416, February 3, 1916.

G. *Employer, stockholder or officer acting as an employee.*—The Court of Appeals, reversing the Appellate Division in *Bowne v. Bowne Co.*, May 8, 1917, has denied compensation to the higher executive officers of corporations. In a number of instances occurring prior to that time, the State Industrial Commission awarded compensation to corporation officers and stockholders accidentally injured while doing manual work for their corporations. No cases of compensation to unincorporated employers working with their employees appear to be included in published reports. The Appellate Division uniformly sustained such of these awards as came

to it upon appeal. It handed down three pertinent opinions. The earliest of the three, *Beckmann v. Oelerich & Son*, 174 App. Div. 353, September 13, 1916, deals also with the continuing jurisdiction of the Commission and appears under that topic in Part Two. The pertinent part of it is quoted here in the second opinion. In this case, the president and major stockholder of a company engaged in manufacturing corn and oat products lost his leg by an accident while taking some boards through a window. The boards were intended to be made into spouts. In affirming the award, the court said "We are not attempting to hold that the president of every corporation is an employee within the meaning of the act." The full text of this second opinion is as follows:

BOWNE v. BOWNE Co., 176 App. Div. 131, Dec. 28, 1916.

HOWARD, J.: The Commission found as conclusions of fact that:

"1. On March 6, 1916, the day when S. W. Bowne received his injuries, he * * * was employed as president of the S. W. Bowne Company, a corporation engaged in the business of jobbers of hay, straw, grain and feed, and in the business of manufacturing corn and oat products into foods.

"2. On said date while S. W. Bowne was working for his employer at his employer's plant at 595-611 Smith street, borough of Brooklyn, city of New York, and while he was engaged in assisting some of the other employees in taking boards through a window, his left foot was caught in a screw conveyor by reason of slipping through a loose board in the floor. The conveyor ran under the floor. The leg was badly crushed and was later amputated above the knee. A new machine for mixing poultry grain had been installed in the plant and some lumber was being delivered to be used in making spouts, and it was while assisting to unload this lumber that the above-mentioned accident happened.

"3. S. W. Bowne Company was a domestic corporation with 800 shares of stock of the par value of \$100 each. Of these shares Bowne owned 560 shares; Warlow, the secretary of the company, owned 239 shares, and one H. B. Smith owned 1 share. Bowne was the principal executive officer and was employed by the directors at a salary of \$70 per week. In the year previous to the accident the stock owned by Bowne in the company yielded him a dividend of \$30,000."

In the employee's claim for compensation appear these questions and answers: "State occupation when injured: Unloading lumber. How long have you worked at this occupation? At intervals, thirteen years." It thus appears from the findings of the Commission and elsewhere in the record that the claimant, although president of this small corporation, was, by the nature of his duties, engaged in all the various activities of the plant, looking after and superintending the work of the concern, and, from time to time, "at intervals," as he expresses it, assisting in the actual, manual labor of the establishment.

Under these circumstances was he an employee? This court has already

taken a position upon this question. (*Beckmann v. Oelerich & Son*, 174 App. Div. 353.) In that case Mr. Justice LYON, writing the unanimous opinion of the court, said: "As to the claim that the claimant was not an employee within the meaning of the act. The claimant spoke of his compensation for services as salary. He was the owner of 7 of the 100 shares of stock of the corporation. There is no claim that the payments received by him were dividends upon his stock. The Commission found that the weekly payment made him was his weekly wage. Its finding was fully justified by the evidence. While he was vice-president of the corporation his employment was doubtless through the board of directors, of whom he may or may not have been one. Although he was the general foreman, he worked in the various industries of the corporation the same as other workmen, and was doing the work of an ordinary employee at the time he was injured. His being vice-president and a stockholder in no way affected his status as an employee. (*Connor Workmen's Compensation Law*, 31, 96; *Aken v. Barnet & Aufesser Knitting Co.*, 118 App. Div. 463; *affd.*, 192 N. Y. 554.)"

The facts in the case before us are so similar to those in the *Beckmann* case that we are not at liberty to recede from the position taken there; neither are we disposed to do so. We are not attempting to hold that the president of every corporation is an employee within the meaning of the act (*Consol. Laws*, chap. 67; *Laws of 1914*, chap. 41); but that a person, under given circumstances, may be both president and employee is very apparent to us. Indeed the learned counsel for the appellate so concedes in his brief. He says: "It may be conceded for the purposes of this argument that where a person is employed and is performing manual labor of the character described in the statute such person may be considered an employee, although nominally an officer of the corporation." It is perfectly obvious to the ordinary observer that the officers of small corporations are quite generally also employees. Concerns which are not of sufficient magnitude to require the services of the officers constantly in the office understand when they elect such officers and fix their salaries that they are to make themselves useful in other capacities about the establishment. The president of the New York Central railroad would not of course be expected to help unload lumber or help operate the trains, or even superintend such work; but the president of a corporation operating a general store in a country village would be expected very likely to act as clerk and make himself generally useful about the establishment. There are border line cases between these two extremes, but we do not consider the case in hand near the border line or at all doubtful.

We have examined the other questions raised by the appeal, but discover no error, and find nothing calling for further comment. The award should be affirmed. Award unanimously affirmed.

The third opinion cites the first two and adds that the insurer by including the claimant's salary in calculating the premium prevented itself from denying that he was an employee. The case is complicated with dissolution proceedings. The text of the opinion is as follows:

KENNEDY v. KENNEDY MFG. & ENGINEERING CO., 177 App. Div. 56, March 7, 1917. ..

KELLOGG, P. J.: When the policy was issued and at the time of the accident on March 24, 1915, the claimant owned ninety-five per cent of the stock of the employer company. Later the company was closing out its business; another was elected president in place of the claimant, and at the time of the accident the claimant held no office in the company. When the policy was taken the insurer knew of his position in the company, and included his salary in the payroll upon which the premium was based. As stated by the attorney for the insurer: "As I understand it, the premium was paid on a salary of not more than \$1,500. Of course, that protects them within the limits of the law, or \$15 per week." Notwithstanding his stock ownership the plaintiff and the company were separate individuals. He was an employee of the company within the meaning of the Workmen's Compensation Law. (*Beckmann v. Oelerich & Son*, 174 App. Div. 353; 160 N. Y. Supp. 791; *Bowne v. Bowne Co.*, 176 App. Div. 131.)

A superintendent, the *alter ego* of the master, is entitled to the benefit of the Employers' Liability Act. (*Aken v. Barnett & Aufesser Knitting Co.* 118 App. Div. 463.)

The insurer, by treating the claimant as an employee and including his salary in the payroll as a basis for the premium, may not now be in a position to deny that he was an employee. The award should be affirmed. Award unanimously affirmed.

The Appellate Division affirmed similar awards to officers and stockholders, unanimously and without opinion, in *Howard v. Howard*, S. D. R., vol. 9, p. 355, July 11, 1916; 176 App. Div. 940, Jan. 12, 1917, and *Reddy v. National Excavating Co.*, S. D. R., vol. 10, p. 621, Oct. 25, 1916; 178 App. Div. 943, May 2, 1917. The Commission, March 6, 1917, affirmed a lump sum agreement of insurer and claimant for \$2,600 in the case of a company president and manager whose hand had been mutilated in a machine: *Hoover v. Vulco Engineering Co.*, S. D. R., vol. 13, p. 513.

May 8, 1917, the Court of Appeals in a decision reversing the order of the Appellate Division in the Bowne case emphatically distinguished the higher executive officers of a corporation from its workmen. This distinction the court found in the provisions of the compensation law itself and in court utterances interpretative of legislative purpose. The text of the opinion is as follows:

BOWNE v. BOWNE Co., 221 N. Y. 28, May 8, 1917.

POUND, J.: The question presented on this appeal is whether the president and principal executive officer of a corporation which employs workmen in carrying on a hazardous occupation is entitled as such to the benefits of

the Workmen's Compensation Law (Cons. Laws, ch. 67) as an employee if he meets with an accident.

The claimant was the president and majority stockholder of S. W. Bowne Company, which was engaged in the manufacture of cattle foods. (Group 29.) He was the principal executive officer. His salary was \$70 a week. He met with an accident on March 6, 1916, while performing manual labor, assisting other employees of the corporation in handling lumber, which resulted in the loss of his left leg. His salary was not interrupted by the accident. His stock dividends in the preceding year amounted to \$30,000. The industrial commission found he was "*employed* as president" of the company and that the accident arose out of and in the course of such employment and awarded him the maximum compensation of \$20 per week for two hundred and eighty-eight weeks. The compensation payment for the loss of a leg shall not exceed \$20 a week. (Workmen's Compensation Law, § 15, subd. 5.)

Conceding that a corporation may employ its officers as workmen, to handle lumber, operate lathes or set brakes, or to act as superintendents and foremen, it must also be conceded that the higher executive officers of a corporation are not, as such, its employees in the ordinary use of the word, nor are they expected to perform manual labor. The question is plainly presented whether the principal executive officer of a corporation is an employee within the definition of the word contained in the Workmen's Compensation Law. "The intention of the law giver is to be sought first in the words of a statute, and, if they are obscure, in the occasion of the enactment and in the policy which dictated it, when that can legitimately be ascertained." (*Palmer v. Van Santvoord*, 153 N. Y. 612, 615.)

The title of the Workmen's Compensation Law is as follows: "An act in relation to assuring compensation for injuries or death of *certain employees* in the course of their employment and repealing certain sections of the Labor Law relating thereto, constituting chapter sixty-seven of the Consolidated Laws."

Section 1 provides that it shall be known as the *Workmen's Compensation Law*. Section 2 provides for compensation to *employees*. Section 3 defines *employer* and *employee* as follows:

"3. 'Employer,' except when otherwise expressly stated, means a person, partnership, association, corporation, and the legal representatives of a deceased employer, or the receiver or trustee of a person, partnership, association or corporation, employing *workmen* in hazardous employments including the state and a municipal corporation or other political subdivision thereof (Subd. 3, amd. by L. 1914, ch. 316). 4. 'Employee' means a person who is engaged in a hazardous employment in the service of an employer carrying on or conducting the same upon the premises or at the plant, or in the course of his employment away from the plant of his employer; and shall not include farm laborers or domestic servants."

The words of the statute are not clear. A workman in a broad sense is one who works in any department of physical or mental labor, but, in common speech, is one who is employed in manual labor, such as an artificer, mechanic or artisan, while an employee in a broad sense is one who receives salary or wages or other compensation from another (*Gurney v. Atlantic & G. W. Ry. Co.*, 58 N. Y. 358), but in common speech the term is usually applied to clerks, laborers, etc., and not to the higher officers of a corporation.

The statutory definition speaks of one "*in the service*" of an employer. In a broad sense the officers of a corporation serve it, but in common speech they are not referred to as its servants or employees. (*Matter of Stryker*, 158 N. Y. 526.)

We turn to the occasion of the enactment and the policy thereof. In *Matter of Petrie* (215 N. Y. 335, 339) it was held that "The Workmen's Compensation Law was adopted in deference to a widespread belief and demand that compensation should be awarded to *workmen* who were injured and disabled temporarily or permanently in the course of their employment, even though sometimes the accident might occur under such circumstances as would not permit a recovery in an ordinary action at law. The underlying thought was that such a system of compensation would be in the interest of the general welfare by preventing a *workman* from being deprived of means of support as the result of an injury received in the course of his employment. The statute was the expression of what was regarded by the legislature as a wise public policy concerning injured employees." And in *Matter of Post v. Burger & Gohlke* (216 N. Y. 544, 553) this court said: "The act was passed pursuant to a widespread belief in its value as a means of protecting *workingmen* and their dependents from want in case of injury when engaged in certain specified hazardous employments. It was the intention of the legislature to secure such injured workmen and their dependents from becoming objects of charity." In *N. Y. Central R. R. Co. v. White* (243 U. S. 188) Mr. Justice PITNEY, delivering the opinion of the court on the constitutionality of the Workmen's Compensation Law of this state, said: "In support of the legislation, it is said that the whole common law doctrine of employer's liability for negligence, with its defenses of contributory negligence, fellow-servant's negligence, and assumption of risk, is based upon fictions, and is inapplicable to modern conditions of employment, that in the highly organized and hazardous industries of the present day the causes of accident are often so obscure and complex that in a material proportion of cases it is impossible by any method correctly to ascertain the facts necessary to form an accurate judgment, and in a still larger proportion the expense and delay required for such ascertainment amount in effect to a defeat of justice; that under the present system the *injured workman* is left to bear the greater part of industrial accident loss which because of his limited income he is unable to sustain, so that he and those dependent on him are overcome by poverty and frequently become a burden upon public or private charity; and that litigation is unduly costly and tedious, encouraging corrupt practices and arousing antagonisms between employers and employees."

The words of the statute, construed in the light of the legislative purpose, do not justify the conclusion that the distinction between the higher executive officers of the corporation and its workmen was obliterated. (*Bristor v. Smith*, 158 N. Y. 157; *Wakefield v. Fargo*, 90 N. Y. 213; *Matter of Stryker*, 158 N. Y. 526.) The short title of the act, the limitation thereof to employers *employing workmen*, the evil to be remedied, the method of remedying the evil, the obvious incongruity of applying the law to the principal executive officer of a corporation as an accident insurance at the maximum rate of not to exceed \$20 a week based on loss of earning power, all point conclusively to a distinction between such an officer and other employees which the court should not disregard.

The claimant in this case is willing, in order to collect a workman's allowance for himself from the insurance carrier, to assume a *status* that he might be the first to disclaim for any other purpose. Theoretically he was subject to the orders of his corporation and was liable to be discharged for disobedience. Practically he *was* the corporation and only by a legal fiction its servant in any sense. Section 30 of the act provides that "no *benefits, savings or insurance* of the injured employee, independent of the provisions of this chapter, shall be considered in determining the compensation or benefits to be paid under this chapter." But these words are appropriate to the meager advantages of a workman and not to the comfortable dividends of the stockholder. Upon the most liberal construction contended for consistent with the purpose of the law the order should be reversed, with costs in this court and in the Appellate Division against the Industrial Commission, and the claim dismissed.

HISCOCK, Ch. J., CHASE, HOGAN, CARDOZO, McLAUGHLIN and ANDREWS, JJ., concur.

Order reversed, etc.

Upon authority of the higher court's decision in *Bowne v. Bowne Co.*, the Appellate Division has reversed the awards in *Clemens v. Clemens & Grell*, Case No. 42660, March 22, 1915; 181 App. Div. 911, Nov. 14, 1917; *Ten Broeck v. Town of Saugerties*, Bul., vol. 2, p. 148, Apr. 24, 1917; 181 App. Div. 910, Nov. 14, 1917; *Sharlow v. Sharlow Bros. Co.*, Case No. 34730, Sept. 14, 1917; 181 App. Div. —, Dec. 28, 1917; and *Kennedy v. Kennedy Mfg. & Engineering Co.*, S. D. R., vol. 7, p. 383, Jan. 18, 1916; Bul., vol. 1, no. 8, p. 8, April 27, 1916; 177 App. Div. 56, March 7, 1917; 182 App. Div. —, Jan. 18, 1918. Ten Broeck, a town superintendent of highways, was killed in an automobile accident while out on Sunday looking for laborers and supplies. The award to a highway foreman injured in the same accident was affirmed by the Appellate Division two weeks later: *Lanigan v. Town of Saugerties*, above, page 162. In the Sharlow case the claimant had been insured under the elective compensation plan of Workmen's Compensation Law, section 2; see above, page 88. The Kennedy case, the text of the first decision in which appears above, page 189, was reversed upon second appeal. Upon authority of its decision in *Bowne v. Bowne Co.* the Court of Appeals has reversed the Appellate Division's order in *Howard v. Howard*, S. D. R., vol. 9, p. 355, July 11, 1916; 176 App. Div. 940, Jan. 12, 1917; 221 N. Y. Rep. 605, July 11, 1917. The case of *Reddy v. National E. & F. Co.*, having been affirmed by

the Appellate Division and placed upon the calendar of the Commission again, the Commission in a new ruling decided that the decision of the Court of Appeals in *Bowne v. Bowne Co.* was not an obstacle to further awards to Reddy: S. D. R., vol. 14, p. 602, Bul., vol. 2, p. 256, Aug. 14, 1917.

H. Farm laborers.—The compensation law denies compensation to farm laborers and domestic servants. The owner of a farm asked a neighbor to help repair his barn. The neighbor, having been injured by collapse of a staging, made claim for compensation on the ground that he was a carpenter under Workmen's Compensation Law, section 2. The Commission certified the question to the Appellate Division which held that the pecuniary gain doctrine applied to the case and that the claimant was a farm laborer. The court's definition of farm labor is of interest in this connection. The full text of the opinion is as follows:

COLEMAN V. BARTHOLOMEW, 175 App. Div. 122, Nov. 15, 1916.

HOWARD, J.: The employer, in this instance, was a lawyer actually practicing his profession and maintaining a law office at Whitehall, N. Y. He was also a farmer engaged in managing and carrying on farms. The Commission has found as a conclusion of fact that "On November 14, 1914, the day when William B. Coleman received his injuries, he resided at Whitehall, N. Y., and was in the employ of A. D. Bartholomew, also of Whitehall, N. Y. Said Bartholomew owned and conducted a farm at Whitehall, N. Y. On said date Bartholomew was having some repairs made to his dairy barn and had employed Coleman and one Frank Morsee to do the repairs. Coleman's regular occupation was farm laborer and he lived on an adjoining farm, and also took odd jobs for repair work on farms such as he could get. In this particular instance he was to receive \$2.50 per day for his work. On said date while William B. Coleman was working on the said barn and was on a staging which he had erected in order to be able to put slate on the roof of the barn, the staging gave way and Coleman was precipitated to the ground, a distance of about twelve (12) feet, causing injuries to Coleman." The claimant contends that the defendant was engaged in a hazardous employment and that the case falls within group 42 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) which enumerates, among other employments, "structural carpentry," "roofing," "construction, repair and demolition of buildings." The Commission at first made the claimant an award; subsequently, upon application of the employer, the case was reopened, the award canceled and the following question certified to this court for consideration: "Was the employer at the time of the injury engaged in a hazardous employment within the meaning of the Workmen's Compensation Law?"

This question should be answered "No" for two reasons. *First*, because the employer was not engaged in structural carpentry, roofing or the construction

and repair of buildings for *pecuniary gain*. We consider this question absolutely and finally disposed of by the determination of this court and the Court of Appeals in *Matter of Bargey v. Massaro Macaroni Company* (170 App. Div. 103; 218 N. Y. 410). Inasmuch as we have discussed the subject somewhat in *Matter of Schmidt v. Berger* (175 App. Div. 957), handed down herewith, we deem it unnecessary to further discuss it here.

The question certified should be answered "No" for the further reason that the claimant was a "farm laborer." It was the clear intent of the Legislature to exclude farm laborers from the benefits of the Workmen's Compensation Law and it only remains for us to define "farm laborers." (See § 3, subd. 4.) The common hired man on a farm is required to perform a great variety of work. His duties are not confined to plowing, planting and harvesting. Tilling the soil and garnering the crops may be the principal work of the farm laborer but they are by no means his exclusive work. All the multifarious work of operating a farm must be done by somebody; and who is to do it except the farm laborer? It is, of course, necessary to keep the farm machinery in repair—the reapers, mowers, corn harvesters, sulky plows, wagons, harnesses, etc. It is just as necessary to keep the farm buildings in repair, and occasionally to make small additions to them. This is a part of the routine work of the farm laborer; just as much so as milking the cows, cleaning off the horses, building fences, putting a new point on a plow, doctoring a sick horse, butchering the hogs, greasing the wagons, assisting the threshers, driving the team to market and innumerable other familiar duties. Is the hired man who pounds his finger while shingling the pigpen any the less a "farm laborer" than when he pounds his finger while building a fence? It is the duty of the farm laborer to build a load of hay; it is likewise his duty to help shingle the barn to protect the hay from the elements. Both processes are necessary in order to preserve the hay. Both are essentially within the scope of the duties of the farm laborer and it makes no difference, in principle, whether he breaks his leg by falling from the roof of the barn or the load of hay. Many of the employments on the farm are as hazardous in fact as shingling a roof. Breaking a fractious colt, for instance; handling an ugly bull; ringing an adult boar; harnessing a vicious horse. But all these are incidents which go with the work of the farm laborer, although they are not, strictly speaking, the process of tilling the soil.

The fact that the claimant in this case was employed only temporarily for this particular job signifies nothing. The same exemption applies to the day laborer on the farm as to the man employed by the month or year.

The question which has been certified to us is answered "No," and the matter remitted to the Commission for further consideration. All concurred. Question certified answered in the negative.

The State Industrial Commission disallowed the claim of a painter by trade injured while painting the roof of a farm building: *McComsey v. Simmons*, S. D. R., vol. 7, p. 433, Feb. 10, 1916.

Threshing grain is not farming under the statute. The Appellate Division has so held in *White v. Loades*, *Vincent v. Taylor Bros.* and other threshing machine cases presented above, page 80.

In *Uhl v. Hartwood Club*, above, page 182, the dissenting justices argued that the employees engaged in cutting timber on the club's lands were farm laborers or domestic servants.

A war measure for fuel conservation, L. 1918, ch. 635, has amended Workmen's Compensation Law, § 2, gr. 14, to except from the law's coverage "operations solely for the production of fire wood in which not more than four persons are engaged by a single employer."

I. Domestic servants.—The dissenting justices in the *Uhl* case, referred to immediately above, would seem to have reasoned that all employees of a pleasure or sporting club have the status of servants.

In the following case the chauffeur had two functions, delivering goods for his employer's store and driving his employer's touring car. The Appellate Division held that he was a domestic servant in the latter capacity and that his dependents were not entitled to death benefits for fatal burns sustained by him while repairing the car.

WINCHESKI v. MORRIS, 179 App. Div. 600, Sept. 27, 1917.

COCHRANE, J.: The State Industrial Commission has certified the following question: "Was the said Stanley Wincheski at the time he received the injuries which resulted in his death engaged in a hazardous employment carried on by his employer for pecuniary gain, within the meaning of the Workmen's Compensation Law?"

The employer conducted a department store, and in connection therewith used an automobile delivery truck for delivering goods. He also owned a seven-passenger touring car for the pleasure of his family. The deceased was employed as a chauffeur, his duties being to operate both cars. On Sunday, September 17, 1916, he was repairing the touring car preparatory to taking the family of his employer out on a pleasure ride, when a gasoline torch was accidentally ignited and he received burns which caused his death. The last use which had been made of the touring car was on the previous Thursday when it had been used to take home a domestic servant employed in the household of the employer, which servant had no connection with the department store. On that occasion the car got out of repair and the deceased was engaged in overcoming this defect when he sustained his fatal injury. It appears that sometimes when the truck was out of repair the touring car was used in its place for the delivery of goods. Occasionally when the demands of the business so required, both automobiles were used at the same time for a like purpose. The evidence, however, does not warrant an inference that the touring car was generally kept or used for delivering goods from the store. Its primary and essential purpose was for the pleasure and convenience of the family. The Commission is not justified by the evidence in finding any other material facts than as above stated. It is absurd to maintain

that this seven-passenger touring car, designed for pleasure and recreation, was owned and kept by the employer in connection with his department store. Its occasional use for delivering goods was merely incidental and in cases of emergency or extreme necessity, and it would be manifestly unjust to exaggerate this occasional and incidental use in such a way as to make it appear that the touring car was a factor of any substantial consequence or importance in the conduct of the employer's business. The employment of the deceased was doubtless of a two-fold nature; he rendered certain service in connection with his employer's business; he also rendered other services disconnected with his employer's business; as a chauffeur operating the automobile truck in delivering merchandise he was engaged in a hazardous employment conducted by the employer for pecuniary gain; as a chauffeur operating the touring car for the pleasure of his employer's family he was not engaged in a hazardous employment conducted for pecuniary gain. Very clearly at the time when he received his injuries he was engaged in the latter capacity. His status was similar to that of a cook or butler in his employer's household. In *Matter of Sickles v. Ballston Refrigerating Storage Company* (171 App. Div. 108) the claimant had duties to perform in connection with a hazardous business but he was injured while performing duties not so connected and it was held that the claim was not within the protection of the statute. That authority is applicable here.

The question certified should be answered in the negative, and the matter remitted to the Commission. All concurred. Question certified answered in the negative, and matter remitted to the Commission.

J. Fault.—Workmen's Compensation Law, § 10, relieves the employer of liability to pay compensation when the accident does not arise out of and in the course of the employment, when intoxication of the employee is the sole cause of the injury or when the employee wilfully intends to injure himself or another. Otherwise, the employer must pay compensation, so the section declares, without regard to fault as a cause of the injury.

1. *Negligence.*—The main object of workmen's compensation legislation has been escape from cruel and unsatisfactory negligence doctrines. The employee's method and means of doing his work, however risky or careless, are no bar to compensation. The following opinion illustrates the point:

ROSS v. GENESEE REDUCTION CO., 180 App. Div. 846, Dec. 28, 1917.

WOODWARD, J.: The employer in this case was engaged in collecting and reducing garbage, and, as an incident of this business, it sold a fertilizer known as "tankage." The claimant's intestate was employed in driving one of the garbage-collecting wagons, and did extra work in helping to load the tankage into cars three or four times a week. On August 4, 1916, the day of the accident resulting in his death he was employed in this extra work, and went upon the roof of a building, operated by the employer as a part of

the plant, and while there, attempting to pull down a rope used in hoisting materials, he fell through a skylight and was killed.

The appellants make an elaborate argument to show that the decedent was not injured in the course of his employment, the theory being that it was not necessary for the decedent to be upon the roof; that he was not required to pull down the rope, as it would fall of its own weight if given time enough. The reasoning is altogether too refined for the very practical results sought to be attained by the Workmen's Compensation Law. The decedent was in the employ of the Genesee Reduction Company at the moment of the accident, and the question of whether he was doing the work in exactly the best manner is not material. It is not seriously questioned that the act which he attempted was designed to facilitate the work of the master, and the fact that it could have been accomplished without this particular effort is not controlling. We are not dealing with the law of negligence; we are considering a system which attempts to compensate for injuries received in the actual performance of duties in hazardous employments, without regard to negligence, and so long as the employee is engaged in the actual service of the master, as distinguished from the personal purposes of the employee, he is entitled to the provision which the law makes for him as an employee.

The award should be affirmed. Award unanimously affirmed.

A helper on a truck who took a plank from the dock for use as a skid instead of using the skid provided with and carried upon the truck received compensation when hurt by the plank: *Conley v. Hickey*, Case No. 6547, Apr. 26, 1917; 181 App. Div. 911, Nov. 14, 1917.

Besides dangerous conduct in the doing of his work the employee may take unnecessary risks in his comings and goings. The Commission awarded compensation to the beneficiaries of an employee who rode on an elevator which bore the sign "Persons using this elevator do so at their own risk" and who stepped on top of the elevator instead of stepping inside: *Lutz v. Zimmerman & Co.*, Bul., vol. 2, p. 228, July 5, 1917. In the following death case the employee left an ordinary roadway to walk along and across the railroad tracks of his employer:

BYLOW v. ST. REGIS PAPER Co., 179 App. Div. 555, Sept. 13, 1917.

LYON, J.: In April, 1916, Elwin Kingsley, an employee of the St. Regis Paper Company at Deferiet, N. Y., was struck by a shifting engine of the company and killed while crossing the lands of the company on his way to dinner. An award was made by the State Industrial Commission to his mother, to three half-sisters, and to one half-brother, as dependents. The award is challenged upon the ground that the death did not result from an accidental personal injury arising out of and in the course of the employment of deceased; that the beneficiaries of the award were not dependent upon

deceased at the time of the accident; and that the award was not based upon the proper wage, but was excessive.

That the death of Kingsley was accidental within the meaning of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chaps. 41, 216) must be conceded. (*Matter of Moore v. Lehigh Valley Railroad Co.*, 169 App. Div. 177; *affd.*, 217 N. Y. 627.)

That an accident in order to be compensatory must have both arisen out of and in the course of the employment must also be conceded. (*Matter of Heitz v. Ruppert*, 218 N. Y. 148.)

The deceased was a common laborer. He left his work of piling and loading wood at about twelve o'clock noon, and started for dinner at his boarding place about half a mile distant, and a few hundred feet westerly of the lands of his employer. For about 2,000 feet his path lay along the private roadway of the company which at the westerly line of his employer's lands terminated in a highway of the village which in its southwesterly course passed the boarding place of the deceased. When within about 200 feet of the end of the private roadway, the deceased turned to the southwest and walked on a switch track of the paper company until about opposite his boarding place when he turned again to the west, and while passing over an intervening switch track of the company was struck by its shifting engine backing down from the north, the signals of which owing to his deafness he did not hear, and was killed.

The appellants contend that by leaving the roadway route and taking a more dangerous course the deceased assumed additional risks which automatically deprived him and his dependents of the benefit of the Workmen's Compensation Law. This is the serious question in the case. Concededly the distance to his boarding place from the point where the deceased left the private roadway was practically the same by either route. The premises of the paper company were interwoven by a system of switch tracks, owned and operated by it, which connected with the tracks of the New York Central Railroad Company. It was necessary for the deceased, whatever course he took in going to his boarding house, to pass over at least five railroad tracks, one of which was the switch track upon which he was killed, which he must cross either where it crossed the private roadway, or at some other point.

The Commission has found upon undisputed evidence that it was the custom of the employees of the paper company to walk along the railroad tracks all over the plant. Apparently the deceased assumed no risk of being overtaken while walking upon or alongside the switch track, as its northerly terminus was only a few hundred feet, and in plain view, from the point where the deceased left the private roadway, and hence a glance in that direction would have satisfied him that the track was clear, and that no danger was to be apprehended from that direction. During the two weeks in which the deceased had been employed by the paper company he had continuously followed this route in going between his work and his boarding house. The Commission has not found that the private roadway was the usual route. It has found that it was a convenient route, also that there was no rule of the company forbidding the men to walk along the railroad tracks. Upon the occasion when the deceased was killed, he seems to have been closely following one

Fitzgerald, as the latter testifies that as he stepped across the track and went down the bank the engine struck the deceased whose hat hit the witness in the back. The evidence also is that most of the other people took the same road going to this house. The deceased was not bright, and appears to have been the butt of his fellow-employees, one of whom tripped him coming down the hill and he fell cutting his hand, after which, muttering, he separated from them and continued alone to the point where he left the private roadway.

Under the evidence it cannot be said that any definite course had been prescribed by the employer by which the deceased or any other employee should leave the premises. Kingsley violated no rule of the company in going where he did. The mere fact that he may have been negligent in taking the more dangerous course, assuming it to have been such, furnishes no defense to the employer or insurance carrier, and does not bar the right of the claimants to compensation. Section 10 of the Workmen's Compensation Law provides that the employee is entitled to compensation "without regard to fault as a cause of such injury," except where the injury was caused by willful intention of the employee or by intoxication, neither of which exceptions is claimed to have existed in this case. Leaving his work and going to his dinner was an ordinary and necessary incident of his employment, and must be regarded as having been within the contemplation of the parties at the time the contract of employment was entered into. Ordinarily, the employment of an employee leaving his work at meal time and passing through and over the premises of his employer by a course usually taken, is deemed to be continued until he leaves the premises of the employer. In the case of *Pope v. Merritt & Chapman Derrick & Wrecking Co.* (177 App. Div. 69) we expressed full accord with the statement contained in the opinion of the Commission in that case that "an employee on quitting work for the day is entitled to a reasonable opportunity to leave the employer's plant and place himself upon a public highway, and that if injured before reaching the public highway, provided he uses reasonable speed in leaving the plant, he is covered by the Compensation Law." This is also in accord with the holding in the much-cited case of *Gane v. Norton Hill Colliery Company* (2 B. W. C. C. 42; 100 L. T. 979). Had the deceased once passed from his employer's premises and gained the public highway, or had he instead of leaving the employer's premises loitered thereon, or deviated from a direct and ordinary route of passage for purposes of his own, a very different question would be presented.

The State Industrial Commission has found, and we think correctly, that the injuries which resulted in the death of Elwin Kingsley were accidental injuries, and arose out of and in the course of his employment.

As to the second ground of appellants' objection to the award, that the beneficiaries named were not dependents. Partial dependency is sufficient to justify an award. (*Matter of Walz v. Holbrook, Cabot & Rollins Corporation*, 170 App. Div. 6; *Matter of Rhyner v. Hueber Building Co.*, 171 id. 56.) The Commission has found that deceased, who was unmarried and without children, left him surviving and partially dependent upon him for support at the time of the accident, his mother, and three half-sisters and one half-brother, the four latter being school children aged respectively fifteen, twelve, nine and six years. The Commission awarded to each the sum of one dollar

and forty-five cents per week. While the evidence is not entirely clear as to the precise sums which the deceased contributed to the support of the family, it appears that at times it represented his full earnings, less such sum as was necessary for his own support. This contribution is stated by the mother in her verified claim for compensation to have been about seven dollars per week. The question of dependency being one of fact the decision of the Commission under the evidence is final.

As to the third objection raised by the appellants, that the award was not based upon the proper wage, the evidence was that at the time of his death the deceased had been earning during his employment by the St. Regis Paper Company, one dollar and eighty cents per day, and that this was the average daily wage received in that employment by an employee of the same class working the year through, although in previous employments by other employers the deceased had received a smaller sum. Computed upon the basis of compensation prescribed by subdivision 2 of section 14 of the Workmen's Compensation Law, which is applicable in this case, the amount of the award was correct.

The award should be affirmed. Award unanimously affirmed.

An elevator operator was more than half an hour late coming to work. Another employee took his elevator. Upon arriving and unlocking the elevator door, the descending car crushed his leg. The Appellate Division unanimously affirmed his award, notwithstanding his tardiness: *Lynch v. Anderson*, Case No. 60299, July 2, 1917; 181 App. Div. 911, Nov. 14, 1917.

In a refinery the clothing of the employees became saturated with oil. The employer did not prohibit smoking during work hours. In an unwitnessed accident an employee's flannel shirt caught fire and burned him to death. The court said in reply to a suggestion that the accident was due to his smoking: "It might indicate negligence when we remember that he wore an inflammable flannel shirt; but compensation is awarded without regard to fault, and the question of negligence or contributory negligence is not before us." For the full text of the opinion see *Chludzinski v. Standard Oil Co.*, above, page 163.

2. *Willful intention to injure*.—As has been said, section ten debar compensation in the case of an employee injured while willfully attempting to injure or kill himself or another. In cases of unwitnessed death, the insurance carrier now and then attempts to establish suicide. The mental condition of the deceased immediately prior to the unwitnessed death is a matter of inquiry and argument. The presumption of § 21, subd. 3, weighs

for award. A good example of such evidence is *Urban v. Frank & Co.*, S. D. R., vol. 11, p. 612, Bul., vol. 2, p. 46, Nov. 22, 1916. Similar cases are *Riedel v. Mallory Steamship Co.*, Bul., vol. 2, pp. 20 (cover), 27, S. D. R., vol. 10, p. 601, Sept. 29, 1916; 176 App. Div. 923, Dec. 28, 1916, unanimously affirmed without opinion; and *Worf v. Phoenix Sand and Gravel Co.*, Bul., vol. 2, p. 205, June 6, 1917. The Commission credited the employer with having overcome the presumption against suicide or intoxication in *Dowling v. N. Y. Central & H. R. R. Co.*, S. D. R., vol. 9, p. 320, June 14, 1916. An injured employee, having entered a hospital, developed delirium tremens and fatally hurt himself by jumping from a window. The insurance carrier averred that his act was calculative, that he had made threats to commit suicide and that he had been put in a straight jacket for previous attempts. The Appellate Division affirmed an award of death benefits unanimously and without opinion: *Beckwith v. Bastian Bros. Co.*, S. D. R., vol. 13, p. 538, Mar. 14, 1917; 181 App. Div. 909, Nov. 14, 1917.

When an employee lays hands upon or assault another and the other party retaliates by injuring or killing him, the accident may or may not be compensatable. Decision turns upon the intention, the duty and the mental condition of the injured employee. The subject, with cases in point, has been presented under the title, "Assault by the injured employee," above, pages 141-147.

3. *Intoxication*.— Compensation for an injury resulting "solely from the intoxication of the injured employee while on duty" is debarred by section ten. If death has resulted with no witness to the accident and charges of intoxication are brought, an award will probably follow under the presumption of § 21, subd. 4. Two cases of the kind have been affirmed without opinion and without dissent. In one of them, men who had handed a garbage can up to a driver and turned their backs to get another, found the driver lying senseless in the bottom of his wagon: *Burns v. Products Mfg. Co.*, Case No. 3278, June 15, 1917; 181 App. Div. 910, Nov. 14, 1917. Leave to appeal to the Court of Appeals has been obtained in this case.* In the other, a fellow employee found

*Affirmed, 223 N. Y. Rep. —, May 14, 1918.

a watchman lying with a fractured skull in the basement of the building that he has been watching: *Sorge v. Aldebaran Co.*, S. D. R., vol. 3, p. 390, Mar. 30, 1915; 171 App. Div. 959, Nov. 22, 1915; 218 N. Y. Rep. 636, May 2, 1916. Two cases of drinking drivers who fell from their wagons, in one of which the Commission granted, and in the other denied, compensation are *Elsis v. Gregory*, Bul., vol. 2, p. 227, July 5, 1917, and *Gorman v. Philippi*, Bul., vol. 2, p. 255, Aug. 14, 1917. In *Conlon v. Selden Motor Vehicle Co.*, Claim No. 18757, Sept. 11, 1917, argued in the Appellate Division, January 8, 1918, the Commission awarded compensation to a tester who had been thrown from a motor truck and run over. A fellow employee was operating the vehicle at the time. They had been drinking from saloon to saloon. The fellow employee testified that Conlon "had a pretty good load on."

A teamster in a lumber camp tripped over an axe at night and cut his forearm while investigating a noise among the horses. Eight days later, while going to the doctor's he slipped on the ice and reopened the wound. Blood poisoning set in. All parties admitted that he had been intoxicated every day from the first accident until after the second accident. The insurance carrier alleged that he fell twice after the original fall. "It does not definitely appear," said the Attorney-General, "that his drinking caused him to slip." The Appellate Division reversed his award: *Lindsay v. Gallagher*, S. D. R., vol. 9, p. 275, Bul., vol. 2, p. 50, May 18, 1916; — App. Div. —, May, 1917.

The Commission denied death benefits in the case of an intoxicated railroad employee who sat down on the track and was run over by a train: *Dowling v. N. Y. Central & H. R. R. Co.*, S. D. R., vol. 9, p. 320, June 14, 1916. Intoxication was a factor in *Pope v. Merrick & Chapman Derrick & Wrecking Co.*, the text of which appears above, page 124.

4. *Taking oneself out of the employment.*—An implication of blame for departure from duty may rest against an employee when his accident does not arise out of and in the course of his employment. Cases in point are: the watchman who fell asleep, *Gifford v. Patterson*; the youth who rescued the young woman's slipper, *Holmes v. U. S. Printing Co.*; the traffic supervisor who went for a newspaper, *McGuire v. Brooklyn Heights R. R. Co.*;

and the fireman who chased a passerby, *Sullivan v. Beach Gasper Co.* The texts of the decisions are presented above, pages 154, 155. Other cases are noticed in the same connection. The charge that the injured employee had taken himself out of his employment arises oftenest in connection with alleged violations of the employer's rules or orders. The following topic presents this point.

5. *Violation of rules or orders.*—No cases of denial of award by the Commission and courts of New York because of disobedience of the employer's rules or orders appear among published reports. The Commission's attitude on the question is set forth by Commissioners Lyon and Sayer in the following quotations. Commissioner Lyon calls attention to the difference between the New York law and the laws of other States and countries.

In *Lee v. Smith & Sons Co.*, S. D. R., vol. 10, p. 584, Sept. 15, 1916, a stevedore, in violation of orders, left a ship by jumping from the side instead of taking the gangway. He fell into the water and was hurt. Commissioner Lyon said:

I think that in the ordinary case, for an insurance carrier to rely on disobedience to orders as a bar to compensation, the orders should be those regularly promulgated, shown to have been known to the employees and enforced with reasonable strictness. I think the English cases cited by the insurance carrier are not adverse to this position. The English statute apparently makes willful misconduct ground for denying compensation. Our statute, on the contrary, contains no such provision. It is apparent that the workmen on board these ships at the dock, notwithstanding warnings to use the ordinary means of reaching shore, continually pass from the deck of the ships to the dock where it can be done by a single step without making use of the means so provided. In fact, unless workmen are positively and strictly forbidden to do so, it seems that in the haste of ordinary business, they would be continually doing it, and the evidence is that the men not infrequently and without reproof, made use of this means of passing from the ship to the dock and from the dock to the ship. I do not think that Lee in attempting to jump from the ship to the dock, if the employer's view of the facts is correct, violated such a positive order as ought to bar him from compensation, and I advise an award.

In *McDermott v. Ingersoll & Bro.*, S. D. R., vol. 11, p. 606, Bul., vol. 2, p. 45, Nov. 22, 1916; 178 App. Div. 943, May 2, 1917, unanimously affirmed without opinion, a salesman disregarded his employer's orders to report to the office before starting upon a trip in which he was to use an automobile for the first time.

The automobile overturned and killed him. Commissioner Lyon said:

I am not able to see how the employer can successfully claim that Mr. McDermott took himself out from under the benefit of the statute by violation of orders. It is true that the courts have held that the willful violation of well known rules and orders of the employer would operate to debar an injured employee from claiming the benefit of the statute, but this Commission has held, and I think its holdings have been sustained by the courts, that in order to debar an injured workman from compensation on this ground, the rules violated should either be the general rules promulgated by the employer, made known to employees generally, and enforced with reasonable strictness, or else it must be disobedience to some positive direction given to the particular employee.

In *Lutz v. Zimmerman & Co.*, Bul., vol. 2, p. 228, July 5, 1917, an employee was fatally injured while riding on top of an elevator. The employer asserted that the employees had been forbidden to ride on this elevator. Commissioner Lyon said:

The counsel for the insurance carrier cites many cases in other jurisdictions, holding that violation of orders and such use of machinery as we have here, takes an employee out of the scope of his employment. No cause is cited in this jurisdiction which would warrant our finding that the deceased in this case was not within the scope of his employment when injured, and I think it fair to presume that the statutes of the jurisdictions where the accidents arose, which are the subject of counsel's comment, were different from our statute. In any event, they do not correspond with my view of the proper enforcement of the Compensation Law in this State, whether we refer to the wording of the statute or to the general trend of judicial decisions, and I, therefore, advise that an award be made.

In *Nappa v. Flushing Bay Improvement Co.*, Bul., vol. 2, p. 166, May 22, 1917; 181 App. Div. 910, Nov. 14, 1917, affirmed without opinion, one justice dissenting, a dock laborer lost his life presumably while riding on the bumpers between dump cars. It was an unwitnessed accident. On the point of disobedience, Commissioner Sayer said:

Evidence has been offered that it was contrary to the rules of the company for employees to ride on construction trains except upon the business of the employer, and then only on the foot board of the engine. Testimony with regard to this rule is very weak and there is no testimony whatever that the employee knew of such rule if it existed. On the contrary, the evidence seems to indicate that it was a general practice to ride on the trains and I think we may assume that that is the condition that usually prevails upon operations of this sort.

The Appellate Division, in the following opinion, reviews certain English cases and lays down a rule for determining when

an employee takes himself out of his employment by violating his employer's rules or orders. The test, the court says, is "whether the order which was disobeyed limited the sphere of the workmen's employment, or was merely a direction not to do certain things, or to do them in a certain way, within the sphere of the employment."

MAKESCHKO v. BOWEN MFG. Co., 179 App. Div. 573, Sept. 13, 1917.

LYON, J.: The question involved in this case is whether an employee who suffers an accidental injury as the result of his having disregarded a rule of his employer, is barred from claiming an award under the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41, as amd.).

The facts are undisputed. In December, 1916, the employer was engaged in manufacturing metal oiling cups at Auburn, N. Y. The claimant was the operator of one of its power presses, into which automatically a sheet of steel was fed and the cup shells punched therefrom released. It was a rule of the company as to which the claimant had been explicitly instructed both by his foreman and superintendent that an operator of the press was never to put his hand within the press while it was in operation. Noticing that one or more small pieces of steel had caught in the die of the press the claimant attempted to remove them with his left hand without stopping the press. His hand was caught by the punch and so badly injured as to require the amputation of all four fingers.

The State Industrial Commission holding that the attempt of the claimant to remove the steel particle was in furtherance of his master's business, although against his master's orders, and that the accident arose out of and in the course of his employment, made the award appealed from.

The appellants base their claim of right to a reversal of the award solely upon the ground that the claimant's injuries having resulted from the violation of a rule of his employer cannot be said to have arisen out of his employment. While the precise question here involved does not seem to have heretofore been before the courts of our State for determination, and the decisions of various State courts are at variance upon the subject, the conclusions reached by the English courts under the English Workmen's Compensation Act (6 Edw. 7, chap. 58), from which our Workmen's Compensation Law was mainly derived, must be regarded as settled.

In the case of *Mowdsley v. West Leigh Colliery Co. Ltd.* (5 B. W. C. C. 80) a workman employed to oil machinery had been strictly forbidden to oil it when the machinery was in motion, and had been warned against the practice when seen to be engaged in it, but had persisted in the act, and had thereby received severe injuries from which he died. It was held by the Court of Appeal that the accident arose out of and in the course of his employment.

In the case of *Barnes v. Nunnery Colliery Co., Ltd.* (5 B. W. C. C. 195) a workman proceeding to his work in a colliery, instead of walking rode in an empty tub, doing which had been expressly forbidden to his knowledge. His head came into contact with the roof and he was killed. The House of Lords held that the accident did not arise out of the employment.

In the case of *Plumb v. Cobden Flour Mills Co., Ltd.* (7 B. W. C. C. 1) a foreman engaged to stack by hand bundles of flour sacks, who when the stack became too high for more bundles to be placed upon it by hand, improperly made use of a rope and a revolving shaft as a hoist and in consequence was injured. It was held by the House of Lords that he was not entitled to compensation, not having discharged the onus of proving that the accident was one arising out of his employment.

In the case of *Blair & Co., Ltd., v. Chilton* (8 B. W. C. C. 324, affg. 7 id. 607) a workman employed to turn a wheel in a rolling machine and obliged to stand upon a high platform while doing so, in which position he could not be injured, sat upon the guard to rest himself while turning the wheel, although forbidden to sit, resulting in his foot being caught in the roller and seriously and permanently injured. It was held by the House of Lords, all the judges concurring, that the workman was acting within the sphere of his employment, though doing his work in the wrong way, and that the accident arose out of and in the course of his employment. Earl Loreburn in his opinion said, "In my opinion, Pickford, L. J., sums up the whole of the facts in saying this: 'This, I think, doing his work in a wrong way, but not doing something outside' his sphere. * * * I am bound to say that I think it is an extremely clear case. This is the very kind of thing for which the Act was passed."

Other English cases also apply as the test to determine whether the accident arose out of the employment, whether the order which was disobeyed limited the sphere of the workmen's employment, or was merely a direction not to do certain things, or to do them in a certain way, within the sphere of the employment. This I think is the correct principle upon which to decide the case at bar. It is in harmony with the provision of the Workmen's Compensation Law (§ 10) that the employer shall provide compensation without regard to fault as a cause of the injury; and also with the plain intent of our statute. To hold otherwise would be to permit an employer by means of a comprehensive set of rules to render the statute practically nugatory.

In the case at bar the prohibition was not one which limited the sphere of the claimant's employment, but simply dealt with his conduct within the sphere of his employment in operating the press. The accident did not occur by reason of claimant having arrogated to himself duties which he was not required to perform. The removal of the piece or pieces of steel was embraced in and was a necessary incident of his work. The act which he did was no different in kind from that which he was employed to do, but he did it in a prohibited and very likely thoughtless and impulsive manner.

The State Industrial Commission was justified in finding that the injury was one arising out of claimant's employment. Hence the award should be affirmed. Award unanimously affirmed.

The Appellate Division, having heard a discussion of English cases by counsel, unanimously affirmed an award to the dependent parents of a young woman who fatally injured herself by participating in some heavy lifting; the insurance carrier claimed that

she had wilfully violated instructions: *Owens v. N. Y. Mills Corp.*, S. D. R., vol. 9, p. 367, July 19, 1916; 178 App. Div. 942, May 2, 1917.

In the Conlon case, reviewed above, page 202, the employer put in evidence rules which forebade its testers from taking other persons upon motor vehicles and from stopping at saloons.

6. *Violation of law.*—Occasionally an accidental injury reveals the fact that the employer, the employee, or both, have been violating law in connection with the employment. Such violation is no bar to compensation. The case of *Kenny v. Union Ry. Co.* has been presented in Bulletin 81, pages 256-259. A corporation cannot plead *ultra vires* to escape liability; in the opinion in *Uhl v. Hartwood Club*, the full text of which appears above, page 182, Justice Lyon said:

I cannot believe that any membership corporation which sees fit to engage in a hazardous business, carried on by it for pecuniary gain, can be heard to plead in defense of the claim for compensation of an employee injured in such employment, that it had no legal right to engage in such employment, nor to employ its injured or deceased employee therein.

In *Ide v. Faul and Timmins*, the full text of which appears in Part Two, the injured employee, a child of fourteen, was employed in violation of the Labor Law; the insurance carrier argued that the words of its contract exempted it from liability in case of law violation and that award of compensation in such case was against public policy. The court held that neither point was well taken.

Another child of fourteen lost part of his hand while at work in a sawmill; the deputy state industrial commissioner, according to report, "advised the insurance carrier to concede a settlement, otherwise he would reserve decision in the case and the manufacturer could take chances on 'other consequences'": *Harvey v. Brown-Kent-Jackson Lumber Co.*, Bul., vol. 2, p. 122.

The Appellate Division affirmed unanimously and without opinion an award to a salesman injured while operating an automobile without a license: *McDermott v. Ingersoll & Bro.*, Bul., vol. 2, p. 45, S. D. R., vol. 11, p. 606, Nov. 22, 1916; 178 App. Div. 943, May 2, 1917.

7. *Refusal of medical treatment.*—Recalcitrance of the injured workman relative to medical treatment or operations sometimes

results in much more serious compensation liability for his employer, as well as consequences for himself. Because of his refusal or neglect a trivial hurt may end in his death. Yet the unreasonable conduct of the employee appears to have no effect relative to compensation or death benefits. Cases of the kind are reviewed under the title "Medical Treatment and Care," in Part Two.

K. Disease.—The oftentimes obscure and insignificant origins or aggravations of disease continuously present puzzling problems of evidence to the Commission and its deputies. Because of this obscurity and insignificance and because of mental and physical inabilities peculiar to sickness, as well as because of ignorance of the law, the injured employee or his family very frequently fail to give the prompt notices of accident that the law requires. The chief questions are three: (a) Has the indispensable element of accident actually been present? (b) Has the accident arisen out of the disease rather than the disease out of the accident? (c) Has the accident originated or aggravated the disease? The first question has been considered in Bulletin 81, pages 48–50, and in this bulletin, above, pages 46–53. The other two questions are taken up in this connection.

1. Accidents due to disease.—Accidental injuries resulting solely from disease are not compensatable. Such injuries, hardly without exception, are the consequence of falling. Disease causes the employee to faint or otherwise to lose self-control. He tumbles and breaks his bones, fractures his skull or drowns. The text of the Appellate Division's decision in *Collins v. Brooklyn Union Gas Co.*, in which a "fainting spell" due to a weak heart caused the employee to fall upon a hard pavement and fracture his skull, has been reproduced in Bulletin 81, pages 100–102. The engineer of a steam lighter fell from its deck into New York harbor. No one witnessed the accident. Rescuers could not revive him. He had been afflicted with indigestion and flat foot. The latter trouble made his movements unsteady. Upon an appeal, the insurance carrier argued that it could just as well be conjectured that heart failure or dizziness had caused him to fall as that he had slipped or stumbled. It asked why his body was afloat if he had not died a natural death. The Appellate Division affirmed the award to his dependents unanimously and without

opinion: *Van Wie v. Wright & Cobb Lighterage Co.*, Death File, No. 306, Dec. 29, 1915; 175 App. Div. 957, Nov. 15, 1916. In a similar unwitnessed fatal accident, the employee tumbled out of an elevator and fractured his skull; the insurance carrier claimed that his fall was due to cerebral hemorrhage; but the Commission affirmed death benefits: *Maher v. Phoenix Underwear Co.*, S. D. R., vol. 12, p. 549, Bul., vol. 2, p. 92, Jan. 17, 1917. While on his rounds, an aged watchman afflicted with heart and arterial trouble became dizzy and fell down stairs; he lost blood from a wound on his head and became very anemic; the Commission denied him compensation: *Rover v. Rigney & Co.*, Bul., vol. 2, p. 205, June 6, 1917. Another watchman fell on the floor of a toilet room and broke his leg; he was unable to say what caused his fall; the insurance carrier paid compensation to him but resisted his widow's claim of benefits upon his death from cerebral hemorrhage six months after he was hurt. Commissioner Lyon advised against an award to her on the ground that the weight of probability was that his fall had been caused by a brain lesion of which the hemorrhage was a recurrence: *Elms v. Buffalo Meter Co.*, S. D. R., vol. 14, p. 576, Bul., vol. 2, p. 210, June 19, 1917. In a case where the question was whether an employee who had fallen and hurt his head had fainted or had slipped on a greasy floor Commissioner Lyon advised that the presumption of Workman's Compensation Law, § 21, subd. 1, that the claim came within the chapter in the absence of substantial evidence to the contrary, justified an award: *Rehmklaui v. Bowman Automobile Co.*, Bul., vol. 2, p. 224, July 12, 1917.

If an employee faints or otherwise loses control of himself and falls while working high on the framework of a building, does the special or unusual falling risk of his work entitle him to compensation? The Attorney-General has raised this question in *Santacroce v. Sag Harbor Brick Works*, Case No. 70213, Oct. 10, 1917, and has cited British workmen's compensation decisions as precedents for an affirmative answer. In the case in hand, the employee, a brickmaker working on top of a stack of bricks fifteen feet high, was seized with vertigo or some similar disorder and was injured by a fall to the frozen ground. The Commission awarded him compensation. The Appellate Division

affirmed the award on the ground that he was in good health and had fallen because of dizziness due to his elevated position. The text of the court's opinion has been presented above, page 49.

2. *Disease and infection due to accident.*—Disease and infection due to accident are compensatable according to Workmen's Compensation Law, § 3, subd. 7. The theory is that the accidental injury so lowers the employee's vitality as to make him a prey to disease. In a multitude of cases the Commission has held that not only disease resulting or ensuing entirely from accident but disease aggravated, accelerated, developed or hastened by accident is compensatable. The Appellate Division and the Court of Appeals have sustained this interpretation with the one exception of the Appellate Division's decision in *Borgsted v. Schults Bread Co.*, the text of which is presented below, page 221. Establishment of causal connection between the accident and the disease is more difficult in **aggravated disease than in resultant disease**. The commonest argument in favor of award, whether the disease has had its inception before or after the accident, is that the employee has enjoyed fair or robust health and has worked steadily just previous to the accident and for a long time before. An additional argument is that the injured employee has never had the disease before. Lung trouble is a frequent resultant disease; heart trouble, a frequent accelerated disease. Tuberculosis is almost always aggravated; while pneumonia is almost always resultant. Delirium tremens is resultant, though predisposition by drinking must exist before the accident. Appendicitis, cancer and glaucoma are latent troubles that accidents activate. In presentation of the court decisions and commission rulings the diseases are taken up in alphabetical order as follows:

(1) *Anthrax.*—The text of the anthrax case of *Hiers v. Hull & Co.*, is presented above, p. 52. The Commission has awarded compensation for anthrax in *Henry v. Levor & Co.*, and denied it in *Eldridge v. Endicott, Johnson & Co.* These cases are noted in Bulletin 81, pages 20, 255, 266. According to the Eldridge ruling the anthrax germ must be shown to have entered through a wound or fissure of the skin that has accidentally occurred in the course of and has arisen out of the employment, but according to the Hiers decision anthrax is infectious in character and

is distinguishable from occupational disease. It is "unexpected, unusual and extraordinary."

(2) *Appendicitis*.—Awards in two cases in which falls attended with special violence to the abdominal regions have revealed the existence of appendicitis and caused it to terminate fatally have been affirmed unanimously by the Appellate Division. In one case, affirmed without opinion, Commissioner Lyon dissented from the Commission's ruling on the ground that the physician had not discovered the gangrenous appendix till more than two months after the accident: *Stolte v. N. Y. State Sewer Pipe Co.*, Death File, No. 18389, Dec. 18, 1916; 179 App. Div. 949, July 3, 1917. In the other, in which evidence of an accident's occurrence was the main issue, the court handed down the following opinion:

LINDQUEST V. HOLLER & SHEPHERD, 178 App. Div. 317, May 2, 1917.

LYON, J.: The most important question presented by this appeal is whether hearsay evidence as to the deceased having suffered an accidental injury was sufficient to warrant the State Industrial Commission in making an award.

The deceased was the superintendent of construction of a section of the barge canal, and concededly his death resulted from acute peritonitis which might have been caused by the rupture of the appendix.

There was no eye witness of the happening of the alleged accident, and it was not confirmed by any marks upon the skin or by other external sign.

The sole evidence of its occurrence is found in the employer's first report of injury, and in the testimony of the wife, son and attending physician of the deceased that he said his foot slipped while he was attempting to climb out of the prism of the canal, and that he fell down the bank, striking his abdomen, causing severe pain, and that he told his wife "he broke something inside." The employer's report also stated positively that the accident happened on the barge canal location May 9, 1916, at ten A. M. while the deceased was climbing out of the prism of the barge canal.

The State Industrial Commission found the facts to be in accordance with such statement of the deceased, which was stated by the medical expert of the Commission to be the most plausible theory from a clinical point of view considering the case *in toto* and the rapid development of the symptoms and physical signs after the alleged fall; that at the time of the happening of the accident the deceased was afflicted with a diseased appendix, and that by reason of the fall, acute exacerbation of the appendix resulted producing a rupture of the appendix from which acute peritonitis developed, causing death five days after the fall. No autopsy was had, and whether the peritonitis in fact resulted from a rupture of the appendix or from some other cause was not definitely proven. It is not claimed that the mere fact that death occurred from peritonitis would of itself be sufficient

evidence that the deceased had sustained an accidental injury to warrant making the award, but we think the conclusions of the Commission were warranted provided the Commission was justified in receiving the hearsay evidence and basing its conclusions thereon. Consideration of the appeal is, therefore, narrowed to the single question as to the admissibility of the hearsay evidence, which was received under the objection of the appellants.

I think that under the decision in the case of *Matter of Carroll v. Knickerbocker Ice Co.* (218 N. Y. 435) the hearsay evidence was admissible in the discretion of the State Industrial Commission and hence was properly received.

There was not in this case as in the *Carroll* case denials of the happening of the accident by persons who were present at the time it was claimed to have occurred, nor is the evidence in this case abhorrent to reason and common sense as in that case, and it cannot be said in this case as in that case that the presumption created by section 21 of the Workmen's Compensation Law was overcome by substantial evidence.

The State Industrial Commission was satisfied as to the credibility of the hearsay evidence. It was, therefore, confronted by questions of fact and its decision thereon being supported by the evidence is conclusive upon us. The award of the Commission should be affirmed. Award unanimously affirmed.

(3) *Blood clot*.—In the opinion of the attending physician a thrombus or an embolism may have caused the death of a laborer who died suddenly in bed five or six months after an accident that had seriously injured his head and body. The Appellate Division affirmed an award to his family unanimously and without opinion: *Judice v. Degnon Contracting Co.*, Bul., vol. 2, p. 149, April 24, 1917; 181 App. Div. 909, Nov. 14, 1917. A similar explanation was offered in *Casey v. Borden's Condensed Milk Co.*, Bul., vol. 3, p. 6, Aug. 13, 1917; 182 App. Div. —, Jan. 18, 1918; argued again in Appellate Division, May 8, 1918.

(4) *Blood poisoning*.—Trivial hurts often terminate fatally because of infection. In two of the following cases injury to a toe caused death. Infection presents close questions of evidence. The Appellate Division, unanimously and without opinion, has affirmed awards in *Staufenberg v. Muller & Son*, S. D. R., vol. 10, p. 503, Aug. 28, 1916; 178 App. Div. 942, May 2, 1917; *Sturges v. King Sewing Machine Co.*, Death File, No. 18933, May 29, 1917; 181 App. Div. 911, Nov. 14, 1917; and *Sturcke v. Lullman*, 181 App. Div. —, Dec. 28, 1917. Other infection cases are *Friedman v. R. & F. Realty Corp.*, S. D. R., vol. 14, p. 551, Bul., vol. 2, p. 165, May 14, 1917; and *Bennett v. Van Motor Co.*, Bul., vol. 2, p. 231, July 5, 1917.

(5) *Boil, bunion, carbuncle*.—Bunking a boil, bunion or carbuncle may drive its poisonous matter into the blood stream and infect the entire body. The Commission has awarded compensation for such accidental injuries in *Caine v. Greenhut & Co.*, S. D. R., vol. 13, p. 515, Bul., vol. 2, p. 125, March 7, 1917; *Cutter v. Snavlin*, S. D. R., vol. 14, p. 547, Bul., vol. 2, p. 152, April 11, 1917; and *Whalen v. N. Y. & Cuban Mail S. S. Co.*, Bulletin of the General Contractors' Association, vol. 8, page 64. The Appellate Division has affirmed the award in the *Caine* case without opinion: 181 App. Div. 907, Nov. 14, 1917.

(6) *Cancer*.—Bruises of a driver, thrown from his wagon, accelerated an unknown cancer of his stomach and caused his death: *Blatt v. Schonberger & Noble*, S. D. R., vol. 7, p. 388, Jan. 21, 1916; 176 App. Div. 924, Dec. 29, 1916. Burns of an employee who fell astride of a hot steam pipe developed into cancer and necessitated an operation: *Richardson v. Builders' Exchange Assn.*, S. D. R., vol. 9, p. 317, June 14, 1916; 179 App. Div. 949, July 3, 1917. In both these instances the Appellate Division affirmed awards unanimously and without opinion. A falling chunk of coal struck a fireman's leg just over a sarcoma of the bone. Amputation became necessary. The Commission awarded him compensation on the ground that the blow had aggravated the cancerous condition. The Appellate Division reversed the award because the fireman had failed to give notice of accident: *Prokopiak v. Buffalo Gas Co.*, S. D. R., vol. 7, p. 390, Jan. 21, 1916; 176 App. Div. 128, Dec. 28, 1916.

(7) *Chorea or St. Vitus's dance*.—Upon a cry of fire in a factory a woman employee fainted and remained unconscious for two hours. In consequence she became choreic. She had been in excellent health and spirits before the accident. The briefs in Appellate Division arrayed numerous precedents for and against affirmation of her award. The court affirmed the award unanimously and without opinion: *London v. Casino Waist Co.*, Case No. 60642, Aug. 2, 1917; 181 App. Div. —, Dec. 28, 1917.

(8) *Delirium tremens*.—Awards for accidents that have brought on delirium tremens are reviewed in Bulletin 81, pages 115, 116, 250-253. The Appellate Division has affirmed awards unanimously and without opinion in two later cases: *Rzepczynski v. Manhattan Brass Co.*, S. D. R., vol. 12, p. 540, Bul., vol.

2, p. 91, Jan. 10, 1917; 179 App. Div. 952, July 2, 1917; and *Beckwith v. Bastian Bros. Co.*, S. D. R., vol. 13, p. 538, March 14, 1917; 181 App. Div. 909, Nov. 14, 1917.

(9) *Eye disease*.—Particles flying into eyes afflicted with glaucoma or other trouble may accentuate the disease to the point of blindness. Such cases are apt to be challenged on the ground that there has been no accident. The interrelation of the eyes further complicates them. In the following case the claimant became practically totally blind following an accident that occurred October 18, 1915. The testimony tended to show that disease had rendered one of his eyes useless before the accident occurred. Unfortunately for him his accident happened after the amendment to Workmen's Compensation Law, § 15, subd. 6, by L. 1915, ch. 615, and before the amendment of the same section by L. 1916, ch. 622, adding subd. 7. The Commission made an award for the loss of one eye. He took an appeal on the ground that he should have received compensation for total disability because of the loss of both. His contention hung upon interpretation of the phrase "previous disability" in subd. 6. The text of the court's opinion upholding the Commission's award is as follows:

BLAES V. BLISS Co., 177 App. Div. 370, Mar. 7, 1917.

LYON, J.: The claimant was employed in a machinery manufacturing establishment in the city of New York. In October, 1915, while grinding a steel tool upon an emery wheel, particles of emery were thrown into his eyes, which were diseased. Soon thereafter he became entirely blind in his right eye, and had remaining only twenty per cent of vision in his left eye. The State Industrial Commission found that the loss of eighty per cent of the vision of the left eye was due to its previous defective condition having been aggravated by the accident, and made an award of 128 weeks for partial permanent disability. To this finding no exception was taken by either the employer or insurance carrier. In fact, the latter agreed at the hearing to make payments therefor in one lump sum without discount. The correctness of this portion of the award is, therefore, not before us for review.

As to the cause of blindness of the right eye the testimony was conflicting. The eye specialist agreed upon by both parties to examine the eye testified that its blindness resulted from optic atrophy. The Commission found that the blindness was not due to injury resulting from particles of emery being thrown into the eye, but was due to changes in the background of the eye, disassociated with such accident. The claimant contends that, conceding this finding to be conclusive as matter of fact, the Commission erred as matter of law in refusing to make an award for total permanent disability. This contention is based upon the claim that the expression "previous disability"

contained in subdivision 6 of section 15 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of 1915, chap. 615) applies only to injuries arising out of and in the course of a hazardous employment, and not to such disability as may be the result of disease. Under this construction of the statute the claimant contends that blindness of the right eye having resulted from optic atrophy and not from accidental injuries arising out of a hazardous employment, was not a "previous disability" within the meaning of section 15, and hence that the award should not have been limited on account of it, but should have been made with reference to the last injury only, to wit, the injury to the left eye, which of itself, the claimant contends, in view of the existing blindness of the right eye, permanently totally disabled claimant.

The argument in support of this contention wholly disregards the fact that the evidence disproves the existence of any condition disabling the claimant from working prior to the time of receiving the injuries complained of. While it appears from the evidence that the claimant's eyes had been diseased for some time before the accident, such condition does not seem to have in any way disabled him, nor even to have been such as to make him aware of its existence, as he testified that prior to the time of receiving those injuries he had never had any trouble with his eyes. The question, therefore, whether the expression "previous disability" is limited to the result of injuries sustained in a hazardous employment is not before us upon this appeal.

The determination of the State Industrial Commission should be affirmed. Determination unanimously affirmed.

An accident destroyed the right eye of a workman and caused an attack of glaucoma in the left, according to the Commission's findings. The insurance carrier took an appeal from the finding relative to the left eye. The Appellate Division upheld the Commission without opinion: *Mathews v. General Electric Co.*, Claim No. 63415, May 24, 1917; 181 App. Div. 912, Nov. 14, 1917. Upon appeal argued January 18, 1918, the insurance carrier challenged the occurrence of an accident to a diseased eye: *O'Hare v. Abenroth & Root Mfg. Co.*, File No. 14225, Aug. 16, 1917. The employer may admit the occurrence of an accident to a diseased eye and yet contend that loss of the eye is not attributable to the accident: *Restivo v. Rapid Transit Subway Construction Co.*, S. D. R., vol. 12, p. 538, Bul. vol. 2, p. 90, Jan. 10, 1917. Following upon an injury to his leg an employee afflicted with syphilis became blind; the Commission awarded compensation to him for his blindness but the Appellate Division reversed the award; the text of the court's opinion appears below, page 221.

(10) *Heart disease*.—Sudden death and disability due to failure of diseased hearts under the strain of lifting has been held compensatable in two unanimous decisions handed down by the Appellate Division. In the one case, the claimant collapsed while lifting heavy barrels; affirmation of his award was without opinion: *Amesbury v. Vacuum Oil Co.*, S. D. R., vol. 9, p. 399, Aug. 15, 1916; 178 App. Div. 945, May, 1917. In the other, the facts are stated as follows:

UHL V. GUARANTEE CONSTRUCTION CO., 174 App. Div. 571, Nov. 15, 1916.

KELLOGG, P. J.: The only question is whether the death was the result of an accidental injury. The Commission has so found. Its finding is challenged on the ground that there is no evidence tending to sustain it, and that the death was the result of chronic endocarditis and was not accidental. The employee was about thirty-seven years of age, five and one-half feet high, weighing about 160 pounds, apparently a strong, able-bodied man and well nourished and was performing his usual work well and cheerfully and had worked regularly. On May twenty-third he was examined for insurance in the John Hancock Insurance Company, and the doctor found him all right. He died October fourteenth following. The widow says that he did not appear to be sickly and never complained; that he worked every day and worked Sundays, too, and the week of his death he had worked overtime, starting at six o'clock a couple of mornings. The coroner's physician saw the body the day after death, and made his diagnosis entirely from what the widow told him and the casual appearance of the body. No autopsy was had. He says the widow told him that her husband had not been feeling well for two or three days and she stated his symptoms, which he could not relate; but he inferred from the symptoms and the appearance of the body that death was due to chronic endocarditis. His evidence, however, is not very satisfactory upon that point. At the time of his death the deceased was working with one Sullivan inside of a form for cement work, and they were required while bending over to spring four heavy steel spring rods and to insert another rod under them; the rods were forty feet long and one and one-quarter inches in diameter. They were used to reinforce the concrete. The lifting was done at the end of the rods where they came through a hole in the form box. The positions in which the rods were "made it extra hard straining and lifting. It was a short lift, and the rod braced against the box we were lifting." Immediately upon springing the rods Uhl fell over dead, blood flowing from his nostrils. Sullivan says the strain in lifting the rod was very unusual, arising from the peculiar, unusual way in which the rods were placed, and caused a feeling which he described as if his stomach "was turning inside out." He thinks he lifted about 300 pounds and that Uhl lifted more. The Commission find that Uhl had a cardiac lesion, which became aggravated by the unusually heavy lifting which he performed in springing the rods and that there was thereby caused a sudden dilatation of the heart, and consequently heart failure, resulting in death. This is not inconsistent with the testimony of the coroner's physician, as

follows: "Q. Now, doctor, as a pathologist, accepting your diagnosis, admitting that it may have been endocarditis, what was the sudden exertion in consequence of the heavy lifting likely to have [been] upon such a heart? A. It might give acute dilatation. Q. Due to what? A. Due to lack of muscular power. Q. And that is possible to cause sudden death? A. Yes, sir.

We are not called upon to determine whether the evidence clearly established that this death was accidental. The finding of the Commission upon a question of fact is conclusive upon us, and the only question is whether there is any evidence to sustain such a finding. If there is no evidence the finding may be treated as error of law. If the heavy and unusual strain aggravated the cardiac lesion and caused a sudden dilatation of the heart and consequent heart failure, resulting in death, the death may well be considered as accidental and within the act. In *Matter of Broleski* (171 App. Div. 959) the deceased had chronic heart disease, the valves of the heart being thick and curled up, but he came to his death through over-exertion, or from an electric shock, and the award of the Commission was sustained.

In *McCahill v. New York Transportation Co.* (201 N. Y. 221) the injured person died of delirium tremens, precipitated or hastened by the accidental injury, caused by the defendant's negligence, and it was held that the negligence was the proximate cause of the death. In the present case there was no perceptible physical injury, but death resulting from a strain, as stated, may well be called accidental. The award of the Commission should be affirmed. Award unanimously affirmed.

The Appellate Division, unanimously and without opinion, affirmed an award to the widow of a car shop employee who had been struck in the abdomen by a piece of iron; he was known before the accident to be in a precarious condition from valvular trouble of the heart; he quit work after a day or two and died of the heart trouble about nine weeks later; physicians testified that he might have lived ten to twenty years had it not been for the accident: *Cook v. N. Y. C. & H. R. R. R. Co.*, S. D. R., vol. 8, p. 469, Apr. 27, 1916; 179 App. Div. 967, Sept. 27, 1917.

The physicians were not so clear and positive in the following case and the Appellate Division reversed the award, one justice dissenting; the Commission had justified the award on the ground that the deceased had been able to do his regular work up to the day of the accident and had not done a day's work during the two months that he lived thereafter: S. D. R., vol. 14, p. 568, Bul., vol. 2, p. 202, June 6, 1917; the text of the court's opinion is as follows:

TUCILLO v. WARD BAKING Co., 180 App. Div. 302, Nov. 28, 1917.

SEWELL, J.: The Commission found as conclusions of fact that on the 23th day of February, 1916, while the deceased was doing some heavy lifting

under a boiler, and in consequence thereof, he received an injury which resulted in a right inguinal hernia; that after an examination by Dr. Fisher, a physician provided by the insurance carrier, an operation was performed by him on account of the hernia about March 19, 1916; that "The deceased made a fair recovery from said operation, the wound having healed by primary intention, and the patient was able to be about, although in a weakened condition," and that three weeks after the operation his condition became such that he had to take to his bed and he died April 26, 1916.

The Commission also found that at the time of the operation, and for some time prior thereto, the deceased suffered with chronic myocarditis arteriosclerosis which condition contraindicated the operation and the anaesthetic administered therewith; that the operation and the anaesthetic so weakened and debilitated deceased as to light up and hasten his previously diseased cardiac condition to a fatal close, and that "The injuries which resulted in the death of John Tucillo were accidental injuries, and arose out of and in the course of his employment."

The appellants contend that the facts found are not supported by the evidence in so far as they relate to the cause of death. It cannot be denied that the proof fails to support the theory that the hernia accelerated or aggravated the cardiac condition of the deceased or that it was the direct cause of his death. All the evidence in the case negatives that idea. To my mind the evidence also fails to show that the operation or the anaesthesia hastened his death.

There was much testimony given before the Commission as to the condition of the deceased before and after the operation, but neither of the two attending physicians, nor any one of the four other physicians called by the insurance carrier to testify as experts, was willing to express the opinion that the operation or the anaesthesia was the cause of death or that the deceased would not have died of myocarditis the time he did if the operation had not been performed. On the other hand, two of these testified that they did not think the operation or the anaesthesia accentuated or accelerated the disease or hastened the death of the decedent. It is also to be observed that Dr. Lewy in his first report to the Commission said: "It is very difficult to state whether the operation for the hernia had debilitated claimant to such an extent that the latent pathological conditions of the heart and blood vessels have been acutely exacerbated and thereby have caused premature death;" and in his second report that "I am not able to consider that death was caused either by a hernia nor in consequence of the operation."

Subdivision 8 of section 3 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) provides that "'Death' when mentioned as a basis for the right to compensation means only death resulting from such injury." To establish the fact that a death resulted from an injury it is clearly not sufficient to prove that the person received the injury; that an operation was performed on account thereof, and after he had apparently recovered from the effect of the operation and the anaesthesia he died from a disease that existed before the injury.

My conclusion is that the award appealed from should be reversed and the claim dismissed. All concurred, except KELLOGG, P. J., dissenting. Award reversed and claim dismissed.

The Appellate Division affirmed unanimously and without opinion awards for heart disease aggravated by over-exertion in *Hackford v. Veeder & Brown*, S. D. R., vol. 8, p. 472, Apr. 27, 1916; 176 App. Div. 924, Dec. 29, 1916; and *Gorton v. Eastman Kodak Co.*, Bul., vol. 2, p. 150, Apr. 11, 1917; 181 App. Div. 909, Nov. 14, 1917. The Commission, upon advice of Commissioner Sayer, denied compensation to the dependents of a driver who, having loaded his wagon with bags of feed, went to the stable to get his horse and was found dead there; testimony relative to the post mortem condition of his heart was unsatisfactory and he had not died immediately after the loading: *Scott v. Grant*, S. D. R., vol. 14, p. 651, Bul., vol. 3, p. 47, Sept. 29, 1917.

Heart disease aggravated by accident is distinguishable from direct traumatic heart injury as noticed below, page 237.

(11) *Hip disease*.—The Commission has denied compensation for tubercular condition of the hip joint claimed to have been caused or aggravated by muscular strain of lifting; *De Feo v. Butterick Co.*, Bul., vol. 2, p. 224, July 5, 1917. This case may be compared with the *Malanzona* case noticed below, page 240.

(12) *Kidney disease*.—A driver who had been treated for chronic nephritis fell from his truck on a hot day. He incurred a scalp wound and partial paralysis of his body. The insurance carrier claimed that the disease and the heat, not an accidental stumbling, caused his fall. The Commission awarded him compensation. The Appellate Division affirmed the award unanimously and without opinion: *Henderson v. Donovan Co.*, Claim No. 16407, Feb. 3, 1917; 178 App. Div. 946, May 17, 1917.

(13) *Malnutrition*.—A blow from a falling timber or beam broke the jaws of a laborer; the injuries prevented him from eating solid food for five months; he died suddenly in the night; the Appellate Division affirmed an award to his widow unanimously and without opinion: *Judice v. Degnon Contracting Co.*, Bul., vol. 2, p. 149, Apr. 24, 1917, 181 App. Div. 909, Nov. 14, 1917.

(14) *Mercurial poisoning*.—While mercurial poisoning is an occupational disease and as such not compensatable, an accident that leads to an undue additional absorption of mercury is compensatable. The Commission has so held in the case of an em-

ployee who cut his hand while working with glass and wore a bandage that constantly got wet with a mercurial solution: *Boslee v. Bache & Co.*, S. D. R., vol. 14, p. 607, Bul., vol. 3, p. 12, Sept. 5, 1917.

(15) *Pneumonia*.—Lowered vitality following injury to the chest cavity or to other parts of the body terminated in death from pneumonia in five cases the awards of which the Appellate Division affirmed unanimously and without opinion, to-wit: a laborer who strained his side by heavy lifting and walked home through cold and snow, *Geoppner v. Henning*, S. D. R., vol. 11, p. 603, Nov. 20, 1916; 178 App. Div. 943, May 2, 1917; an aged workman who slipped, fell and hurt his hand and arm, infection resulting; *Sturges v. King Sewing Machine Co.*, Death File, No. 18933, May 29, 1917; 181 App. Div. 911, Nov. 14, 1917; a shoe treer whose exertion and bending over his work caused a hernia, *Coons v. Endicott, Johnson & Co.*, S. D. R., vol. 14, p. 565, Bul., vol. 2, p. 203, June 6, 1917; 181 App. Div. —, Dec. 28, 1917; a laborer who cut his little finger while washing bottles, infection resulting, *Rodgers v. Borden's Condensed Milk Co.*, Death File, No. 27351, July 13, 1917; 182 App. Div. —, Jan. 18, 1918; and a coal-hoist engineer who sprained his ankle in a complete somersault over a stair railing while descending to get his pay envelope, *Graham v. Brooklyn Union Gas Co.*, Death Case, No. 10594, Jan. 2, 1918; — App. Div. —, March 15, 1918. In the *Sturges* case the infection caused static pneumonia to develop. In the *Coons* case the pneumonia followed immediately upon an operation for the hernia and resulted in death in two days. Commissioner Lyon said: "It seems to be the consensus of medical opinion that pneumonia may and often does develop directly from surgical operations. Apparently the pneumonia germ finds a freer scope for its operation when the person is weakened and debilitated from the shock of an operation. Such pneumonia is usually referred to as post-operative or post-traumatic pneumonia." In the *Graham* case the insurance carrier claimed that the employee had unduly exposed himself to chill air while nursing his ankle at home.

(16) *Sarcoma*.— See under *Cancer*.

(17) *Syphilis*.—In the following opinion in the case of one Borgstedt, the Appellate Division, speaking through Justice Wood-

ward, appears to put a limit upon compensation for accidental aggravation of already existing disease, if it does not exclude it altogether. The reasoning follows Justice Woodward's reasoning in his lengthier dissenting opinion in the tuberculosis case of *Van Kueren v. Dwight, Divine & Sons*; also Justice Lyon's reasoning in the typhoid case of *Banks v. Adams Express Co.* The texts of these two opinions are presented immediately below. In the Borgsted opinion the court says that "only resulting disease or infection is provided for by the law," emphasizes the words "naturally and unavoidably" and calls attention to the fact that syphilis has "a tendency toward progression." The scriptural quotation indicates that sin should be a factor in deciding cases involving disease. Justices Kellogg and Cochrane dissented from the reversal of the award. The full text of the opinion is as follows:

BORGSTED V. SHULTS BREAD Co., 180 App. Div. 229, Nov. 28, 1917.

WOODWARD, J.: There is no dispute that John Henry Borgsted received injuries while employed by the Shults Bread Company, in a hazardous occupation, on the 22d day of March, 1916, but the question whether such injuries resulted in the permanent disability of the injured employee is presented. The State Industrial Commission has found as conclusions of fact that "on said date while John Henry Borgsted was working for his employer and was driving his employer's wagon at 169th street, * * * he slipped in getting off of his wagon and fell, and thereby received a spiral fracture of the right tibia just above the ankle. Previous to this accident, Borgsted was afflicted with the disease of syphilis. * * * The injury to the ankle caused a lowering in Borgsted's resisting power and made him less able to resist the progress of the disease of syphilis which manifested itself one week after he returned home by a dimness of vision which has now become so severe that he is able now to perceive only the difference between light and darkness. In this way his previous diseased condition has become aggravated and there has been caused a complete permanent disability. The fractured ankle is still painful at the date hereof and he is still compelled to walk on crutches by reason of the condition of the said ankle. By reason of the said disease the healing of the ankle has been much prolonged. Even if Borgsted possessed sight in both eyes, he could not use his right ankle for the purpose of getting about without the aid of a crutch or possibly of a cane. Considering the existence of the disease of syphilis, and the pre-existing involvement therein of his optic nerves, the present condition of Borgsted is the natural result of his injury. The injury to Borgsted is total permanent disability, as the loss of vision in the eyes cannot be cured." The Commission then finds the amount of wages, and that the "injuries to John Henry Borgsted were accidental injuries, and arose out of and in the course of his employment," and holds as a conclusion of law that "this claim comes within the provisions" of the

statute, and awards the sum of ten dollars and twenty-five cents weekly during the balance of his life for permanent total disability.

The insurance carrier appeals from this award and urges that the finding of the Commission, that the claimant's previous diseased condition has become aggravated because of the accident, is without basis of fact, and is not supported by any evidence, and we are referred to much detailed expert testimony upon this proposition, which it does not seem to us important to consider, for the reason that upon the Commission's own findings of fact the conclusion of law that this accident produced a permanent total disability does not follow. The purpose of the Workmen's Compensation Law was not to abrogate the divine law that the "sins of the father shall be visited upon the sons, even to the third and fourth generation," but to impose upon certain designated industries, or the product of such industries the burdens of the accidents arising out of such employments. (*Ives v. South Buffalo R. Co.*, 201 N. Y. 271, 286.) The finding that the accident occurred, and that it resulted in a spiral fracture of the right tibia just above the ankle, establishes the nature of the accident, which is one of very incidental importance, and ought not to result in anything more serious than a short disability. The accident occurred on the 22d of March, 1916, and the Commission finds that there was some pain, and that it was necessary to use a crutch at the time of the report, which was dated April 30, 1917, more than one year after the accident. The Commission finds that by reason of the disease the healing of the ankle has been prolonged, but its finding of fact is not that this condition of the ankle has produced the permanent total disability, but that such disability is caused by "the loss of vision in the eyes," which cannot be cured.

The statute (Workmen's Compensation Law [Consol. Laws, chap. 67; Laws of 1914, chap. 41], § 3, subd. 7) defines "injury" and "personal injury" to "mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." To constitute an injury resulting in total disability by reason of the loss of eyesight it must be shown, that the eyesight was destroyed by the injury, or that the injury produced "such disease or infection" as resulted in the loss of the eyesight; the injury must be "an accidental injury," and "such disease or infection as may naturally and unavoidably result therefrom." An injury which does not naturally and unavoidably produce disease or infection cannot be compensated under the law, except to the extent of the actual injuries. The insurance carrier is liable for the compensation due for the breaking of the tibia, and it may be that it would be liable to compensate the claimant for the disability, or partial disability, arising out of such injury during its continuance, though this should be prolonged beyond the ordinary period by reason of the pre-existing syphilitic condition of the claimant, but where as here it is found that the claimant was the victim of a disease, which all the witnesses agree was the cause of the loss of eyesight, and the most that is suggested is that the disease may have been aggravated by the accident, the case is not within the statute, in so far as it relates to the loss of eyesight. The disease, which the Commission finds existed prior to the accident, did not "naturally and unavoidably result" from the accident; it was there with all the potentiality of destruction to the eyesight when this accident occurred, and if we assume that the disease was aggravated

by the accident; that it developed more rapidly than would otherwise have been the case; still the disease or infection was not the result of the accident, and it is only resulting disease or infection which is provided for by the law. The evidence before the Commission is undisputed that this disease had resulted in "an atrophy or degeneration of the optic nerve," and that "such a condition is in consequence of a specific constitutional infection and is permanent with tendency toward progression;" that the claimant had developed the symptoms of locomotor ataxia, and that the atrophy of the optic nerve predated the injury, and the only inference from the testimony is that the claimant was so far advanced in the disease that it was only a matter of a comparatively short time when he must have reached the results which now prevail, though no accident had happened. There is some slight testimony to the effect that the disease might have been aggravated or accelerated by reason of the degeneration of the tissues, lessening the claimant's power of resistance, but this does not tend to bring the case within the letter or the spirit of the statute, for no one has ever suggested that the results of "specific constitutional infection," which in the present case are conceded to be congenital syphilis, constituted a legitimate charge upon the industrial life of the State.

We are clearly of the opinion that the facts found by the Commission, many of which were not in issue, do not give rise to the conclusion of law that this case, as here presented, comes within the statute. That the claimant may be entitled to further compensation upon his claim for the spiral fracture of the right tibia, which was the full measure of his demand in the first instance, may be conceded, and this though the injury may have been prolonged in its results because of the degeneracy due to syphilis; but that the State Industrial Commission has no jurisdiction to award compensation for a permanent total disability due to loss of eyesight, where such loss cannot by any possibility be traced to the accident, and where no claim for such loss of eyesight was made, is certain.

The award should be reversed, and the matter should be remitted to the State Industrial Commission for such further action as the Commission may be advised, consistent with this determination. All concurred, except KELLOGG, P. J., and COCHRANE, J.; dissenting. Award reversed and matter remitted to the State Industrial Commission for such further action as the Commission may be advised consistent with the opinion herein.

(18) *Tetanus*.—The Appellate Division, one justice dissenting, has affirmed an award to the widow of a driver who ran a rusty nail in his foot while collecting dirt from the streets and died in hospital of tetanus: *Putnam v. Murray*, S. D. R., vol. 6, p. 355, Dec. 6, 1915; vol. 7, p. 407, Feb. 3, 1916; 174 App. Div. 720, Sept. 13, 1916. It has unanimously affirmed an award to the widow and children of another driver for injury terminating fatally in tetanus but the Court of Appeals has reversed the award on ground of non-incidentalness: *Glatzl v. Stumpp*, S. D. R., vol. 6, p. 397, Dec. 29, 1915; 174 App. Div. 901, June 30, 1916;

220 N. Y. 71, Jan. 30, 1917. The texts of opinions in the two cases appear above, pages 115, 169.

(19) *Tuberculosis*.—Justice Woodward's reasoning of November 28, 1917, in the Borgsted case, just presented above, had been preceded by like reasoning in his dissenting opinion in *Van Keuren v. Dwight, Divine & Sons*, July 2, 1917. The majority opinion in the Van Keuren case had declared his reasoning fallacious and had clearly and emphatically sustained an award for acceleration of existing tuberculosis. Justice Sewell had concurred in Justice Woodward's dissent. The Van Keuren case was pending in the Court of Appeals at the time of the Borgsted decision and has since been affirmed by the higher court without opinion: 222 N. Y. 648, Jan. 22, 1918. The majority and minority opinions in the Appellate Division are as follows:

VAN KEUREN V. DWIGHT, DIVINE & SONS, 179 App. Div. 509, July 3, 1917.

COCHRANE, J.: The Commission has found that the deceased at the time of his injury had dormant tuberculosis which was aggravated by the injury so that it became acute and caused his death. These findings are supported by the evidence and are conclusive on this court. An injury under the statute is one "arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." (Workmen's Compensation Law [Consol. Laws, chap. 67; Laws of 1914, chap. 41], § 3, subd. 7.) It seems to me that there is a fallacy in the reasoning of the opinion of Mr. Justice WOODWARD, in assuming that it must be shown that death resulted from "such disease or infection as may naturally and unavoidably result" from the injury, and in ignoring the other part of the definition of the word "injury" that it may arise "out of and in the course of employment" irrespective of whether or not any disease or infection results therefrom. The claim here is not that tuberculosis resulted from the injury as would be inferred from the opinion of Mr. Justice WOODWARD. But the evidence shows quite clearly and the Commission has found that the disease existed before the injury which accelerated the disease and shortened life. The injury caused a hemorrhage which so far as the evidence discloses the deceased never experienced before or after and there is medical testimony to the effect that such an injury would develop the disease then existing. If an employee has a disease and having the same receives an injury "arising out of and in the course of employment" which accelerates the disease and causes his death, such death results from such injury and the right to compensation is secured even though the disease itself may not have resulted from the injury. The award should be affirmed.

All concurred, except WOODWARD, J., who dissented in an opinion in which SEWELL, J., concurred.

WOODWARD, J. (dissenting):

On the 24th day of December, 1915, George Van Keuren was employed as a cutler by Dwight, Divine & Sons, who were engaged as cutlery manufacturers

at Ellenville, N. Y. While the evidence is entirely of the hearsay order, it is not disputed that, while engaged in lifting a box of knives weighing some thirty or forty pounds, the employee fell against a vise located upon his workbench, striking his neck just above the collar bone. Mr. Van Keuren was taken to the office of Dr. Divine, who appears to be a member of the employer's firm, where he was examined, and a plaster was placed over the spot indicated as the point of injury and going down over a portion of the chest, and the patient was sent home and directed to refrain from walking or taking any violent exercise. Dr. Divine, who appears to have been a perfectly frank and conscientious witness, testified that the point of contact with the vise showed no abrasion, no discoloration and no indication of pain under pressure, and that the plaster was applied as a reminder to prevent sneezing or coughing, the patient having told her that he had had a hemorrhage, though whether this hemorrhage was before or after the fall does not appear from the evidence. She testified that there was no blood visible at the time of her examination, though she makes no effort to discredit the patient as to his having had a hemorrhage, and no one anywhere suggests that this injury was anything more than a very incidental bump, producing no visible signs. On the seventeenth day of January, about three weeks after the fall, Mr. Van Keuren returned to work in the factory, apparently entirely well from the injury to this neck, but after working about two days and a half he quit work, complaining of feeling tired, and from that time on he performed no work, and it is conceded that he died in October of pulmonary tuberculosis. The theory of the claimant, found by the State Industrial Commission, is that the death resulted from the injury received by Mr. Van Keuren in the fall, and the only question presented upon this appeal is whether there was any evidence to support this finding of fact. If there is such evidence the fact is conclusively found, and the award must be sustained.

Section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) provides that the "compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments," and it is conceded that the claimant's decedent was employed in a hazardous employment. By subdivision 7 of section 3 "injury" and "personal injury" are defined to mean "only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom," while subdivision 8 provides that "'death,' when mentioned as a basis for the right to compensation means only death resulting from such injury." The language of the statute clearly indicates that it is not every death following a slight injury which is to become a charge against the industry; it is "only death resulting from such injury." And injury is "only * * * such disease or infection as may naturally and unavoidably result" from such injuries. The clear intent of the statute is that only where the injury results in "such disease or infection as may naturally and unavoidably result therefrom" and death results from "such injury" the compensation becomes payable. To establish the fact that a person has received an accidental injury in a hazardous employment, and that nearly a year thereafter the person so injured has died of tuberculosis, and that there might have been some casual connection between the injuries and the death, does

not meet the requirements of the law. It is necessary to show that the injury resulted in producing "such disease or infection as may naturally and unavoidably result therefrom," and that this disease or infection produced the death. It is a maxim of the common law that "in law the immediate, and not the remote, cause of any event is regarded," or, as Lord Bacon quaintly puts it, "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." (Bacon's Maxims, reg. 1.) But here, we believe, the statute fairly construed permits us to look to the cause of the cause of death, and to determine the liability, not from the immediate injury, but from the more remote results of such injury.

There is absolutely no dispute that the cause of death was pulmonary tuberculosis; without tuberculosis there was no sufficient cause of death. The claimant's decedent concededly recovered from the immediate injury, and went back to his work within three weeks; it was obviously an injury of such slight importance that it would have passed with only incidental mention, except for the fact of the subsequent death of the injured person, and the liability of the insurance carriers depends upon whether the injury produced "such disease or infection" as tuberculosis, and whether such disease or infection was such as may "naturally and unavoidably result" from the injury. Mere opinions that the injury might have had some incidental effect upon a pre-existing disease does not meet the situation; there must be evidence that there were "accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom," and a disease or infection which already exists may not be said to "naturally and unavoidably result" from an injury subsequently sustained. It may well be, as we have suggested in *Sullivan v. Industrial Engineering Co.* (173 App. Div. 65, 69), that with the aid of the presumptions authorized by section 21 of the Workmen's Compensation Law little evidence is needed to establish the right of the claimant, but it is still necessary, we assume, to have some evidence to bring the case within the language and fair intent of the statute, and where the award is challenged, it is the duty of this court to determine the question of law whether the record affords such evidence. In the light of this discussion, let us examine the testimony that we may discover whether there is any proof that the decedent died as the result of any injury which produced "such disease or infection as may naturally and unavoidably result therefrom."

Decedent's own family testified generally to the effect that he had been in seeming good health, and that he worked every day and had had no occasion to employ a physician or to refrain from work, though it appears that shortly after the accident the decedent changed from the care of Dr. Divine, who had originally treated him, to Dr. Rapp, and gave as his reason therefor that Dr. Rapp was his doctor. After this family testimony, which found some support in that of the employer's foreman, Dr. Divine was called. She testified that on the day of the accident she was notified by telephone that the decedent had been injured and that he would be brought to her office; that he came and complained of an injury which he located; that he gave the history of the accident; that "he told me he had slipped and fallen, striking his neck on

the point of the vise, right above the collar bone, and complained of some pain there;" that "his face was clear and he seemed fairly strong, but he was pale." She testified further that he gave a history of having expectorated a little blood, "and I was anxious to find out where that blood came from. I found no blood in his mouth, and there was no external bleeding point, but I was afraid he might strain it, and I put a plaster there so as not to cause or bring on a hemorrhage." She definitely located the point of the injury as "about an inch over the medial line and two-thirds of an inch above the clavicle;" that there was no laceration, no discoloration, and that the most serious symptoms she discovered was the alleged spitting of blood; that there was nothing apparent in the injury which would have prevented him from working, but that she had advised him to go home and to refrain from working or walking until she could be sure that there would be no further hemorrhage. This witness further testified to her watching the developments in this case, of discovering a sub-normal temperature in the morning and an elevated temperature in the afternoon, and that she finally reached the conclusion that the patient was suffering from tuberculosis; that he was in an advanced stage of the disease, and that she found these abnormal conditions immediately after the accident; the same night. She was asked: "If he received a blow on the collar bone, as he gave you a history at that time, would that affect his lungs in any way; such a blow as he gave you a history of and the injury you saw at that time, would you think that could affect the lungs?" She answered, "I don't see how it could," and while frankly admitting that she did not think him weak enough to have fallen by reason of the tubercular condition, she held to the opinion that the injuries described to her, and which she found in her examination, had nothing to do with the death of her patient months later. No evidence can be found in her testimony which gives any support to the theory that this injury had anything to do with producing the tubercular condition which she says she discovered immediately on taking charge of the case, and which her further experience in the case justified. She admitted that she knew nothing of the decedent prior to the accident, and that "from what I guess at from the history of the case, and my examination; that is everything I know."

The next witness examined was Dr. Wicklow, who testified that he saw the decedent between the twentieth and twenty-seventh days of January; that decedent was sent to his office by Dr. Rapp, who then had charge of the case, for the purpose of having his diagnosis confirmed, and that he did not hesitate to pronounce the case to be tuberculosis; that he found it in an advanced stage. Various hypothetical questions were asked of this witness, in which it was assumed that the injury produced the hemorrhage, and finally resulted in his answering: "Assuming the hemorrhage was the result of the blow, I cannot help but think that it might have" had something to do with the condition which he found in January following the accident. But he likewise answered the question, "From the condition of the man, as you saw him in January, isn't it very probable that he might have had a hemorrhage without any blow?" by saying: "Sure, possibly." He had already testified that the hemorrhage could come on without a blow, and that if decedent had a hemorrhage without a blow, that that would aggravate the condition. He had also expressed the opinion that the decedent had tuberculosis at the time

of the alleged injury. He was asked: "From the condition you found him in January, 1916, do you believe that a slight blow above the clavicle could have rendered and put the right lung in the condition you found him in?" and he answered: "Not without having tuberculosis prior to the accident." It appears conclusively that there was no evidence from this witness that tuberculosis was "such disease or infection as may naturally and unavoidably result" from the injury complained of; there was no evidence that the hemorrhage was the result of the injury; for all that appears he may have had a hemorrhage and fallen, and this witness testified that the hemorrhage might come on from the tuberculosis becoming acute.

Dr. H. Van Hovenberg, the next witness, who had merely been called on the day of the trial, and who listened to some of the testimony and formed his opinions from such testimony, testified. He was asked: "Assuming a man twenty-six years of age who was found leaning over his work bench on December 24, head down on his chest, and when the fellow employees got to him he advised them that he had slipped on the floor and struck against a wise; that he was spitting blood; that he was taken to the office of Dr. Divine who loosened his shirt and that Van Keuren indicated to her the site of injury was two-thirds of an inch above the clavicle; she examined that, finding no lacerations, or bruises, or discoloration; that she put a plaster on it, sent him home; that he returned to work January 17, and worked two and one-half days and left, went back home and gradually got weaker so that in February he was confined to the house, and was so confined until October 7th when he died of tuberculosis; that his ailment was diagnosed some time before February as tuberculosis; that it was in rather an advanced stage; that he had a brother die of it at the age of eighteen; in your opinion would such a blow as he indicated have caused or contributed to, of itself, the tubercular condition which resulted in his death in October?" He answered: "You mean as a cause of the tubercular condition?" The question was restated: "As a cause directly or indirectly to his tubercular condition which resulted in his death; the blow itself which, as the doctor testified, left no laceration, bruise or discoloration?" He answered: "As tuberculosis is caused by a germ, I do not see how it is possible that any blow would cause tuberculosis." Asked, "Wouldn't a blow make tuberculosis flare up, or make it exciting?" The witness answered: "It is possible if the man was in an advanced stage, but the gentleman asks me whether it would be a cause." Counsel then stated: "I incorporated in my question the blow, as he stated it was two-thirds of an inch above the clavicle and still there was no evidence of an injury there. He had a hemorrhage. Would that blow, if there was a blow; it must have been slight or it would have caused some evidence there; with such a history as that, do you think that such a blow would have contributed to his death or hastened it?" He answered: "Under certain conditions, if the lung were in an advanced stage of tuberculosis, a blow might cause a hemorrhage which would possibly hasten the action of the tuberculosis." "Q. Would such a blow as this, two-thirds of an inch above the clavicle, a blow which didn't leave any marks, would that hasten it? A. It doesn't seem to me as though it would. Q. You have listened to the testimony and know the history of the case. In your opinion, did that man have the hemorrhage before the fall or after the fall? A. I think it is

possible he had it when he fell. He might have had the hemorrhage which caused him to feel weak. Q. Isn't that your opinion from the history of the case? A. As I gather it, from the condition the lungs were in, I think that might have been the cause of his fall." The witness went to the extent of saying that the hemorrhage might come on thus suddenly; that there always had to be a first time for a hemorrhage, and that while the man might appear normal and go to his work, he would not be in good condition with his lungs in the condition in which they were found at the time of and immediately subsequent to the injury. Here the testimony clearly negatives the proposition which it is necessary to establish; this witness testified positively that a blow could not produce tuberculosis; that it was a germ disease and could not be produced in any other way.

The next witness, Dr. Rapp, who attended the decedent after Dr. Divine, was asked the same hypothetical question in substance as had been propounded to the other expert witnesses, and his reply was that he thought the blow would have some connection with the subsequent condition; that it would "aggravate any existing tubercular lesion." Asked further, "Might it not induce an acute tuberculosis?" He answered, "Yea, sir." This witness, the village health officer, produced a copy of his report to the State Health Department, containing no new information, testified that he found no injury to his patient and that he treated him for pulmonary tuberculosis, and that the case was in "a moderately advanced stage" when it came to him, in January following the accident on the twenty-fourth of December.

This is all the evidence in the case tending to show that the decedent came to his death by means of this trifling injury. The uncontradicted evidence is that death resulted from pulmonary tuberculosis, and that this specific and well-defined disease could not be produced by a blow such as was described by the decedent himself. There was not a suggestion in the evidence that this disease "may naturally and unavoidably result" from the injury alleged, and without such evidence it is impossible to establish that death resulted from such injury, as no one pretends that the decedent was killed by the accident. It was only upon the theory that the injury, trifling in itself, produced the tuberculosis that there could be any pretense of justification for this award, and, as we have seen, no one has attempted to say that this injury could by any possibility produce the disease; much less to say that it might "naturally and unavoidably result therefrom." No one testifies positively even that it might "naturally and unavoidably result" in any serious harm to the patient, unless he was in such an advanced stage of tuberculosis as to make any disturbance of his daily life of importance; all the opinions are based upon the proposition that the decedent was well advanced in the disease before the accident happened, and not one of them pretends to say that he can determine with reasonable certainty that the injury had anything whatever to do with the conditions producing the death, while there is positive and uncontradicted testimony that the disease could not have been produced by the accident. There was, therefore, no warrant in law for the claims presented, and the awards may not stand.

The awards appealed from should be reversed, and the claims dismissed. SEWELL, J., concurred. Award affirmed.

Besides the Van Keuren affirmation, the Appellate Division, unanimously and without opinion, has affirmed awards for death from accelerated tuberculosis, more or less lingering, in the following cases: a back tender on a paper machine whose hand had been caught between its rolls and whose vitality had been reduced by successive operations, *Champine v. DeGrasse Paper Co.*, Death File, No. 2581, Nov. 18, 1916; 181 App. Div. 909, Nov. 14, 1917; a moulder, struck on the chest by a falling piece of iron, *Friday v. Galusha Stove Co.*, Death File, No. 18739, Feb. 28, 1917; 181 App. Div. —, Dec. 28, 1917; a workman overcome by coal gas and steam, *O'Dell v. Adirondack Electric Power Corp.*, Death File, No. 12192, April 27, 1917; 181 App. Div. 910, Nov. 14, 1917*; and an iron coremaker struck in the chest by a corebox, *Callow v. Otis Elevator Co.*, Death Case, No. 7376, Oct. 4, 1917; — App. Div. —, March 6, 1918. It has remitted for further findings the tuberculosis case of a truck driver bruised all over in a runaway and kicked in the stomach by a horse, *Casey v. Borden's Condensed Milk Co.*, Bul., vol. 3, p. 6, Aug. 13, 1917; 182 App. Div. —, Jan. 18, 1918; argued a second time in Appellate Division, May 8, 1918.

The following commission findings awarding compensation for accelerated tuberculosis are worthy of study: an employee struck in the chest by a bursting grindstone, *Backman v. Dwight, Divine & Sons*, S. D. R., vol. 9, p. 322, June 14, 1916; a longshoreman whose legs had been jammed by a truck load of ore, *Nelson v. Compagnie Générale Transatlantique*, S. D. R., vol. 11, p. 619, Bul., vol. 2, p. 44, Nov. 22, 1916; and an elevator erector who strained his side while handling a heavy car platform, *Fegan v. Republic Elevator & Machine Co.*, S. D. R., vol. 12, p. 571, Feb. 7, 1917.

The Commission, for failure of evidence, denied an award to an employee who claimed that a tubercular condition of his hip joint was due to an accident: *De Feo v. Butterick Co.*, Bul., vol. 2, p. 224, July 5, 1917.

(20) *Typhoid*.—An employee fell from a wagon, his head striking upon the pavement. He died of virulent typhoid fever twelve days later. Testimony of a medical expert connecting the disease and the accident is reproduced in S. D. R., vol. 7, p. 473. The Appellate Division and the Court of Appeals affirmed the

*Affirmed by Court of Appeals, 223 N. Y. Rep. —, May 14, 1918.

award without opinion: 176 App. Div. 916, Dec. 29, 1916; 221 N. Y. Rep. 606, July 11, 1917. Justice Lyon dissented from the Appellate Division's decision in a memorandum which is of interest because of its similarities to Justice Woodward's later opinions in the Van Keuren and Borgsted cases, the texts of which appear above under the titles "Tuberculosis" and "Syphilis." The memorandum is as follows:

BANKS v. ADAMS EXPRESS Co., 176 App. Div. 916, Dec. 29, 1916.

LYON, J. (dissenting): On August 6, 1915, Harry Banks, the deceased, was employed as a helper upon one of the delivery wagons of the Adams Express Company. While engaged in his work about half-past four o'clock in the afternoon he fell from the wagon, striking the side of his head upon a car track, receiving a cut which bled for about half an hour. He was dazed and unable to work the balance of the day, although he rode about on the wagon until he went to the stable about six P. M. The next day he worked from seven A. M. to five P. M., and was not thereafter able to work and remained at his home. On August twelfth a physician was called. On August sixteenth he was taken to the hospital, where he died August 18, 1915. The Commission found that at the time of the accident he was suffering from typhoid fever in the incubation stage, which became aggravated by the severe injury to his head through the consequent lowering of his resisting power, and that such disease thus aggravated caused his death. The claimant, who is the father of the deceased, filed a claim for compensation as a dependent. An award to the father was denied, but was made in favor of the three half-brothers and a half-sister of deceased as dependents. From this award the employer appeals. Unquestionably, the injuries sustained by the deceased were accidental and arose out of and in the course of his employment, and the sole question presented by this appeal is: Was the death of Harry Banks the result of the accident which he sustained? The Workmen's Compensation Law defines the terms "injury" and "death" as follows: "'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." (§ 3, subd. 7.)* "'Death' when mentioned as a basis for the right to compensation means only death resulting from such injury." (Id. 8.)* The Commission having found, that Harry Banks at the time of the accident was suffering from typhoid fever in the incubation stage, which became aggravated by the injury to his head and that said disease, thus aggravated, caused his death, it cannot be said that the fever which caused his death was a disease or infection which naturally and unavoidably resulted from the accident. The Commission did not find that the injuries which deceased sustained by the fall resulted in his death, but, justified by medical testimony, found that such injuries aggravated the typhoid fever through the consequent lowering of his resisting power. In *Dunham v. Clare* (4 W. C. C. [Minton-Senhouse 2d ed.] 102), a case where a workman sustained an accident and in a short time erysipelas supervened from which he died, the County Court judge denied compensation upon the ground that death

*See Consol. Laws, chap. 67 (Laws of 1914, chap. 41), § 3, subds. 7, 8.—[Rep. Digitized by Google]

was not the natural or probable consequence of the accident. Upon appeal the Court of Appeals held that the county judge had misdirected himself and remitted the case for rehearing, saying: "It is a question of fact whether the death did result from the injury caused by the accident. * * * The only material question is whether there has been any break in the chain of causation, whether any new act has intervened between the injury by accident and the subsequent death * * *. Although death might not be a natural and probable consequence of the accident, yet it might be caused by the accident without any new act intervening to break the chain of causation." The medical expert of the Commission stated that the severity of the head injury did not depend upon the consequent loss of blood, for an external wound of the scalp might bleed more extensively than would be found in a fracture of the skull without an external wound. I do not think the case is within the statute making death from disease compensatable only when the disease naturally and unavoidably results from such injury. The award should be reversed and the matter remitted to the Commission for a finding as to whether the injury caused the death.

(21) *Uterine disease*.—A factory hand asked a strong and apparently healthy girl employee to help him lift a heavy beam of yarn. The abdominal strain of the lifting inflamed diseased adnexa. She died following an operation. The Appellate Division affirmed an award to her parents unanimously and without opinion: *Owens v. N. Y. Mills Corp.*, S. D. R., vol. 9, p. 367, July 19, 1916; 178 App. Div. 942, May 2, 1917.

L. *Internal injuries*.—Difficulties of evidence characterize invisible injuries to internal organs of the body, as well as the relation of accident to disease. Strain is the most common cause of such injuries. Organs weak or malformed, though not diseased, give way under great physical exertion. External bruising may be accompanied by internal injuries where the employee is hurt by a blow or a fall. In *Fowler v. Risedorph Bottling Co.*, the text of which follows below, the court holds that injury need not "present a visible or external sign."

1. *Brain*.—Strain may cause blood vessels of the brain to burst; blows upon the head from falling or from other accident may cause blood clots. Heavy lifting brought on a stroke of apoplexy, which was declared by the Appellate Division to be compensatable in the following case:

FOWLER V. RISEDORPH BOTTLING CO., 175 App. Div. 224, Nov. 15, 1916.

LYON, J.: The question involved upon this appeal is the right to compensation of an employee suffering from the result of a cerebral hemorrhage induced by over-exertion while engaged in an occupation designated as

hazardous by the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1913, chap. 816; re-enacted by Laws of 1914, chap. 41, as amd. by Laws of 1914, chap. 316).

The State Industrial Commission has found as conclusions of fact that in November, 1914, the claimant was employed as a bottler by the Risedorph Bottling Company, which was engaged in the manufacture of mineral waters at Kinderhook, N. Y.; that while claimant "was working for his employer at his employer's plant, and was assisting another employee in lifting a barrel weighing about 200 lbs. for the purpose of tiering for storage in the cooler, he was seized with a stroke of apoplexy by reason of the strain occasioned by the lifting of the heavy barrel. By reason of this apoplexy, that portion of the brain in which the apoplexy was seated became degenerated, and while Fowler gradually recovered from the motor paralysis of the left side which immediately followed the apoplexy, there remained a deterioration of his mental faculties due to the above-mentioned degeneration, by reason of which apoplexy and degeneration Fowler was disabled from working from the date of the accident to the date hereof, and is still disabled. * * * The injuries to Clinton D. Fowler were accidental injuries, and arose out of and in the course of his employment. * * * This claim comes within the provisions of chapter 67 of the Consolidated Laws."

There was much testimony given before the Commission by medical experts as to the cause of claimant's enfeebled condition. The experts called by the insurance carrier ascribed it to cerebral thrombosis, resulting from arterial sclerosis. The experts called by the claimant supported the theory that such condition resulted from embolism, and one of them testified that he found no evidence of arterial sclerosis. However, it is not for us to determine which theory seems to be better supported by the facts. The Commission has done that, and its decision, which finds justification in the evidence, is binding upon us.

As the appellants' counsel state in their brief the case must be viewed as one of cerebral hemorrhage. So considered, I think, the award made by the Commission was fully warranted. The Workmen's Compensation Law does not require that the nature of the injury shall be such as to present a visible or external sign. The act simply says (§ 2): "Compensation provided for in this chapter shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments." It may well be doubted whether the beneficent purposes of the law, which have repeatedly been the subject of consideration by both the Court of Appeals and this court, would be fully subserved if its application were limited to accidents of which there appeared an external or visible sign. No good reason for such limitation is apparent. Certainly the statute has not seen fit to prescribe it, and it is not for this court to write it into the law.

Appellant's main contention is that claimant's condition was the natural progress and result of disease, and not of accidental personal injury arising out of his employment. This contention was disposed of by the decision of the State Industrial Commission made upon conflicting testimony mainly of medical experts. That the cerebral hemorrhage, if resulting from strain in lifting while the claimant was engaged in his usual employment, constituted an accidental injury within the meaning of the Workmen's Compensation

Law is denied by the appellants who, in their carefully prepared brief, cite many cases in support of their contention. These cases in effect hold that where the death of the employee occurs from heart failure or from inherent internal weakness or disease while the employee is doing his ordinary work in the ordinary way and not as the result of sudden or extra exertion, his death cannot be said to be accidental. In one of the cases cited (*Barnabas v. Bersham Colliery Co.*, 103 L. T. [N. S.] 513) it was held that a stroke of apoplexy which may or may not have been brought on by a strain or over-exertion, is not an injury suffered by accident where there is no evidence that the work subjected the workman to any serious strain.

In the case at bar there was testimony that the claimant, who was fifty-two years old, and for twenty-two years had been in the service of the defendant employer, had always been in good health, and in fact had never up to the time of sustaining the apoplectic stroke been attended by a physician. Of the occurrence itself the claimant testifies that while raising the barrel he felt a sensation, "I had a dizzy head. It came on me suddenly." His brother, who was assisting claimant in raising the barrel, testified that he saw the claimant put his hand to his head and leave the cooler; that he stood outside holding his head and rubbing it; that the brother asked the claimant if he had a pain or headache, to which the claimant answered: "I have a terrible pain, never had anything like it before;" that the claimant then sat down upon a box, but when he tried to get up, slipped and sank down upon the floor. The evidence was that the barrels were usually piled only two tiers high, and that the claimant was at the time of the occurrence assisting in doing the unusual work of piling this barrel three tiers high. Claimant's attending physician testified that the injury was "rupture of cerebral artery on right side producing clot of blood on brain and causing complete paralysis on left side," and that the disability was likely to exist permanently.

The Workmen's Compensation Law (§§ 3, 10) requires that the injury, in order to entitle the claimant to compensation, must have been an accidental injury arising out of and in the course of employment. An "accident" has been most commonly defined as "an unlooked for mishap or an untoward event which is not expected nor designed." (Connor Workmen's Compensation, 8, 9.) "Accidental" has been defined by the United States Supreme Court as "happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected." (*Mutual Accident Assn. v. Barry*, 131 U. S. 100, 121; *Matter of Moore v. Lehigh Valley R. R. Co.*, 169 App. Div. 177, 181.)

The following English cases support the decision of the State Industrial Commission in this case. As the British Workmen's Compensation Act of 1906 (6 Edw. VII, chap. 58), which to a large extent formed the basis of our statute, provides (§ 1) for compensation for personal injury to a workman caused by accident arising out of and in the course of the employment, the English decisions are entitled to careful consideration in arriving at a proper construction of our Workmen's Compensation Law. (*Matter of DeFilippis v. Falkenberg*, 170 App. Div. 153.)

In the case of *Fenton v. J. Thorley & Co.* (5 W. C. C. 1; 19 T. L. R. 684, House of Lords) it was held that a physiological injury caused by an

unlooked-for mishap or an untoward event which is not expected or designed is an injury by accident. In this case the claimant and a fellow-workman set to work to move a wheel of a machine which the claimant was operating. Suddenly the claimant felt something which he described as a "tear" in his "inside," and it was found that he was ruptured. In deciding this case Lord MACNAGHTEN said: "If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight, or trying to move something too heavy for him. * * * A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he is to be told that his case is outside the Act because he exerted himself deliberately, and there was an entire lack of the fortuitous element. I cannot think that this is right."

In the case of *Clover, Clayton & Co. v. Hughes* (3 B. W. C. O. 276) a workman suffering from an advanced aneurism of the aorta was doing his work in the ordinary way by tightening a nut with a spanner. This ordinary strain caused a rupture of the aneurism, resulting in death. The House of Lords held that there was evidence upon which the county judge was justified in making the award. In his opinion Lord LOREBURN said: "No doubt the ordinary accident is associated with something external * * *. I think it may also be something going wrong within the human frame itself, such as the straining of a muscle or the breaking of a blood vessel. If that occurred when he was lifting a weight it would be properly described as an accident * * *. The man 'broke a part of his body' to borrow Lord ROMERSON's expression in *Brintons v. Turvey*."

In the case of *McArdle v. Swansea Harbour Trust* (8 B. W. C. C. 489; 11 N. C. C. A. 175, June, 1915), a workman fifty years of age, who had been employed in the respondent's tin sheds for ten years, whose work was to move tin plates in cases, and who during the forenoon had been employed with other men in shifting heavy cases, while moving lighter cases in the afternoon, fell backwards and died almost immediately. A *post mortem* examination established the cause of death as rupture of an aneurism of the aorta. The county judge found that death was the result of long-standing heart disease which reached its ordinary and fatal result while he was doing the lightest part of an ordinary day's work and held that there had not been an "accident" within the meaning of the act.

The Court of Appeal in allowing the appeal and sending the case back to the county judge to make an award held that it was a misdirection to consider whether the rupture occurred when the deceased was or was not doing work of a light nature, and that an accident should have been found as soon as it was ascertained that the rupture occurred by reason of the strain at work, however slight that strain may have been. In the opinions of the court both Lord COZENS-HARDY, M. R., and PICKFORD, L. J., comment upon the two cases above cited as expressing the law of England.

At this point it may not be amiss to refer to the case of *McCahill v. N. Y. Transportation Co.* (201 N. Y. 221), a negligence action, in which it was

*L. R. [1905] A. C. 290.—[Rep.

held that the acceleration of death causes death according to both the civil and the criminal law and hence that liability exists for hastening the death of a person in a diseased condition even though the disease would probably have caused death at a later time with defendant's agency.

Returning to the English cases. It was held by the Court of Appeal in *Doughton v. A. Hickman, Ltd.* (6 B. W. C. C. 77) that a workman who was suffering from a weak heart and whose duty it was to load heavy sacks on a truck and then with the help of another to push the trucks along the rails, and who shortly after pushing an empty truck and while he was having a rest, fell senseless and died soon afterwards, suffered death by accident, the medical evidence proving that the heart would not have failed had it not been subjected to more than ordinary strain.

It was held by the Court of Appeal in *Broforst v. S. S. "Blomfield"* (6 B. W. C. C. 613) that a fireman who after having been some time at work shoveling coal, and raking fires in the stokehold of a steamship, had an apoplectic stroke, was entitled to an award although he was in such a diseased condition that a stroke would be likely to be brought on by such exertion. The court places its decision upon the case of *Clover, Clayton & Co., Ltd., v. Hughes (supra)*.

It was held in *Brown v. Kemp* (6 B. W. C. C. 725) that a brewer's assistant who felt a severe internal strain and became faint and sick while lifting a heavy cask, and later found that he had ruptured himself, was injured by accident although he had suffered a rupture in the same place twenty-two years before for which he had worn a truss up to within the last five or six years, when he found he could do his work without it. The County Court had held that although there was an injury by accident, it did not arise out of the employment as it was the result of gradual weakening and not of any unusual strain. The Court of Appeal held that there was a misdirection. Accident having been found, the evidence proved that it arose out of the employment, and remitted the case to the County Court to fix the compensation.

It was held in *Aitken v. Finlayson, Bousfield & Co. Ltd.* (7 B. W. C. C. 918; 51 Sc. L. R. 653 [Court of Session, Scotland]) that a workman employed as a gateman at a flax mill whose duty it was to attend to the gate, telephone and ambulance appliances, and personally to minor accidents, who being informed of a scaffold accident to some workmen not in the employment of the mill owners, but engaged in doing work for them on the premises, ran from the gate to the scene of the accident and back to the gate in order to telephone for a doctor and an ambulance, and who while telephoning was seized with an apoplectic fit from which he died, was entitled to an award of compensation upon the ground that his death was due to apoplexy brought on by the exertion of running as quickly as he could and the excitement caused by the scaffold accident, and hence that his death was due to an accident arising out of and in the course of the employment.

We do not understand it to be seriously questioned that the injury to claimant arose out of and in the course of his employment. In *Matter of Fisher* (220 Mass. 581), where a workman subject to affection of the valves of the heart and who earlier in the day had been engaged in heavy lifting, and in carrying two buckets of water at a time up a slight incline so that

his heart muscle was tired and exhausted, suddenly fell to the ground after lifting a bag of coal weighing one hundred and fifty pounds, and died of heart disease after about five minutes of unconsciousness, and where at the hearing before an arbitration committee a medical examiner testified that the employee died from debilitation of the heart caused by the abrupt lifting of the load, it was held that a finding was warranted that the injury that caused the workman's death arose out of and in the course of his employment.

We conclude that in the case at bar the claimant having been an employee engaged in a hazardous employment and having suffered a cerebral hemorrhage as the result of unusual strain or exertion while prosecuting such employment, suffered an accidental injury within the intent and meaning of the Workmen's Compensation Law and that the same arose out of and in the course of his employment and that he is entitled to be awarded the compensation established by that act.

The award of the State Industrial Commission should be affirmed. Award unanimously affirmed.

An employee working in a railroad engine house or repair shop had his head squeezed between heavy iron pipes that he was helping to move; his accident caused tumor on the brain and terminated fatally; the Appellate Division affirmed the Commission's award to his widow unanimously and without opinion: *McNeil v. N. Y. Central R. R. Co.*, Death Claim, No. 14239, July 11, 1916; 181 App. Div. 912, Nov. 14, 1917. A driver fell from a truck striking his head; dislodgement of a blood clot due to his accident paralyzed one side of his body; the Appellate Division affirmed his compensation award unanimously and without opinion: *Henderson v. Donovan Co.*, Case No. 16407, Feb. 3, 1917; 178 App. Div. 946, May 17, 1917. A driver having received injuries to various parts of his body, including his head, from two separate accidents, died eight months after the first accident, either — according to the Commission's findings — from tuberculosis or from a blood clot on his brain; upon appeal from an award, the Appellate Division remitted his case for further findings: *Casey v. Borden's Condensed Milk Co.*, Bul., vol. 3, p. 6, Aug. 13, 1917; 182 App. Div. —, Jan. 18, 1918. A brickyard employee accidentally kicked an iron bar from a ledge. It struck a fellow employee on the head, paralyzing his right side and leaving him mentally incompetent. The Appellate Division affirmed an award in the case unanimously and without opinion: *Smith v. Washburn & Co.*, Case No. 18733, Sept. 6, 1917; — App. Div. —, March 6, 1918.

2. *Heart*.—Accidental injury may befall an entirely healthy

heart, whether by penetration, by bruising through the chest wall or by overexertion. Such cases are distinguishable from the disease cases noticed above, page 216. In the following decision, the Appellate Division unanimously affirms an award for injury to the membrane surrounding the heart by contusions due to a fall:

LA FLEUR v. WOOD, 178 App. Div. 397, May 2, 1917.

WOODWARD, J.: The State Industrial Commission has awarded compensation to the widow of Henry La Fleur, who is alleged to have died from injuries received while in the employ of G. M. Wood, Jr., who was conducting the business of erecting silos. There are no disputed questions in respect to the nature of the employment, or the fact of liability, except that it is contended by the appellants that the evidence fails to show that the death grew out of the injuries. This question depends upon some highly technical testimony of physicians called in behalf of both parties, and while it must be confessed that it is not entirely satisfactory we are of the opinion that it was such as would have demanded a submission of the question to a jury, and the conclusion of fact found by the State Industrial Commission is made conclusive by statute. (*Matter of Dale v. Saunders Brothers*, 218 N. Y. 59, 63.) In *Matter of Collins v. Brooklyn Union Gas Co.* (171 App. Div. 381) and kindred cases, it has been held that there must be evidence of some degree of probative force to support an award; but where there is any evidence fairly calculated to establish the essential facts, the policy of the law requires that the finding shall be supported, and that the compensation shall be paid. (*Matter of Moore v. Lehigh Valley Railroad Co.*, 169 App. Div. 177, 187, and authority there cited.)

In the case now before us the decedent fell into a well hole in such a manner as to strike against a center pole, used in the construction of a silo, producing a more or less serious contusion of his right side immediately below the nipple. He continued to work from June 19, 1915, the day of the injury, up to the ninth day of July following when he was unable to continue. He had had medical attention on the day following the injury, and was bandaged upon the theory that some of his ribs were broken, and at different times he was advised by his physician to quit work, but he continued as above stated until the ninth of July when he was confined to his home, and soon afterward developed what the doctor diagnosed as bronchitis, but which subsequently was found to be acute pericarditis with a serofibrinous exudate, causing his death on the 16th day of July, 1915.

There was a decided conflict in the evidence, and, from the record as it reaches us, there is much reason to doubt if a jury would have been justified in finding in favor of the claimant's theory upon the evidence produced; it is quite likely that in an action based upon negligence this court would feel called upon to reverse the judgment as against the weight of evidence, but we are not permitted to consider the weight of evidence in the ordinary sense, for it is only when there is no evidence of probative force that we are permitted to interfere. Here there is evidence, which seems to be in harmony with the medical authorities, to the effect that the accident was a sufficient producing cause of the acute pericarditis, with its accompanying conditions;

that the bruising of the chest on the right side was sufficient to produce a traumatic injury to the membrane surrounding the heart, and in this way bring about the ultimate death. That the doctors disagree about this, and that it is difficult to harmonize the theories even of those who testify in support of the award, is most true, but the State Industrial Commission were not bound to accept the theories of any of the witnesses; they were there to try the facts, and if they could spell out from the evidence a theory in harmony with the facts which gave a reasonable foundation for the award, it was proper this should be done. It cannot be said as a matter of law that there was not such evidence in this case.

The appellants' case was presented here with unusual subtlety and force, and the argument has compelled careful attention on the part of the court, but we are forced to conclude that the award should be affirmed. Award unanimously affirmed.

Strain causing dilatation of the heart muscle and resulting in acute cardiac dilatation, caused death in the following case:

GIBBONS v. MARK & RAMOLLE, 181 App. Div. 142, Dec. 28, 1917.

COCHRANE, J.: The finding of the Commission is that Gibbons, the husband of the claimant, while lifting a heavy weight in the course of his employment on March 21, 1917, "suffered a strain which caused a dilatation of the heart muscle, and resulted in acute cardiac dilatation which caused his death on April 1, 1917." It is urged by the appellants that there is no evidence that he received an injury or strain. A fellow-workman of Gibbons testified in effect that after lifting the heavy weight he stopped lifting others and asked that someone be substituted in his place to do the rest of the lifting, and that he walked up and down the platform where he was at work as if in pain. The witness asked him: "What's the matter?" and he said he "had a pain." On the following day he went to a physician who diagnosed his trouble as heart difficulty and prescribed for him accordingly until he died. His wife testified that he never complained of illness before. There is no substantial evidence to overcome the presumption created by section 21 of the Workmen's Compensation Law. (Consol. Laws, chap. 67; Laws of 1914, chap. 41.) All the evidence favors the presumption. The claim, therefore, is established. (*Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435; *Fleming v. Gair Co.*, 176 App. Div. 23.)

Notice of injury was not given to the employer within ten days thereafter and the Commission has excused such failure and found that the appellants were not prejudiced thereby because the factory superintendent heard of the accident within ten days. Within our recent decisions this finding cannot be sustained. (*Dorb v. Stearns & Co.*, 180 App. Div. 138; *Walsh v. Woolworth Co.*, Id. 120; *Swart v. Town of Shelby*, 181 Id. —.) The excuse on the ground stated makes oral notice equivalent to the written notice which the statute requires. (§ 18; *Dorb v. Stearns & Co.*, *supra.*) But the statute does not require that the notice shall be given within ten days after the injury but within ten days after *disability*. The statute clearly indicates a distinction between the two words (§ 18). The language is as follows: "Notice of an injury * * * shall be given * * * within ten days after disability." The

evidence shows that Gibbons continued regularly in the discharge of his duties until March twenty-fifth; that then was the date of his disability and he died within ten days thereafter. Within thirty days after his death, notice of the injury was given and the statute was satisfied. Award unanimously affirmed.

3. *Hip*.—The Commission has awarded compensation to a fireman for gluteal condition at the hip due to the strain of using a larger shovel than he had been accustomed to use: *Malanzona v. Utica Steam & Mohawk Valley Cotton Mills*, S. D. R., vol. 10, p. 604, Oct. 16, 1916, Bul., vol. 2, p. 92, Jan. 17, 1917. This case may be compared with the hip disease case of *DeFeo v. Butterick Co.*, noticed above, page 219.

4. *Intestines*.—The Appellate Division has affirmed awards for accidents causing inguinal hernia, unanimously and without opinion, in *Gartner v. N. Y. Dairy Produce Co.*, S. D. R., vol. 9, p. 279, May 23, 1916; vol. 13, p. 507, Mar. 3, 1917; 179 App. Div. 950, July 3, 1917; *Coons v. Endicott, Johnson & Co.*, S. D. R., vol. 14, p. 565, June 6, 1917; 181 App. Div. —, Dec. 28, 1917; and *Bellafore v. Roman Bronze Works*, Bul., vol. 2, p. 213, June 19, 1917; 181 App. Div. 910, Nov. 14, 1917. It has remanded *Van Blarcum v. Domenick & Hoff*, File No. 37327, Mar. 22, 1917, to the Commission for further evidence. The employee, Coons, strained himself treeing shoes. Commissioner Lyon, dissenting from the award in the Bellafore case, drew a comparison with the Coons case, and cited German compensation practice as follows:

In order to prove that the hernia was the direct result of the accident, it must be shown that:

1. He complained of pain immediately following the accident.
2. He was forced to give up work, for a time at least, immediately following the accident.
3. The doctor called not later than the evening of the following day.

It is assumed that the forcing of an incipient hernia through the subcutaneous inguinal ring so that a complete hernia results in so serious a happening that a continuance of work is inconceivable, and expressions of pain and the desire to consult a physician are to be considered necessary results.

The Appellate Division has unanimously affirmed an award for traumatic inguinal hernia in the following opinion:

FLEMING v. GAIR Co., 176 App. Div. 23, Dec. 28, 1916.

KELLOGG, P. J.: Fleming, the deceased employee, was at work in the plant of the employer, who was a manufacturer of corrugated paper goods and boxes. At times he wheeled, or assisted in wheeling, heavy trucks. Usually one or two men assisted him in the work. At times the pulling or pushing of the truck required an extraordinary exertion and apparently might cause a severe strain. On March fourteenth he left his work and went to see the company's doctor for examination, with the result that the doctor found an indirect inguinal hernia which could have been caused by an accident sustained during the course of his employment. He told the doctor that "he had received [it] at work." The doctor advised an immediate operation. Dr. Neary certifies that the history of the hernia shows that it "was an accident caused by his work." Fleming was operated upon March twenty-second and died March twenty-fifth. Dr. Neary also certifies that four days previous to March fourteenth, the date of the alleged accident, he examined Fleming particularly with reference to hernia and found none, and that the ether which was administered at the time of the operation caused pneumonia which, with the shock of the operation, caused his death. The cause of the previous examination was a treatment for indigestion. A day or two before Fleming went to the hospital and after St. Patrick's Day he informed the foreman that he was going to the hospital, that the company's doctor advised an operation. The foreman asked him what was the cause and he told him that "a few days ago he was hurt pulling a loaded truck around." The foreman asked why he had not spoken to him about it at the time and he said that he had gone down to see the company's doctor and that he knew all about it. The finding of the Commission is binding upon us if there is any evidence to sustain it. An accident seems to be the only suggestion which tends to account for the hernia. The death of the injured employee makes it impossible to know the exact time, place and particulars of the injury.

Section 21 of the Workmen's Compensation Law requires us to presume that the claim comes within the provisions of that law in the absence of substantial evidence to the contrary. There is no evidence to the contrary; the evidence all favors the presumption.

Matter of Carroll v. Knickerbocker Ice Co. (218 N. Y. 435) is not a determination to the contrary. It was there held, by a divided court, that all the facts shown were to the contrary of the presumption, and that mere hearsay evidence was not sufficient to sustain an award when the known facts established that an accident had not taken place. Here, as we have seen, all the facts are consistent with the presumption. The Commission was justified in finding that death resulted from an accidental injury. The award should be affirmed. Award unanimously affirmed.

The Court of Appeals has reversed with opinion an order of the Appellate Division affirming by a divided vote an award to an employee for inguinal hernia and has remanded the case to the Commission for a new hearing. The affirmation of the Appellate Division was without opinion by the majority, but with opinion

by the minority. The facts of the case are sufficiently stated in the opinions, which also review the evidence and the Commission's proceedings and findings and discuss the nature of accident. They are as follows:

ALPERT v. POWERS, 181 App. Div. 902, Nov. 14, 1917.

WOODWARD, J. (dissenting): The claimant, Leo Alpert, in presenting his demand for compensation, fixes the date of his alleged accident at the 10th day of April, and the hour of the day at 3:30 P. M. In a statement in his own handwriting, which he claims was copied from a statement prepared for him by an agent of the insurance carrier, he says that on the 10th day of April, 1917, "I was doing my usual work on the press I always work on and about 11 a. m., I began to have cramps in my stomach but I kept to work until 12 o'clock, and then I took a little rest, laying down in the shop at my lunch hour. I started in again at 12:30 and worked until 3:30 when my cramps were so bad I had to go home and saw a doctor that same evening. He said I had a rupture. On April 10th, the day the cramps came on me, I was handling paper of the same size and weight as usual and in the usual way; I did not have anything like an accident happen to me. I did not have any extra strain. I can't account for why the rupture should come." This statement was made four days after the alleged accident. At a hearing before the Commission on the 7th day of May, less than a month from the date of the alleged accident, the claimant testified entirely in harmony with this statement, making no suggestion of its modification in any way, and the Commission made an award, and included in its findings of fact that the claimant "severely strained himself."

On the 18th day of June, at the suggestion of the attorney for the insurance carrier, this award was called to the attention of the counsel for the Commission, who advised that there was not sufficient evidence to warrant this finding, or to support the award, and advising that a further hearing be had. Acting upon this advice the Commission held a second hearing on the second day of July, 1917, at which time the claimant was further examined, and in response to a question by Commissioner Mitchell he testified directly that he felt no unusual strain at the time of the alleged accident. The Commission then struck out the finding that the claimant "severely strained himself," and directed the formulation of new findings. Subsequently, and on the 14th day of July, the counsel to the Commission advised still another hearing, at which all of the parties should be present, and at that time the claimant was further examined, obviously with the purpose of inducing him to modify his previous testimony so as to sustain the award, and he was asked to define his understanding of an accident, and this was followed by interrogatories in reference to the statement from which we have already quoted. The claimant explained that this statement was prepared by a Mr. Brooks, apparently connected with the insurance carrier, and that he read it over and at the request of Mr. Brooks copied it in his own handwriting, adding that "I didn't have any experience in courts or anything like that." This examination brought out no evidence of any particular importance on the question of the accident. The Commission apparently laid stress upon the fact that the claimant had been examined and accepted into a Hebrew

insurance organization about four weeks before the alleged accident, although there was no evidence of anything more than a superficial examination, with no special regard to the question of a hernia, which is the difficulty complained of here. The claimant on this third effort did testify that the bundle of papers which he was carrying up to the press was of the weight of seventy or eighty pounds, thus materially increasing the weights which he had previously given, but he further testified that he had been lifting the same kind of bundles in the same way for a period of seven or eight years, and evidently did not intend to modify his previous statements as to the character of the work. He was a pressman, and at intervals he was called upon to place bundles of paper upon the elevated feed-board, and the Commission, after these various hearings, has found as conclusions of fact that "In the course of his employment it was necessary for Leo Alpert to lift bundles of paper weighing from 40 to 60 pounds from the floor to his shoulder and carry each bundle up two or three steps to lay it on the press. The number of times it was necessary to lift and carry such bundles averaged about twenty per day. On said April 10th, 1917, while thus working for his employer at his employer's plant and while engaged in the lifting of a bundle of paper weighing about seventy pounds, he sustained a complete right inguinal hernia which will require an operation," and "(4) that the injuries to Leo Alpert were accidental injuries and arose out of and in the course of his employment."

It is to be recalled that the claimant has not himself ever testified contrary to his statement that there was no accident, and he is the only witness. No one contradicts him. He fixes in his original claim, and in his testimony, the exact hour of the alleged accident; this is placed at 3:30 P. M., of April 10th, and his testimony at page 31 of the record, to the effect that the bundle of paper, which he was carrying when he felt the pain, weighed about seventy pounds, relates to a time prior to the noon hour, as will be seen from what follows at page 32. In fact, he tells us all through the record that he had what he supposed were cramps during the forenoon; that he felt the pain when he handled the bundles, and that it receded when he took a rest, and he does not claim that the so-called accident happened until 3:30 in the afternoon, and all that he claims then is that the pain grew more severe as he worked and that he quit at about that time. There is, therefore, no evidence to support the conclusion of fact that the claimant was carrying a bundle weighing about seventy pounds at the time of this alleged accident; he was carrying a bundle of this size, if at all, when he felt the pain, but he felt the pain at least as early as 11 o'clock in the morning.

Where are we to find the evidence to sustain the conclusion of fact that "the injuries to Leo Alpert were accidental injuries?" Where was the accident? When did it occur? The claimant does not say that he had anything which could be characterized as an accident; he specially disclaimed it, and while we are to give a liberal construction to the statute, we are not warranted in calling "a sheep's tail a leg" for the sake of bringing a case within the statute. It may not be improper to recur to the fundamental principles underlying the Workmen's Compensation Law, that we may preserve the integrity of the law. We are to read and understand this act in the light of the environment in which it was created, and it all centers around the proposition that there are certain industrial enterprises which are inherently dangerously to life and limb; that when all of the precautions have been taken, still the

employee is subjected to dangers—to accidents—which should be compensated as a part of the cost of production. See *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271. Article 14-a of the Labor Law, pronounced unconstitutional in that case, provided in its 215th section that “this article shall apply only to workmen engaged in manual or mechanical labor in the following employments, each of which is hereby determined to be especially dangerous, in which from the nature, condition or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen engaged therein are inherent, necessarily or substantially unavoidable, and as to each of which employments it is deemed necessary to establish a new system of compensation for accidents to workmen.” This same idea runs through the present statute; it is because certain employments are inherently dangerous; because accidents are “inherent, necessarily or substantially unavoidable” that a special rule has been provided for them, and when the statute refers to an injury or personal injury it means “only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom.” Workmen’s Compensation Law, section, 3 subdivision 6. And accidental means, not some refinement of reasoning, but such an accident as is inherent, necessarily or substantially unavoidable—that is the class of accidents which the statute was designed to provide for. Of course, if an accident really happens in a plant classed as hazardous by the statute, the fact that it is one which might happen in another plant without incurring liability is not a reason for denying the compensation; the lesser accident is embraced within the general scope of the statute; but in determining what is an accident, we have a right to consider what was in the minds of the framers of the law, and this is afforded by the statute as framed by the Commission appointed to prepare it, and those which have followed it. It was those industries which were “determined to be especially dangerous, in which from the nature, conditions or means of prosecution of the work therein, extraordinary risks to the life and limb of workmen” were involved, that the commission had in mind, and the accidents contemplated were those which involved “extraordinary risks to the life and limb of workmen,” and not such as might by a refinement of reasoning come within the definition of accident. The definite injuries which in the very nature of the occupation were bound to occur were what were to be provided for—the accidents which inhered in these specific enterprises. It did not pretend to provide against occupational diseases, nor to provide for the element of depreciation in the manpower involved in productive labor, but for personal injuries, defined to be “only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result” from such accidental injuries. There must be an accident—one of the inherent accidents of the business—and if disease or infection “naturally and unavoidably” resulted therefrom such disease or infection could be included as a part of the injury, but in the absence of an accident there was no liability for disease or infection; and it seems to be well understood in medical circles that hernia is a disease of slow development which may manifest suddenly under ordinary bodily activities. In other words, the Workmen’s Compensation Law does not undertake to go beyond providing compensation for the accidents growing out of occupations which are in and of themselves specially subject to accidents involving “extraordinary risks to the life and limb of workmen engaged

therein; accidents in the ordinary acceptation of that word, the fortuitous and unforeseen bruising and maiming of persons engaged in the enterprises covered by the act. To say that a man engaged in carrying paper to a press, following out the usual practice of years, neither slipping, straining, falling, bumping, or in any manner realizing that anything has occurred different from his every-day experiences, has been injured in an accident, merely because he felt some pain at various times during the day in his abdominal region, and particularly when he was in the act of lifting one of the ordinary parcels, is an abuse of language. He might have had the same experiences if he had merely had cramps, as he describes his condition during the day. This is what he thought he had. It never occurred to him that he had had an accident; he does not now pretend that there was anything in the nature of an accident in the common understanding of that word.

The evidence does not support the conclusion of fact, and the award should be set aside and the claim dismissed. Sewell, J., concurred.

ALPERT v. POWERS, 223 N. Y. 97, Mar. 12, 1918.

CRANE, J.: While doing his work, the claimant became sick, and upon examination it was discovered that he had an inguinal hernia. The Commission, after three hearings, has determined that it arose out of and in the course of his employment, and their determination has been affirmed in the Appellate Division by a divided court. It is pressed upon our attention that there is no evidence whatever to sustain the finding that there was an accidental injury within the terms of the Workmen's Compensation Law; that, at most, the evidence shows that the claimant, while performing his usual work without accident or unusual strain, sustained or developed a hernia. Such facts, it is said, do not bring him within the benefits of the act.

J. C. & W. E. Powers were engaged in the printing and lithographing business with a plant at No. 65 Duane street, in New York city. Leo Alpert, a young man twenty-five years of age, residing in Brooklyn, had been at work for this firm about ten weeks prior to the 10th day of April, 1917. He was a cylinder feeder and had been such for seven years. His work for the present employer required him to lift a bundle of paper weighing from forty to sixty pounds from the floor to his shoulder and carry it up two or three steps to his press. This he had done about twenty times a day during the previous seven years. On the morning of the day mentioned he felt pains in his stomach, became sick, and went home about four o'clock in the afternoon. It was discovered later by Dr. Charles F. Fisher that Alpert was ruptured on the right side.

In the statement of his claim made April 14, 1917, Alpert gives this history of the occurrence: "I was doing my usual work on the press I always work on, and about 11 A. M. I began to have cramps in my stomach but I kept to work until 12 o'clock, then I took a little rest, laying down in the shop at my lunch hour. I started in again at 12:30 and worked until 3:30 when my cramps were so bad I had to go home and saw a doctor the same evening. He said I had a rupture. On April 10th the day the cramps came on me I was handling paper of the same size and weight as usual and in the usual way; I did not have anything like an accident happen to me. I did not (*sic*) any extra strain. I can't account for why the rupture should have come."

In his testimony on the first hearing he says that he was doing the work the same as he had done it every day and was not in any different position when he was lifting the paper. At the second hearing, in reply to a question put by Commissioner Mitchell, he stated that he did not feel any unusual strain; and on the third hearing he testified as follows: "I didn't have an accident. * * * While I was lifting it up I felt pain and it was like electric shock, more than anything to me. * * * I went upstairs and felt kind of weak, cramped up like. That is, when I was walking upstairs it hurted me. When I got up there I felt kind of dizzy and sat there for a minute before I rolled sheets out. * * * I figured it was cramps at first; probably I ate something. I really didn't remember; probably my stomach was out of order. When I started walking around again I got these little pains. I thought it would be best before I went to the doctor,—I took a physic. I thought that would help me out."

While doing work which he had done regularly every day for seven years, the employee felt a pain which indicated to his physician, upon examination, that he had sustained a rupture. There was no blow or unusual exertion, nothing out of the ordinary to suggest to the employee that anything that he then did caused the pain. He thought it was due to a disordered stomach and took a physic.

At the first hearing, May 7, 1917, the commission found that the claimant "severely strained himself." Subsequently, the counsel to the commission notified the members thereof that there was no evidence to sustain such a finding, and it was stricken out at the next hearing, had on July 2, 1917. A further hearing was had on August 3, 1917, after which the commission made its finding of fact to the effect that Alpert while engaged in lifting a bundle of paper sustained a hernia. There is no finding that this hernia was caused by the lifting of paper, or by any strain, or was in any way due to the work that he was performing. The lapse between cause and effect is as apparent by these findings as if the commission had said that while the claimant was engaged in lifting a bundle of paper, he sustained a mental collapse, a nervous breakdown, or an attack of pneumonia. The subsequent finding that the injuries were accidental and arose out of and in the course of his employment are conclusions without facts or evidence to support them.

No medical evidence was given before the commission as to the nature or cause of hernia, and no attempt was made to prove that the lifting in this case could have produced the rupture which later developed. Hernia is a disease arising out of natural causes as well as from accident, and it was, therefore, incumbent upon the claimant to offer some evidence that his employment caused or could have caused the injury.

It will be noted that the finding by the commission that the employee strained himself in lifting these bundles was stricken out and not subsequently included in its final determination. If there were no strain upon the parts injured and the lifting did not cause the hernia—as we must assume in the absence of a finding of such fact—it is difficult to understand how the rupture arose out of and in the course of the employment. As was said in *Madden's Case* (222 Mass. 487): "It (the act) does not afford compensation for injuries or misfortunes, which merely are contemporaneous or coincident with the employment, or collateral to it. Not every diseased person suffering a misfortune while at work for a subscriber is entitled to compensation.

* * * The personal injury must be the result of the employment and flow from it as the inducing proximate cause. * * * The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being." And in *Clover, Clayton & Co. v. Hughes* ([House of Lords, 1910] 3 B. W. C. C. 275) it was said of a man who was injured while doing his work: "If that occurred when he was lifting a weight it would be properly described as an accident. * * * But it does not establish that the accident was one 'arising out of the employment;' * * * It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working." In that case there was a direct finding that the strain in fact caused the rupture. Such a finding is lacking in the one under consideration.

For these reasons the order of the Appellate Division must be reversed and the claim sent back to the commission for a rehearing.

We refrain from expressing any opinion at this time as to whether the words "accidental injuries" include internal injuries of an accidental nature caused by the usual and customary employment. It will be time to deal with this question when it arises.

The order should be reversed, and rehearing ordered, costs to abide event. *HISCOCK, Ch. J., COLLIN, CUDDEBACK, POUND and ANDREWS, JJ., concur; CARDOZO, J., not voting. Order reversed, etc.*

There was no dispute as to traumatic origin of the hernia in *Tucillo v. Ward Baking Co.*, the text of which appears above, page 217. For failure to give notice of accident causing inguinal hernia the Appellate Division reversed and remanded *Dorb v. Stearns & Co.*, 180 App. Div. 138, Nov. 14, 1917; text of the opinion appears in Part Two. Cases of hernia are noticed in Bulletin 81, page 256. The Commission grants compensation for hernia until the injured employees are able for operation; then for six weeks after operation in single hernias and for ten to twelve weeks in double hernias. Fear of death prevents operation in some cases.

5. *Kidneys.*—The arm of a candy pulling machine struck an employee in the abdomen. Injury to his kidney resulted in abscess. He died from the effects of an operation. The Appellate Division affirmed an award to his dependents unanimously and without opinion: *Abbonato v. Greenfield's Sons*, S. D. R., vol. 9, p. 292, May 31, 1916; 175 App. Div. 958, Nov. 15, 1916. For injury of the kidneys by strain the Commission made award in *Dunbar v. Schaupp*, Bul., vol. 2, p. 232, July 25, 1917; but denied award in *Hurley v. Consolidated Dental Mfg. Co.*, Bul., vol. 2, p. 149, Apr. 24, 1917.

6. *Pleura*.—The arm of a knitting machine struck an employee in the chest. He continued at work against his physician's advice. Twelve days after the accident he was found to have traumatic pleurisy. Upon his death as a result thereof, the Commission awarded compensation to his widow. The Appellate Division affirmed her award unanimously and without opinion: *Greenberg v. Canadian Knitting Mills*, S. D. R., vol. 10, p. 572, Bul., vol. 2, p. 9, Sept. 15, 1916; 178 App. Div. 942, May 2, 1917. A mason's helper received numerous injuries from falling brick, including bruises on the right side of the chest. The Commission awarded him compensation. Having so far recovered as to go about, he developed pleurisy in the right side and died therefrom. The death occurred more than three months after the accident. The Commission's physician was of opinion that "traumatic pleurisy should have made its appearance a good deal earlier." The Commission's denial of death benefits to his dependents was affirmed by the Appellate Division unanimously and without opinion: *Henry v. Fuller Co.*, S. D. R., vol. 12, p. 529, Jan. 5, 1917; 179 App. Div. 952, July 3, 1917.

7. *Testicles*.—An automobile repair tester strained himself in cranking a motor. The accident necessitated removal of a testicle. A tumor followed the operation. The Commission awarded him compensation which the Appellate Division affirmed unanimously and without opinion: *Smyth v. Packard Motor Co.*, File No. 8486, Feb. 1, 1917; 181 App. Div. 907, Nov. 14, 1917. The Commission decided to award compensation for impaired earning power to an iron worker incapacitated by a blow on the testicle due to slipping of a pair of tongs, *Muller v. Ludlum Steel Co.*, Bul., vol. 2, pp. 15, 21, but, for insufficiency of evidence, denied compensation to a blacksmith who claimed to have been struck on the testicle by a hammer: *Cronk v. Turner*, S. D. R., vol. 13, p. 547, Bul., vol. 2, p. 167, Apr. 11, 1917.

M. *Exclusiveness of remedy*.—Full protection to the employer who has complied with the Workmen's Compensation Law is guaranteed by section 11, as interpreted by the Court of Appeals in *Shanahan v. Monarch Engineering Co.* The text of the Shanahan decision has been presented in Bulletin 81, pages 321–327.

Two decisions of the courts concerning the procedure of

employers in availing themselves of the exclusiveness of the compensation law's remedy are reproduced here.

The Appellate Term of the Supreme Court in the First Department has held that the question of relegating an employee to his compensation law remedy should be raised at the close of trial or when the facts are all shown and that denial of such relegation can be reviewed only upon appeal. The text of the opinion is as follows:

SCHATTNER v. AMERICAN TOBACCO Co., 100 Misc. 261, June, 1917.

WHITTAKER, J.: The complaint in this action is oral, the claim being "An action for personal injuries. Date Aug. 2d. 1916. Place 511 West 22d St."

No answer has been filed. The defendant moved to dismiss the complaint setting up in affidavits that the defendant is engaged in a business which falls within the provisions of the Workmen's Compensation Act; that it has taken advantage of the said act; that when the plaintiff was injured she was in the employ of the defendant; that the jurisdiction of the Workmen's Compensation Commission is exclusive as provided in said act, and that the Municipal Court has no jurisdiction of the subject-matter of the action.

The defendant appeared generally, and the plaintiff claims that for that reason he is precluded from questioning the jurisdiction of the Municipal Court and cites section 88 of the Municipal Court Code as authority for that position. Section 88 of the Municipal Court Code reads as follows: "An objection that the court has no jurisdiction of the person of the defendant or no jurisdiction of the subject of the action may be taken by filing a notice of special appearance, as hereinbefore provided. All other objections which heretofore might have been taken by demurrer may be taken by motion. The notice of motion must specify the grounds thereof and the particular defects or objections upon which the moving party relies."

A general appearance waives any question as to jurisdiction of the person, but it has always been held that an objection to the jurisdiction of the subject-matter can be taken at any time, and the authorities in support of that proposition are so numerous and familiar as to need no citations. So far as the section above quoted relates to objections to the subject-matter, it must be held to be permissive only, and that a party cannot be deprived of raising the question of jurisdiction of the subject-matter at any time. So far as appears by the complaint the Municipal Court has jurisdiction of the cause of action. Whether or not it has been deprived of the power to exercise that jurisdiction in this action depends upon the facts shown upon the trial, and cannot be determined by affidavits in advance of the trial.

That the plaintiff may be relegated to her remedy under the Compensation Law is a question that should be raised by answer or motion made at the close of the trial or when the facts are all shown, and the denial of a motion to dismiss can only be reviewed upon an appeal from the judgment. Municipal Court Code, § 154.

GUY and FINCH, JJ., concur. Appeal dismissed with ten dollars costs.

In the following case the Appellate Division of the Supreme Court in the First Department, upon authority of *Shinnick v. Clover Farms Co.*, Bulletin 81, page 299, affirmed an order of Special Term granting a motion by plaintiff, the employee, for judgment on the pleadings (176 App. Div. 915, January 19, 1917) and certified the question of the correctness of its action to the Court of Appeals. The higher court answered the question in the affirmative and affirmed the Appellate Division's order. The plaintiff alleged that he "suffered pain for a long period of time, though he was not incapacitated for more than two weeks from earning full wages." The decision of the Court of Appeals appears to have turned upon the employer's failure to show coverage under Workmen's Compensation Law, § 2. The text of the opinion is as follows:

NILSEN V. AMERICAN BRIDGE CO., 221 N. Y. 12, May 8, 1917.

HOGAN, J.: The complaint in this action alleged in substance that defendant is a domestic corporation; that on February 15th, 1916, plaintiff while in the employ of defendant and engaged in work under its direction, without negligence on his part, and by reason of the negligence of defendant, received injury to his person, the nature of which is detailed in the complaint; that by reason of such injuries, which are stated to be permanent, he suffered pain for a long period of time, though he was not incapacitated for more than two weeks from earning full wages at his customary employment. The Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled and plaintiff's motion for judgment on the pleadings granted. From such judgment appeal was taken to the Appellate Division, where the judgment was affirmed.

Upon argument of the appeal in this court counsel for defendant appellant urged that by the enactment of the Workmen's Compensation Act plaintiff is barred from any right to recover damages for his injuries in a common-law action for the reason that the remedy provided for in the Compensation Law is exclusive.

That the complaint sufficiently alleges a cause of action for negligence at common law is practically conceded by appellant. The complaint does not allege that plaintiff was engaged as an employee in a hazardous employment at the time the injury was sustained. While the complaint alleges the corporate existence of defendant it does not disclose that such corporation defendant was engaged in any hazardous work or occupation described in the Workmen's Compensation Law, and it fails to allege the nature of the business carried on by the defendant or that it was engaged in business as a manufacturing corporation. The complaint does not disclose that plaintiff and plaintiff's employer, the defendant, are subject to any provisions of the Compensation Law. Consequently, the question as to whether or not the plaintiff, by reason of the Compensation Law, is barred from a right to recover is not presented upon the pleadings before us.

The order of the Appellate Division should be affirmed, with costs, and the question certified answered in the affirmative.

HISCOCK, Ch. J., CHASE, POUND, McLAUGHLIN, CRANE and ANDREWS, JJ., concur. Order affirmed.

A New York City driver hauled a load of beer from his employer's brewery to a saloon in a building at some distance that also belonged to his employer. Collapse of the sidewalk elevator connected with the saloon injured him. The Municipal Court denied him an action for negligence because his employer had complied with the Workmen's Compensation Law. Upon appeal the Appellate Term, First Department, granted him such action upon the ground that the brewery business and the ownership of the separate real estate were altogether independent of and unrelated to each other. The employer, it said, was a third party as to the building to which his employee was making the delivery. In a dissenting opinion Justice Guy argued that the compensation law did not contemplate that an employer should have "a dual personality — a sort of Doctor Jekyll and Mr. Hyde." The texts of the Appellate Term opinions were presented in Bulletin 81, pages 124-126. Since the publication of that Bulletin, the Appellate Division, reversing the Appellate Term's determination, has affirmed the Municipal Court's judgment. The text of its decision is as follows:

WINTER V. DOELGER BREWING Co., 175 App. Div. 796, Dec. 29, 1916.

McLAUGHLIN, J.: This action was brought in the Municipal Court to recover damages for personal injuries sustained by plaintiff through the alleged negligence of the defendant. At the close of the trial the complaint was dismissed and from a judgment entered to that effect an appeal was taken to the Appellate Term where the same was reversed and a new trial ordered. (97 Misc. Rep. 150.) The defendant then, by permission, appealed to this court.

The facts are undisputed. The plaintiff, at the time of the accident, was employed by the defendant to drive one of its motor trucks used in connection with its business in manufacturing and delivering beer. While delivering a number of barrels of beer to a saloon located on the corner of One hundredth street and Central Park West, a sidewalk elevator upon which the beer had been placed fell by reason of a defect in it, and the plaintiff was injured. The building, including the elevator, was located some distance from defendant's brewery, but was owned and controlled by it. The Municipal Court held that the defendant having complied with the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1913, chap. 816, as re-enacted by Laws of 1914, chap. 41) the plaintiff had to proceed against the defendant under the

statute, since it furnished the exclusive remedy, and for that reason a common-law action for negligence could not be maintained. The Appellate Term held—one of the justices dissenting—that notwithstanding the fact that the plaintiff had not proceeded under the statute, the action could, nevertheless, be maintained as a common-law action under the authority of *Lester v. Otis Elevator Company* (169 App. Div. 613).

I do not think the authority relied upon has any application to the facts here presented. In that case the plaintiff was an employee of the firm of Bing & Bing, which had complied with the Workmen's Compensation Law. The plaintiff was injured, not by reason of the negligence of his employer, but through the negligence of a third party, the Otis Elevator Company, and this court held that a common-law action against such third party could be maintained without alleging and approving plaintiff's election to do so pursuant to section 29 of the Workmen's Compensation Law.

In the present case plaintiff was injured, not by reason of the negligence of a third party, but solely by reason of the negligence of his employer. The fact that the elevator and building were located some distance from the defendant's brewery did not make the defendant a third party or in any way change the relation existing between plaintiff and defendant. The employer, it is true, owned and controlled the building and elevator, but plaintiff's duties were to take beer from the brewery and deliver it to such places as the brewery company might direct. One of the places which it was supplying with beer was the saloon referred to, where the plaintiff was delivering beer as he had been directed to do. He was, therefore, at the time of his injury engaged directly in the work for which he had been employed. His relation to the defendant was precisely the same when delivering the beer that it was when he left the brewery. To hold, under the facts, that the brewery company ceased to be his employer and could be treated as a third party would, in effect, as it seems to me, destroy the whole scheme and purpose of the statute. The purpose of the statute is to provide a fixed schedule of the rates of compensation to be paid by employers to employees injured in the course of certain hazardous employments, irrespective of the fault occasioning the injury. To that end the employer is required to secure payment of the prescribed compensation in the manner pointed out in the statute. It is conceded that the plaintiff's employer—the defendant—had complied with all the provisions of the statute so that the plaintiff was fully protected under it and could have applied for such compensation instead of claiming damages against the defendant upon the theory that as to the elevator where plaintiff was injured it was a third party. To give the statute such construction is to read into it provisions not there to be found, and to destroy the very purpose, it seems to me, sought to be accomplished by the act.

The determination of the Appellate Term, therefore, is reversed and the judgment of the Municipal Court affirmed, with costs in this court and in the Appellate Term.

CLARKE, P. J., SCOTT, SMITH and PAGE, JJ., concurred. Determination of Appellate Term reversed and judgment of Municipal Court affirmed, with costs in this court and in the Appellate Term.

If the brewery company in the above case had owned a theater building and its driver, while attending a play out of hours, had

been injured by some defect in the theater, it is hardly possible but that the courts would have sustained an action for negligence. The relationship of employer and employee would have been in suspension and another relationship substituted in its place. The cases of *McCabe*, *Ames* and *Pierson*, above, pages 118-123, are in point. Upon such theory the jury upheld the right of the employee to an action for negligence in *Murphy v. Ludlum Steel Co.*, the facts of which have been presented above, page 126. The jury decided that Murphy was a tenant of the steel company rather than its employee as concerned the accident that killed him. The case being under appeal to the Appellate Division, Third Department (January, 1918), the steel company's attorney argued that it was entitled to have the question of fact whether or not Murphy met his death in the course of his employment first passed upon by the State Industrial Commission. The action for negligence, said the attorney, deprived the company of the benefits of Workmen's Compensation Law, §§ 21 and 68; "the legislature intended to bring every case of injury or death to an employee arising out of an employer's negligence" within the Commission's purview and to "do away with any action before any other tribunal in the first instance for such cause." The Appellate Division, however, affirmed the judgment.

Commissioner Lyon has noted an exception to the completeness of the protection against negligence actions afforded to an employer by the New York compensation law. If an employer enters into a contract of employment in New York with a resident of another state and if such non-resident is injured outside of New York in the course of his employment, the Commissioner is of opinion that an action for negligence may lie in the state where the employee meets with the accident and that against such action insurance under the New York compensation law will be pleaded without avail. This phase he brought out in *Lloyd v. Power Specialty Co.*, Bulletin 81, pages 157, 158, and amplified later in *Carlson v. Ogden Co.*, Bul., vol. 3, p. 49. In the latter case he said:

One of the fundamental principles of our Compensation Law is, that insurance made compulsory upon the employer is balanced by a release of the employer from common-law liability. It is well settled that in actions of tort the law of the place where the tort is committed must govern. The consequence is that if the claimant's injury arose from the negligence of his

employer, he has undoubtedly, at common-law or perhaps by statute, a right of action under the laws of Texas, and this right of action cannot be taken away by the New York Workmen's Compensation Law.

It is quite evident, therefore, that the feature of our law which is compensatory to the employer for compulsory insurance is not present in this case. I think it altogether probable that the claimant, if he were injured in Texas by the negligence of his employer, could, notwithstanding the New York Compensation Law, maintain an action even in the State of New York for damages under the Texas law, the states affording these remedies to the citizens of each other under the general doctrine of comity. I do not think that a resident of Rhode Island suing a New Jersey corporation for a negligent injury in Texas would be barred by our statute from recovery in our courts of law.

The question may arise, whether the claimant in the *Post* case, if he had elected to sue at common-law in New Jersey, where his accident happened, would have been barred by the provisions of the New York Compensation Law. I am inclined to think he would. A resident of New York seeking the aid of a New Jersey court carrying with him, as our Court of Appeals holds he does, the law of his home state might very well be held to be debarred from pursuing a remedy which the statute of his own state had taken away from him.

Notwithstanding this opinion of Commissioner Lyon and the Commission's denial of compensation thereon, the Appellate Division, to which the Commission certified the question, has replied that Carlson is entitled to compensation: 181 App. Div. —, December 28, 1917.

In connection with Commissioner Lyon's statement that the New York compensation law would have barred the claimant in the *Post* case had he attempted to sue for negligence in New Jersey, the following opinion of the New York Supreme Court in Nassau County is of interest. In this case the employer and employee were residents of New Jersey, the hiring was in New Jersey, and the employee met with an accident in New York. The New Jersey compensation law did not bar the claimant when she attempted to sue for negligence in New York. The court cites as authority the Appellate Division's decision in *Shanahan v. Monarch Engineering Co.*, which decision the New York Court of Appeals has since reversed.

BARNHARDT V. AMERICAN CONCRETE STEEL Co., Bulletin of the General Contractor's Association, vol. 7, p. 224.

SCUDDER, J.: Motion by defendant to set aside the verdict in favor of plaintiff and for a new trial. Plaintiff's intestate, John Barnhardt, was accidentally killed on June 12, 1914, at Far Rockaway, N. Y. He was working

on a building as a mason. His death was caused by the breaking of a scaffold on which he was working. The action is brought against intestate's employer, the American Concrete Steel Company, under section 18 of the Labor Law. Plaintiff recovered a verdict of \$2,200. The sole point argued by defendant's counsel in support of the motion to set aside the verdict is that it was error for the trial court to exclude the Compensation Law of the State of New Jersey as a defense to this action. Defendant is a New Jersey corporation and intestate was a resident of that state. The deceased was hired by defendant in New Jersey, and he was sent by it from that state to work on the building in New York at which the accident occurred. After his death his sister, Gertrude M. Barnhardt, applied to a New Jersey court for compensation under the law of that state upon the ground that she was an actual dependent upon the deceased. The court after hearing the evidence decided that she was not a dependent and her application was denied. Subsequently Miss Barnhardt obtained letters of administration in New Jersey upon her brother's estate and commenced the present action in this state. In this action defendant, in addition to the usual defenses, pleaded as a separate defense the New Jersey Compensation Law and Miss Barnhardt's proceeding in the New Jersey court under that law. Upon the trial the court refused to admit in evidence the New Jersey Compensation Law on the ground that it was not a defense. To this refusal an exception was duly taken by defendant. In order to review its ruling the trial court reserved its decision of defendant's motion to set aside the verdict and for a new trial. The case presented is in substance as follows: Both the employee and employer were residents of New Jersey and entered into the contract of employment in that state under which the employee was to perform services in this state, and he was killed while performing such services here. The Compensation Law of New Jersey is impliedly binding on employees and their dependents unless its provisions are waived in writing. Employees subject to its provision have no remedy except the compensation or death benefits provided by the act itself. It is not claimed that the contract of employment expressly provided that the law of New Jersey should be applied in determining the respective rights and liabilities of the parties arising out of such contract, and it seems to me that it cannot properly be inferred that the parties to the contract contemplated that the law of New Jersey, the place of making that contract, and not the law of New York, the place of its performance, should apply. The general rule is that the law of the place of the performance of a contract and not that of the place where it was made controls its construction. In *Dike v. Erie R'y* the rule is stated as follows: "The *lex loci contractus* determines the nature, validity, obligation and legal effect of the contract, and gives the rule of construction and interpretation unless it appears to have been made with reference to the laws and usages of some other state or government, as when it is to be performed in another place, and then in conformity to the presumed intention of the parties, the law of the place of performance furnishes the rule of interpretation." In *Curtis v. D., L. & W. R. R.* it is stated: "When it appears that the place of performance was different from the place of making the contract, it is to be construed according to the laws of the place where it is to be performed." Furthermore, it seems to me that it would be contrary to the public policy of this state to permit

an employee in advance, as a part of the contract of employment, to relieve his employer from any liability imposed by the Labor Law of this state, or to substitute therefor other or different liability, or a liability created or imposed by the law of another state. The Labor Law of this state imposes upon employers many restrictions and duties. Its provisions are designed to conserve the health, safety and morals of the employees and to increase the duties and responsibilities of the employer. The rules of conduct prescribed by the Labor Law are enacted in the exercise of the police power of the state to conserve the public welfare, and their observance cannot therefore be subject to any private agreement between employer and employee. The Labor Law of this state expressly provides that an employee shall have a right of action against his employer to recover damages for a wrong done him contrary to said law. That this liability of the employer to respond in damages to the employee for an infraction of the law furnishes the chief inducement for its observance is not open to question. An express or implied agreement between the employee and employer relieving the employer from such liability is therefore contrary to public policy as tending to defeat the observance of the law. The Court of Appeals, in *Matter of Post v. Burger*, etc., did not decide, as contended by defendant's counsel, that the law of the place where the contract of employment is made governs the rights of the parties, although the injury may have happened in another state. The court in that case decided that, by force of the construction to be placed on the Workmen's Compensation Law of New York, a workman hired in this state, sent by his employer into another state to work, and injured while at work there, is entitled to compensation under the New York law. In the *Post* case the court only undertook to construe and apply the Workmen's Compensation Law of New York, and it held that the New York act, in view of its humane purpose, should be construed to intend that in every case of employment there is a constructive contract between employee and employer, general in its terms, and unlimited as to territory, that the employer shall pay, as provided by the New York act, for a disability or the death of the employee as therein stated. It remains to be considered whether or not the application of the deceased's sister to the New Jersey court for relief under the Compensation Law of that state, and that court's denial of her application on the ground that she was not an actual dependent of decedent bars the present action in this state. Even if it is assumed that it is the law that in such a case as this an actual dependent represents the decedent's estate, and that if compensation was granted to him as such dependent by the New Jersey court, the administrator of the estate would be barred from maintaining an action for death in this state on the ground that a double recovery for the same injury should not be permitted, such reasoning would not apply to the present case where the application to the New Jersey court was denied on the ground that the applicant was not a dependent. The deceased's sister, not being an actual dependent, had no right to make such application to the New Jersey court, and therefore had no right to represent the estate, and the application having been denied, there was no former recovery (see *Shanahan, as adm'r, v. Monarch Engineering Co.*, 172 A. D. 221). Motion denied and exception allowed defendant. Thirty days' stay of execution and sixty days to make case on appeal.

The City Court of New York City, in *Banchiere v. American Brass Co.*, sustained an action for negligence by a resident of New York, whose hiring, employment and injury were in Connecticut, because the Connecticut compensation law did not provide a remedy for loss of teeth and fracture of nasal bones, an accident which caused no cessation of labors beyond the statutory period of two weeks. The case is similar to *Shinnick v. Clover Farms*, a New York case which the above-mentioned decision of the Court of Appeals in the Shanahan case seems to have reversed by implication. Its text may be consulted in the Bulletin of the General Contractors' Association, vol. 7, p. 223, October, 1916.

Cases in which the New York courts have sustained foreign compensation laws on behalf of employees temporarily coming into New York, as against foreign negligence statutes, are cited in Bulletin 81, page 248.

The courts of New York decline to entertain actions of New York residents based on the New Jersey compensation law because that law provides a special forum for decision of disputes that may arise between employer and employee in the adjustment of claims under its terms. Such controversies, it declares, are to be submitted to and determined by a judge of the Court of Common Pleas of New Jersey. The text of *Lehmann v. Ramo Films*, involving the point, has been presented in Bulletin 81, pages 158, 159. The texts of two later cases are given here as follows:

MCCARTHY V. MCALLISTER STEAMBOAT CO., 94 Misc. 692, Apr. 24, 1916.

NEWBURGER, J.: Motion for judgment on the pleadings. The complaint alleges that the defendant, a New York corporation, entered into a contract of employment in the state of New Jersey with one Joseph McCarthy; that on or about the 2d day of July, 1913, while so employed, through the carelessness and negligence of the defendant, said Joseph McCarthy received injuries which resulted in his death; that he was a resident of this state and that plaintiff was appointed administratrix by the surrogate of the county of New York; that the weekly earnings of said decedent were about \$8.75; that the legislature of the state of New Jersey enacted a compensation law, which went into effect July 4, 1911; that the said law provided that the next of kin of an employee shall benefit by fixed schedule of compensation from the employer of the deceased upon the employee's death from injuries through an accident arising out of and in the course of his employment, and that the said compensation shall be paid during a period of 300 weeks; that the plaintiff is entitled to \$1,500 based upon the minimum rate of wages of

the deceased. The answer alleges that under the act of New Jersey all questions shall be submitted to the Court of Common Pleas of that state upon petition, which petition shall be answered and the issues raised determined by said court, and that the plaintiff has no right of action which can be enforced in this state. Section 18 of chapter 95, Laws of 1911, of the state of New Jersey provides that in case of a dispute over or failure to agree upon a claim for compensation between the employer and employee, or the dependents of the employee, either party may submit the claim both as to questions of fact, the nature and effect of the injuries and the amount of compensation therefor to the Judge of the Court of Common Pleas of such county as would have jurisdiction in a civil case. Section 20 provides for the procedure in case of dispute. That there is a dispute between the parties is apparent. The answer denies any liability and any negligence or carelessness on its part. In *Lehmann v. Ramo Films, Inc.*, 92 Misc. Rep. 418, I held that as the act provided a forum wherein the disputes between the parties were to be determined this court would not assume jurisdiction. But the plaintiff contends that as the compensation is fixed by the New Jersey statute this action is merely to recover the minimum rate. Section 1 of the act provides that the employee shall receive compensation provided that the employee himself was not wilfully negligent. Section 12 provides that in case of death compensation shall be paid during 300 weeks. Section 21 provides that the amounts payable periodically as compensation may be computed to one or more lump sum payments by the judge of the Court of Common Pleas having jurisdiction upon application of either party. I do not understand upon what theory plaintiff fixes the compensation at \$1,500; the compensation under the law is payable weekly, and the complaint does not allege that the court has fixed a lump sum, as provided by section 21 of the act. For the reasons stated the motion must be granted. Motion granted.

VERDICCIO v. McNAB & HARLIN MFG. CO., 178 App. Div. 48, Apr. 5, 1917.

LAUGHLIN, J.: The only point presented by this appeal which we deem it necessary to decide is whether the Workmen's Compensation Act, so called, of New Jersey, being chapter 96 of the Laws of 1911, as amended by chapter 174 of the Laws of 1913 and chapter 244 of the Laws of 1914, confers a cause of action for the death of an employee, who duly elected to take thereunder and to relinquish his common-law rights and any other statutory rights of his dependents in case of his death, to have the weekly indemnity given by the statute computed and the present value thereof determined and for the recovery thereof without applying to or action by a judge of the Court of Common Pleas of New Jersey as therein provided. It is alleged in the complaint that the plaintiff's intestate was employed by the defendant in the State of New Jersey to work in its foundry at Paterson, in that State, where in the course of such employment and arising therefrom he met with an accident on the 25th of January, 1916, from which he died, leaving both parents him surviving who were dependent upon him for support and who reside in Italy. Paragraph 7 of the statute provides that where its terms are accepted *compensation* for personal injuries to or for the death of an employee by accident not intentionally self-inflicted or not due to intoxication and arising out of or in the course of his employment shall be made by the employer according to the schedule prescribed by the statute. Paragraph 11,

as amended in 1913, contains a schedule of compensation for injuries, and paragraph 12, as amended in 1913 and 1914, provides a basis of payments for death. The scheme in each instance is for weekly compensation for specified periods. In the case of injuries where the disability is temporary or is total and permanent the compensation is a specified percentage of the wages received by the employee at the time with a maximum and minimum and is payable during the disability not exceeding a specified number of weeks, and where the disability is partial but permanent the compensation is a fixed percentage of such wages for specified periods varying for different specified injuries with a like maximum and minimum and with a general provision with respect to injuries of the class stated "or where the usefulness of a member or any physical function, is permanently impaired," providing that the compensation "shall bear such relation to the amounts stated" in the schedule "as the disabilities bear to those produced by the injuries named in the schedule." It is further provided in that section that if the employer and employee are unable to agree upon the amount of compensation to be paid in cases not covered by the schedule the amount shall be settled by a judge of the Court of Common Pleas by a summary proceeding specially prescribed in paragraph 20. Where the accident causes the death of the employee the compensation is a percentage of such wages with a like maximum and minimum for 300 weeks depending on the number of dependents of the class specified in the statute which includes parents, but it is also provided that in the event of the death of a dependent the right to the weekly payments shall cease. It is also provided that where, as here, there is more than one dependent the distribution of the compensation shall be made among them according to an order to be made by a judge of said court who shall on an application and presentation of the facts make the determination "according to the relative dependency." Paragraph 15 requires that notice of the injury be given to the employer by the employee or dependent unless he have notice thereof and that no compensation shall be allowed unless the employer has knowledge of the injury or the notice be given within ninety days. Paragraph 18 provides that in case of a dispute over, or failure of the employer and claimant "to agree upon, a claim for compensation," either party may submit the claim both with respect to questions of fact and the nature and effect of the injuries and the amount of compensation to any judge of the Court of Common Pleas of the county "as would have jurisdiction in a civil case," and such judge is authorized "to hear and determine such disputes in a summary manner," and it is provided that "his decision as to all questions of fact shall be conclusive and binding." Paragraph 19 provides that in case of death, "where no executor or administrator is qualified," the judge shall order and direct payment to be made to such person as would be appointed administrator of the estate of the decedent "upon like terms as to bond for the proper application of compensation payments as are required of administrators." Paragraph 20, as amended in 1913, regulates the procedure in case of a dispute between the claimant and the employer and contemplates the hearing and determination by the judge of the Court of Common Pleas summarily of any question with respect to notice to or knowledge of the injury by the employer as well as other questions and for the entry of judgment on the decision and for the satisfaction

thereof to the extent that installments are paid. It also contemplates that the Supreme Court may review questions of law by certiorari.

Paragraph 21, as amended in 1913, provides that on the application of either party on due notice to the other the compensation may be commuted by the Court of Common Pleas "at its present value when discounted at five per centum simple interest" if it shall appear to be for the best interest of the claimant "or that it will avoid undue expense or undue hardship to either party, or that such employee or dependent has removed or is about to remove from the United States, or that the employer has sold or otherwise disposed of the greater part of his business or assets." The statute then enjoins upon the judge of the Court of Common Pleas, upon whom only the authority to commute is conferred, the rule to be observed in passing upon such an application, viz., "that it is the intention of this act that the compensation payments are in lieu of wages, and are to be received" by the claimant in the same manner in which wages are ordinarily paid and that, therefore, commutation "is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure." Authority is also conferred upon the judge in determining a dispute with respect to the right to compensation or the amount or commutation thereof to settle and determine the amount to be paid for legal fees and declares it to be unlawful and a contempt of court for "any lawyer or other person" to ask or to receive more.

The plaintiff brings this action in total disregard of all of the provisions of the statute which contemplate an endeavor on the part of the claimant to agree with the employer and a determination of any controversy with respect to the facts and to the right of the claimant to receive a gross sum by commutation by a judge of the Court of Common Pleas of New Jersey. The decedent elected to accept the rights and remedies given by these statutory provisions in lieu of any other right or remedy that he or his dependents might have, and this action is predicated upon the contractual liability thereby created. As has been seen, the right of his dependents is conditioned under the statute upon either an agreement between them and his employer or a decision by the judge of the Court of Common Pleas on any dispute between them with respect to notice to or knowledge by the employer within the time specified of the injury which resulted in the death of the employee and of any other question of fact upon which the right to compensation depends. This necessarily embraces any question with respect to his employment or rate of wages, or as to whether his death was accidental arising out of and in the course of his employment and was not intentionally self-inflicted or not due to intoxication and with respect to the proportion of the compensation that should be received by each dependent and with respect to whether the compensation should be commuted into a lump sum presently payable. It appears that the defendant was incorporated under the laws of this State and it is suggested that service could not be made upon it in compliance with the statute to enable the claimants to proceed thereunder in New Jersey. Defendant conducts business in New Jersey and the contract of employment and the employment were there and decedent met his death in that State. It is to be presumed that the statute will be given a construction in the jurisdiction where it was enacted to enable those having claims thereunder to enforce them as therein provided; but if plaintiff's

rights are not enforceable under the statute then it is not apparent on what theory they can be enforced here and relief under the New Jersey statute is all the plaintiff now demands. There is no objection to the maintenance of a *cause of action* in the courts of this State based on a foreign statute which does not contravene any public policy of this State. The difficulty with the plaintiff's case, on the point now under consideration, is that the foreign statute does not give an independent cause of action enforceable anywhere. It has provided an administrative remedy by prescribed procedure in New Jersey as a substitute for any cause of action that there might otherwise be and it was optional with the employee to accept it or not and he stipulated with his employer to accept it. The fact that jurisdiction was conferred upon a judge of a court of that State to determine all controverted questions of fact and whether or not there should be a commutation of the compensation creates no greater right than the conferring of such authority on an administrative board or body created by the Legislature. No controlling decision on the point has been cited or found by us but there have been other decisions at Special Term to the same effect. (See *McCarthy v. McAllister Steamboat Co.*, 94 Misc. Rep. 692; *Lehmann v. Ramo Films, Inc.*, 92 id. 418.) Until some amount is determined upon as compensation in accordance with the statute no action can be maintained by a claimant based on the statute. Moreover if the action could be maintained here it is not at all clear that it could be enforced by the plaintiff who does not show that he is the person who would be entitled to administration in New Jersey; and, therefore, a recovery by the plaintiff might not prevent a recovery by the dependents or in their right in New Jersey.

It follows that the order should be affirmed, with ten dollars costs and disbursements. CLARKE, P. J., SCOTT, DAVIS and SHEARN, JJ., concurred. Order affirmed, with ten dollars costs and disbursements.

N. Failure to insure.—If an employer has failed to take out insurance, his injured employee has the alternative of proceedings for compensation before the Commission or proceedings for damages before the court (Workmen's Compensation Law, §§ 11, 52). Once the employee has chosen one of these two remedies intelligently and with knowledge of the facts he cannot withdraw and elect the other, especially if the Commission or the court has made a decision. The point is established by the following opinion:

PAVIA V. PETROLEUM IRON WORKS Co., 178 App. Div. 345, May 2, 1917.

COCHRANE, J.: This is an appeal from a decision of the State Industrial Commission denying the application of the claimant to withdraw his claim for compensation so that he may proceed by action against the employer.

The claimant was injured December 9, 1915. The employer had not secured compensation to his employees as required by section 50 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of 1914, chap. 316). The claimant, therefore, under sections 52 and 11 of that act might at his option elect to claim compensation thereunder or to maintain an action for damages. He could not have the benefit

of both remedies, and an election once made with knowledge of the facts confined him to the remedy which he thus elected. Section 51 requires an employer who has complied with the law as to security for compensation to "post and maintain in a conspicuous place or places in or about his place or places of business typewritten or printed notices in form prescribed by the Commission, stating the fact that he has complied with all the rules and regulations of the Commission and that he has secured the payment of compensation to his employees and their dependents." The law, therefore, takes very good care that an employee shall be adequately informed as to whether or not his employer has complied with the law and there is no reason why save in exceptional instances the employee should be ignorant of his rights.

In the present case the claimant on February 20, 1916, more than two months after the accident, submitted to the Commission his first notice of injury in which he stated among other things that the employer had furnished him medical service at his request. Application for compensation was made March 14, 1916. On April 11, 1916, the Commission wrote the attorney of the claimant as follows: "Supplementing our letter to you of April 4th, 1916, we wish to advise that on December 9, 1915, the Petroleum Iron Works of Pennsylvania, did not carry insurance as required by the Workmen's Compensation Law of the State of New York." The claim was heard April 17, 1916, by the Commission, and an award on that day was made in favor of the claimant and the claim continued for further hearing. On April twentieth payment of the award was tendered by the employer and refused by the claimant. On the following day, April twenty-first, the claimant filed with the Commission a statement that he withdrew his claim for compensation stating that it was his intention to prosecute his common-law remedy under the laws of this State. This notice although not filed with the Commission until April twenty-first, was dated April fourteenth, three days before the claim was heard by the Commission and the award made, and recited the fact that the attorney of the claimant had received the communication above mentioned of April eleventh, from the Commission to the effect that the employer did not carry insurance as required by the statute.

With full knowledge of the situation, therefore, before an award was made and with competent counsel to guide and advise him, the claimant permitted an award to be made in his favor and thereby most effectually confirmed his election to accept such remedy as was afforded him by the Workmen's Compensation Law. There is no pretense that he did not fully understand his rights before the award was made. A party cannot experiment with the Commission for the purpose of ascertaining how much compensation may be awarded him and then if dissatisfied repudiate the award and seek the other remedy permitted by the statute. His election once made intelligently and with knowledge of the facts should be conclusive. The Commission was clearly right in denying the application to discontinue the claim. Decision unanimously affirmed.

In an action of an employee against his employer for damages the burden of proof is on the employee to show that the employer was not carrying compensation insurance at the time of the accident. The point is made in the following decision:

BARONE v. BRAMBACH PIANO Co., 101 Misc. 670, Dec. 6, 1917.

BIJUR, J.: Plaintiff, an employee of defendant engaged in the manufacture of pianos, was injured by the bite of a dog under the following circumstances:

He had been directed by his superior to carry some materials into a cellar of the factory. The engineer stationed in the cellar had kept a dog there for a year or more. It must be presumed from the lapse of time that the dog remained there with the permission of the defendant.

Appellant urges that plaintiff cannot maintain this action because his remedy under the Workmen's Compensation Law is exclusive. Plaintiff had alleged in the complaint that defendant had failed to "secure the payment of compensation to plaintiff for said injuries," but he offered no proof in support of this allegation. Defendant contends that in view of the provisions of the law (§ 11) that the remedy therein afforded shall be exclusive the burden was upon plaintiff to prove that the law did not apply by reason of defendant's failure to "secure the payment of compensation" as therein required. I think that the language of the statute (§ 50), which is mandatory upon every employer in this respect, gives rise to the presumption that the defendant has complied with this duty placed upon him, and that the burden is upon the plaintiff to establish the fact which prevents the application of the law to himself. This very point is impliedly held in *Shinnick v. Clover Farms Co.*, 169 App. Div. 236, 237, and although it has been intimated in *Connors v. Semet-Solvay Co.*, 94 Misc. Rep. 405-410, that the *Shinnick* case has been in substance overruled by *Matter of Jensen v. Southern Pac. Co.*, 215 N. Y. 514, the suggestion does not relate to the point now under consideration. I think, therefore, that the judgment must be reversed.

Plaintiff also urges that the law does not apply because the injury complained of was not sustained by the employee "arising out of and in the course of his employment," as provided by section 10. This subject has been discussed in an elaborate opinion of Mr. Justice Lyon in *Matter of Moore v. Lehigh Valley R. R. Co.*, 169 App. Div. 177. See, also, *Matter of Rheingold v. Builders' Brick & Supply Co.*, 168 App. Div. 425. The instant case, however, seems to me to be much simpler of solution. There is no doubt that the plaintiff was engaged in performing the duties of his employment at the time he was bitten. The presence of the dog with defendant's implied knowledge and consent was one of the physical conditions of the plant under which the defendant required the plaintiff to perform his duties. The mere fact that the direct cause of the injury was animate rather than inanimate does not alter the result; nor in this view can I see any force in the suggestion that the dog was not especially kept as a watchdog or for some similar purpose (though I think the proof showed that it was so employed). The right of the plaintiff to a recovery does not, on any theory of which I am made aware, depend upon the comparative usefulness to the employer's business of the immediate cause of the injury.

PHILBIN and ORDWAY, JJ., concur. Judgment reversed and new trial granted, with costs to appellant to abide event.

Earlier cases relative to failure to insure may be consulted in Bulletin 81, pages 111-114, 232-235.

O. *Third party responsible*.—The double remedy noticed immediately above is also available to an employee or his dependents if another not in the same employ has caused his accident; in such case, if he elects to claim compensation, an award operates as an assignment of his cause of action against the third party for damages to the insurance carrier or other person liable to pay such award (Workmen's Compensation Law, § 29).^{*} The cases whose texts follow involve interpretation of these provisions.

Compensation is payable as a rule in periodic partial payments (§ 25). Its total amount may be definite or contingent (§§ 15, 16). In one case the injured employee may receive compensation for a very limited number of weeks; in another, for the balance of his life. Awards for loss of certain bodily members are limited to fixed numbers of weeks. Awards are subject to future modification. In death cases the total amount that the beneficiaries will receive is calculable only from mortality and remarriage tables. This variety of possibilities has a bearing upon the question of the amount of damages that an insurance carrier may recover under automatic assignment of the cause of action, when the employee has elected to claim compensation, as two conflicting Supreme Court decisions show. In one of these, *U. S. F. & G. Co. v. N. Y. Rys. Co.*, the text of which has been presented in Bulletin 81, pages 118–121, the Appellate Term, First Department, holds that the assignee may not recover damages in excess of the amount of the compensation allowed to the assigning claimant; in the other, the text of which follows here, the Appellate Division, Fourth Department, holds that the assignee should recover full damages impressed with the trust, after recompensing itself for its payments of compensation, to account in the end to the claimant or his heirs for any surplus. The two decisions may be read together. The text of the second and later is as follows:

CASUALTY CO. OF AMERICA V. SWETT ELECTRIC LIGHT & POWER CO., 174 App. Div. 825, Nov. 15, 1918.

DE ANGELIS, J.: James A. Robinson, an employee of Matthew A. Ryan, was killed on the 4th day of November, 1914, in the village of Albion, by an electric current which proceeded from the defendant's primary electric wires with which he came in contact.

^{*} During the year ended June 30, 1917, according to statement, action for damages was brought by injured employees in 1,500 third-party cases, but in only 108 such cases was such action actually begun.—Report of Workmen's Compensation Bureau.

Ryan, the employer, was insured under the Workmen's Compensation Law in the plaintiff. Robinson's widow elected to take the benefit of the Workmen's Compensation Law, made the required assignment of the cause of action against the defendant to the plaintiff, procured an award against the plaintiff for herself and children and had been paid by the plaintiff on account of its liability almost \$400 when this action was begun.

The plaintiff, the insurance carrier, has recovered a judgment against the defendant for the moneys so paid out, upon the theory that the death of the deceased was caused by the negligence of the defendant without fault on his part.

The defendant challenges the judgment, asserting that the evidence did not permit an inference of negligence on its part and showed conclusively that the death of the deceased was due solely to his own negligence; and that in the view of the case most favorable to the plaintiff the question of the defendant's negligence and the question of freedom from contributory negligence on the part of the deceased were for the jury.

The plaintiff challenges the judgment on the ground that an improper rule of damages was adopted by the trial court, in that the plaintiff should not have been limited to the amount of the moneys paid by it, but should have been allowed to recover full damages, not, however, in excess of an amount sufficient to indemnify it to the extent of its liability.

We think that the trial court erred in taking from the jury the question of the defendant's negligence and the question of freedom from contributory negligence on the part of the deceased. We also think it was error to limit the recovery to the amount of the moneys that had been paid by the plaintiff on account of its liability up to the time the action was begun.

It is not easy to determine what the rule of damages should be.

At the time of the death of Robinson his widow was twenty-nine, one of his children, ten, and the other, three years of age. The widow was awarded three dollars and forty-six cents and each child one dollar and fifteen cents per week. The sum of the allowances was ordered paid to the widow bi-weekly so that she gets eleven dollars and fifty-two cents bi-weekly for the family. She was also awarded ninety-five dollars for the funeral expenses of her husband. Under section 16 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of 1914, chap. 316)* the widow is entitled to her allowance during her widowhood and in case she shall marry she will be entitled to two years' compensation in one sum as a final allowance. Each of the children is entitled to his allowance until he shall reach the age of eighteen years.

We have carefully considered the provisions of the Workmen's Compensation Law in its bearing on the question of damages in a case like this where the widow has elected to take compensation under the Workmen's Compensation Law and has assigned the cause of action against the third party to the insurance carrier. Whether in such a case the employer is insured in the state insurance fund or by an insurance corporation or association authorized to transact the business of workmen's compensation insurance, the right to maintain an action against a third party, a wrongdoer, is the same.

We are disposed to construe section 29 of the Workmen's Compensation Law,* applicable in such a case, in such manner as to give it the meaning

* Since amd. by Laws of 1916, chap. 622.—[REF.]

that would ordinarily be attached thereto. We believe that when the Legislature adopted this provision, "If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the State for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation," etc., the Legislature intended that the full and complete cause of action should pass under the assignment. If not, what was to become of such part of the cause of action as might remain? Take what was done in the case under review. Here the trial judge limited the recovery to the amount that had been paid by the insurance carrier down to the time of the commencement of the action. That certainly could not be regarded as indemnity, for the widow and the children still live and have already received much more than this so-called indemnity. It may be said that another action may be brought. Suppose we could overcome the objection to splitting the cause of action by making an exception to the rule against splitting causes of action on the ground that the reason for the rule did not exist and justice required the exception. Would any one suggest that the exigency for protecting the state fund is so great that we could by construction suspend the operation of the statute (Code Civ. Proc. § 1902 *et seq.*), which limits to the period of two years the time within which a death negligence action can be brought? Again, what is there in the Workmen's Compensation Law which would justify the donation of part of the damages for which a third party might be liable to the third party, the wrongdoer? Again, who can say that a recovery in such a case is necessarily indemnity? Cases of the liability of third parties will be few in any event. How can we say that the Legislature did not regard them as negligible rather than the basis for speculation? Assume that in a given case, where the State or an insurance corporation prosecutes an action of this kind, without the presence of the widow in her sable garments and the prattling babies about her feet, there be a recovery (it may be possible) beyond indemnity, still we ask why should that be cut down by a gift to the third party, the wrongdoer? The fact that the Commission under the Workmen's Compensation Law is required to "fix the rates of premiums * * * at the lowest possible rate consistent with the maintenance of a solvent state insurance fund and the creation of a reasonable surplus and reserve" (§ 95) and to readjust rates for the several groups of employment and to give credit for surplus to and charge employers with deficiencies in rates (§ 97),* does not seem to us to give any advantage to the insurance corporations or associations. We know of no provision in the insurance contract of insurance corporations and associations for adding to or reducing premiums and we have no certain information to lead us to believe that the law as it now stands in the respect referred to favors such corporations and associations. We think the Commission would find no difficulty in retaining their recoveries in third party cases so as not to put the state fund at a disadvantage in favor of such corporations and associations, if such a disadvantage may be possible. Again, we may assume that there may be a defect in the law, still we should not attempt to put a strained construction on other parts of this law to remedy a defect which may be cured by appropriate legislation. Again, we must remember that this

* Since amd. by Laws of 1916, chap. 622.—[REP.]

defendant is making a selfish claim for relief from part of its liability. Within the idea of indemnity, as claimed by the defendant, we may suggest a possible solution of the problem, although we need not pass upon that question now, for we think the plaintiff should recover from the defendant its full liability in the first instance in any event. Our suggestion is that the damages when recovered shall be regarded by the plaintiff as impressed with the trust to reimburse it for whatever moneys it may be called upon to pay to the widow and children, and, if in the end there shall be a surplus, to account for that surplus to the proper legal representatives of the deceased.

It follows from the foregoing that the judgment and order must be reversed and a new trial ordered, without the costs of this appeal to either party.

All concurred, KRUSE, P. J., in a separate memorandum, and FOOTE, J., in result only, in a separate memorandum.

KRUSE, P. J. (concurring):

I concur for reversal upon both grounds stated in the opinion of DE ANGELIS, J. I think, however, that it does not necessarily follow that if the plaintiff's right to recover is to be limited to the actual payments made by it under the Workmen's Compensation Law, the Statute of Limitations would commence running upon its cause of action at the time the cause of action for negligence accrued to the personal representatives of Robinson, the employee, for whose death the defendant became liable. If the plaintiff's right of recovery is to be thus restricted, it would seem that its claim against the defendant is like any other obligation payable in instalments. In such a case the plaintiff could sue as each installment became due and the Statute of Limitations would not begin to run until the particular installment is due.

The general liability of the defendant would be litigated upon the first action. It would not be necessary to litigate it again, because the determination in that action would be *res adjudicata* in any action brought upon a subsequent installment. I am of the opinion, however, that the plaintiff in that regard is in the same situation as the personal representatives of the deceased would be, to whose rights it succeeds under the assignment; that it can maintain but one cause of action and must recover all its damages in that action. It is true it may recover more than it actually pays. It is also true that it may recover less.

FOOTE, J. (concurring in the result):

I think defendant had the right to have the questions of fact left to the jury, but I do not think the trial judge erred in holding that plaintiff's recovery is limited to the amount plaintiff had paid out. There is but one cause of action and no action can be brought for future payments plaintiff may make.

Judgment and order reversed and new trial granted, without costs of this appeal to either party.

The amendment to Workmen's Compensation Law, § 29, effected by L. 1917, ch. 705, makes the assignment of a cause of action consecutive upon and therefore contingent upon award of compensation. This is essential to full protection of the injured

employee. If the Commission, for any cause, denies him compensation, he can then fall back upon such relief as a suit for damages offers. The amendment avoids harsh consequences of the following decision interpretative of § 29 as it stood prior to the amendment of 1917. According to this decision, the section, as it stood originally, made an assignment effective immediately upon the election and before the Commission had acted upon a claim. The decision holds that assignment vests in the person liable to pay compensation, a title of which he cannot subsequently be divested against his consent either by the injured employee or by the Commission; also that payment of a compensation award by a third party is sufficient consideration for a release by the assignee of a cause of action. Its text is as follows:

SABATINO V. CRIMMINS CONSTRUCTION CO., 102 Misc. 172, Jan. 9, 1918.

PENDLETON, J.: Defendant moved to dismiss the complaint on the evidence at the trial. Decision was reserved and the case sent to the jury to assess the damages. Code Civ. Pro. § 1187.

The action is in negligence for damages for personal injuries brought by an employee against a third party, not the employer.

The answer sets up as an affirmative defense that plaintiff had been divested, before suit brought, of the cause of action under the provisions of section 29 of the Workmen's Compensation Law, and was not therefore the real party in interest.

There is no dispute as to the facts, and the only question is whether the title to the cause of action had passed out of the plaintiff as matter of law.

Evidence having been offered for defendant, the motion should properly have been to direct a verdict for defendant, and, there being concededly no question of fact, it may be so treated. *Niagara Falls Fire Ins. Co. v. Campbell Stores*, 101 App. Div. 400; *Sheldon v. George*, 132 id. 470; *Dillon v. Cookroft*, 90 N. Y. 649; *Westervelt v. Phelps*, 171 id. 212; *Appleby v. Astor Fire Ins. Co.*, 54 id. 253.

Plaintiff, an employee of the Collette Company, was struck by a chain operated by defendant. He filed with the commission notice of an election to sue defendant as a third party under the provisions of the Workmen's Compensation Law, subsequently withdrew it and filed a claim against the employer accompanied by an assignment in the form prescribed by the commission of any claim against third parties. The claim was allowed by the commission and an award made. It was not paid by the employer, who notified defendant of the award and, claiming to be subrogated to the employee's rights against the defendant, called upon defendant to pay it. Thereafter this action was commenced. Subsequently defendant paid the amount of the award to the commission and received a release from the employer releasing defendant from all liability for any claim arising out of plaintiff's injury. The commission sent its check for the amount of the award to plaintiff, who refused to accept it. Thereafter plaintiff, on notice to the

employer, but not to defendant, applied to the commission to withdraw his claim against the employer, claiming that the employer had failed to secure the payment of compensation as provided in section 50 of the act. The commission allowed the claim to be withdrawn and apparently set aside the award.

Construing section 29 of the Workmen's Compensation Law in connection with the other provisions of that statute, its plain intent, purpose and effect is that an employee has, where injured by the negligence of one other than the employer and not in the same employ, the choice of remedies, viz., his claim under the act against the employer or his cause of action at law against such other person, and that in the former event the cause of action against such other person must be surrendered to the State for the benefit of the state insurance fund or to the person liable to pay.

The act created a new remedy and was designed to make trade accidents a trade liability in cases coming within its provisions; the liability of employers was extended, and they, or the persons liable to pay the compensation, were subrogated by way of indemnity to all claims of the employees against others who caused the injury.

The statute deals directly only with the liability of the employer. It neither impairs nor adds to the employee's common-law rights against third parties. He has the option of pursuing those rights as if the statute never existed, or he may take compensation under the act, in which case he surrenders, for the benefit of the party paying, the cause of action against third parties, or he may pursue the action at law against the third parties and claim under the statute the difference, if any, between the recovery at law and the compensation he would be entitled to under the act, giving notice of the election in order that the party liable under the act may have an opportunity to protect his interest. *Lester v. Otis Elevator Co.*, 169 App. Div. 613; *Miller v. New York Railways Co.*, 171 id. 316; *Matter of Woodward v. Conklin & Son, Inc.*, id. 140; *Dietz v. Solomowitz*, N. Y. L. J. Sept. 24, 1917.

There is no dispute as to these general principles, but plaintiff contends that until payment of the award the assignment of the cause of action is not effective.

The original act, as amended by chapter 41, Laws of 1914, section 29, provided: "If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A com-

promise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association or corporation liable to pay the same."

The words "*before any suit or claim*" were held to refer to *suits or claims under this act*. *Lester v. Otis Elevator Co.*, 169 App. Div. 613.

By chapter 705, Laws of 1917, section 29 was amended so as to substitute for the words "*before any suit or claim*" the words "*before any suit or any award*," and in place of the words "*the cause of action against such other shall be assigned to the state*" the words "*the awarding of compensation shall operate as an assignment of the cause of action against such other to the state*."

The manifest purpose of the change was to make the transfer of title operative under the statute without formal instrument of assignment, and was apparently intended to simplify the procedure, especially in cases of death benefits and next of kin, and the time of the divesting of title was expressly fixed at *the awarding of compensation*. This case comes under the original act. By the forms prescribed by the commission, section 76, a formal transfer or assignment was included in and made part of the "Employee's Claim for Compensation" filed with the commission, and as part of his claim plaintiff executed such an assignment in this case, which expressly reads "in consideration of the compensation, if any, *when awarded*."

The language of the act that "such injured workman * * * shall before any suit or claim under this chapter elect. * * * Such election shall be evidenced in such manner as the commission may * * * prescribe * * *" and "if he shall elect to take compensation * * * the cause of action against such other shall be assigned * * *" seems very plain.

There is nothing to indicate that the divesting of title was intended to be postponed until payment of the award. On the contrary, the plain express import is that it should take effect on the election, and the forms prescribed by the commission, containing a formal assignment, and the language of the assignment itself, all evidence the same intent. The amendment of 1917 points in the same direction. As above stated, its purpose was to dispense with the formal instrument of assignment; it evidently postponed rather than advanced the time of transfer of title.

The act makes special provisions for the enforcement of payment of the award, and it was evidently the intention that those who had received an award should be relegated to these remedies for its payment.

In *Miller v. New York Railways Co.*, 171 App. Div. 316, above cited, it was held in an action by an employee against a third person that the fact that the employee had made claim for compensation under the act and received an award was a good defense. An examination of the record of that case shows that, as matter of fact, the award had been paid, but such circumstance was not relied on in the opinion. Under a statute of Wisconsin, very similar to the New York statute, it was expressly held that the transfer of title did not await the payment of the award. *McGarvey v. Independent Oil & Grease Co.*, 146 N. W. Rep. 895; *Paulak v. Hayes*, 156 id. 465.

Payments of compensation awarded are made periodically, not in one sum (§ 25), and this fact alone is sufficient to show that the divesting of title must depend on the claim or award and not payment; any other contention would seem quite impracticable. Moreover, it is scarcely conceivable that it was intended an employee might speculate with the commission, try for the award, and if not satisfied abandon the proceedings and sue the third parties. A somewhat similar case was decided in *Pavia v. Petroleum Iron Works Co.*, 178 App. Div. 345. There the employee had elected to seek compensation, whereas, under section 11 of the act, he might, the employer not having secured compensation to his employees as required by section 50 of the act, have elected to bring against the employer the special suit for damages at law provided for in that section. The action of the commission in refusing to allow him to withdraw his claim in order to sue at law was approved. The court said: "A party cannot experiment with the commission for the purpose of ascertaining how much compensation may be awarded and then if dissatisfied repudiate the award and seek the other remedy permitted by the statute. His election once made intelligently and with knowledge of the facts should be conclusive." The same principle would seem to apply here.

Plaintiff urges that until the award is paid there is no consideration for the assignment, but this is not so.

The statute gives a new remedy, and as a condition of its enjoyment requires a surrender of any cause of action against third parties. This is ample consideration for the assignment; the employee is not obliged to pursue the statutory remedy, but, if he does, he surrenders his claim against others.

If the statute had intended the assignment should only become effective on payment, it could have so provided. It did not. On the contrary, as above pointed out, the language seems clear that such was not the intent.

The construction contended for by the plaintiff would inject so much uncertainty and lead to such confusion as to the rights of the parties in regard to the claim against third parties, that it is difficult to believe such a condition was intended. If the employee claims under the statute, the party liable to pay the compensation is entitled to the benefit of the claim against third parties, and to take such steps to protect his interest and enforce the claim as he deems advisable. *Lester v. Otis Elevator Co.*, 169 App. Div. 613. On the other hand, if the employee does not take under the statute, he retains the full benefit and control of the claim against third parties, with authority to compromise or settle it, and should be free to take such steps to protect his interest as he may deem advisable.

If, as plaintiff contends, the assignment does not become effective until payment of the award, it is evident that during this period there would be uncertainty as to who would be ultimately entitled to this claim and as to the rights or interests of the parties and a manifest inability of either to effectively act so as to protect his interests. It is improbable a construction which would lead to such results is in accordance with the intent of the legislature.

Plaintiff's title having been divested by the assignment, he had no cause of action at the time suit was commenced. After suit brought plaintiff applied to the commission, as above stated, to allow the claim against the employer to be withdrawn, alleging that the employer had not paid the

award, and that when he filed his claim he did not know the employer had not secured the payment of compensation to his employees by the methods provided in section 50 of the act. The application was granted and plaintiff allowed to withdraw his claim for compensation and the award was set aside.

The effect of the failure to pay an award is to expose the employer to the action provided in section 26 of the act (as matter of fact the defendant here had paid it) and of the failure to secure the compensation to the suit under section 11 and section 52 of the act and the penalty provided by section 50, subdivision 3. These matters can have no pertinency at this time.

The only question here is as to the effect of the action of the commission on the cause of action against defendant. The assignment having become effective, it vested title in the employer, and he could not be divested except with his consent. Neither plaintiff nor the commission had such power. Even if it be assumed, however, for the sake of argument, that the award or the employer's title was voidable, it is not void *ab initio*, and the withdrawal of the claim or the setting aside of the award could not make it so. Proceedings neither void nor irregular, if erroneous or vacated for error or favor, are valid until set aside and furnish a protection to third parties acting under them in good faith. *Hess v. Hess*, 117 N. Y. 306, 309; *Day v. Bach*, 87 id. 56; *Fischer v. Langbein*, 103 id. 90; *Simpson v. Hornbeck*, 3 Lans. 53; *Anderson v. Schmidt*, 96 Ill. App. 125.

As in this case the award was not payable out of the insurance fund, the assignment of the cause of action against defendant was under the express provisions of the statute, and the instrument of assignment itself to the employer, as the party liable to pay the award, he called on defendant to pay, which the latter did, receiving from the employer a release of the claim. Having acquired title to the cause of action by the assignment, the employer could assign it (*McGarvey v. Independent Oil & Grease Co.*, 146 N. W. Rep. 895; *Saudek v. Milwaukee Elec. R. & Light Co.*, 157 id. 579; *Diets v. Solomonowitz*, N. Y. L. J. Sept 24, 1917), and on the same principle release it. Defendant was not a party to the award, nor obligated to pay it. It was not binding and imported no liability on defendant; the payment was therefore voluntary and a good consideration for the release, and all this having taken place before plaintiff's application to withdraw his claim against the employer the cause of action against defendant had been then extinguished. It is true that the payment of the award by defendant was after action brought, but no application had then been made to withdraw the claim or set aside the award, and defendant could have no notice that plaintiff would attempt to do so. As above pointed out, the right of the parties had become fixed, the cause of action against defendant vested in the employer and could not be divested by any action of the employee or the commission, but, even if voidable, the proceedings being neither void nor irregular and the defendant having acted in good faith he is protected thereby notwithstanding the subsequent action of the commission.

Sections 20, 22 and 74 of the act fix the powers of the commission as to changing or modifying its awards and rulings. In none is there a suggestion that the original awards are by any modification or change made void *ab initio*. The language in section 22, that no review shall affect such awards as regards any moneys already paid, is just to the contrary. Even if the

withdrawal of the claim and the setting aside of the award could be held to entitle plaintiff to a reassignment of the cause of action or even that it reinvested him with it, being after the action was commenced, the suit was in such aspect prematurely brought.

Motion granted, verdict for defendant directed, and judgment ordered thereon dismissing the complaint.

According to the concluding part of the following opinion, denial of compensation for extra-territorial or other reason is immaterial as concerns the right to an action against a third party for negligence, and, on the other hand, award of compensation excludes the injured employee from such right of action.

ROYAL INDEMNITY CO. V. PLATT & WASHBURN REFINING CO., 98 Misc. 631, Feb., 1917.

BIJUR, J.: Plaintiff had provided insurance under the Workmen's Compensation Law to a Connecticut firm against claims of its employees while engaged in its business in this state. It had paid such a claim which had been allowed by the commission in this state in favor of one McGuiness, and brings this action to recover the amount of the award it had paid against the third party through whose negligence the accident to McGuiness is alleged to have occurred.

The circumstances of the accident were as follows:

McGuiness while buying lumber and some other supplies in this state happened to be at Brookhaven on Long Island and desired to go to some lumber yards beyond East Moriches. Braden, an employee of defendant, engaged in selling oil on its behalf, solicited business and used one of defendant's automobiles to go about visiting customers. He was acquainted with McGuiness, and meeting the latter at Brookhaven invited him to go along and offered to take him to the lumber yards, which was McGuiness' destination. He also invited two other persons to accompany him, one of whom testified at the trial. After leaving Moriches, Braden, according to the testimony, when nearing a curve in the road, turned to speak to some one of his guests who called his attention to the approaching curve, when Braden suddenly turned the front wheels and the accident resulted, from which McGuiness received his injuries.

There was thus ample proof to go to the jury on Braden's negligence.

The learned judge below seems to have dismissed the complaint for the reason urged by the defendant that Braden was not at the time of the accident engaged in defendant's business. The record, however, discloses the contrary. It was his business to solicit orders for oil and to use defendant's automobile for that purpose. He was engaged in that business at the time of the accident, and plaintiff having been invited by him to ride was a licensee of the defendant toward whom it owed the duty of exercising ordinary care. *Grimshaw v. Lake Shore & M. S. R. R. Co.*, 205 N. Y. 371; *Adams v. Tozer*, 163 App. Div. 751. In addition to that fact McGuiness testified affirmatively that Braden was during the trip soliciting an order for oil from McGuiness.

Respondent on this appeal urges also that the compensation commission

improperly made an award to McGuiness, and that, therefore, plaintiff, as indemnitor had no better and no valid claim against the defendant. This claim, upon which the judge below seems not to have passed, is based upon the fact that McGuiness' employers are located in Connecticut and that he was hired there. There is no doubt, however, that McGuiness was and had been for some time engaged in their business in this state, and as I read the law his claim is expressly covered thereby. Such also is the plain intimation of the recent case of *Matter of Gardner v. Horseheads Cons. Co.*, 171 App. Div. 66. But it does not seem to be important in a determination of this case whether McGuiness' right to compensation from his employer is covered by our statute or not. Defendant is being sued not under the statute, but on its common-law liability for negligence toward McGuiness, a third party not its employee. McGuiness' course in presenting and accepting payment through the workmen's compensation commission would certainly estop him from claiming against defendant that plaintiff indemnity company had not succeeded by way either of subrogation or assignment to all of McGuiness' rights against the defendant.

Judgment reversed and new trial granted, with thirty dollars costs to appellant to abide the event. GUY and MULLAN, JJ., concur. Judgment reversed and new trial granted, with costs to appellant to abide event.

According to the following decision a widow without having been appointed administratrix could validly assign both her own and her infant child's right to an action for damages under Workmen's Compensation Law, § 29, as it stood before amendment. The concluding sentence of § 29 has since been added by L. 1916, ch. 622, not "to give a power which theretofore did not exist," but simply to make clear the section's provisions.

HANKE v. N. Y. CONSOLIDATED R. R. Co., 168 N. Y. Supp. 234, Dec. 21, 1917.*

STAPLETON, J.: The death of plaintiff's intestate occurred while he was in a hazardous employment. His employer was the Transit Development Company, a domestic corporation. A verdict was directed against her in this action, and from the judgment entered upon it this appeal is taken.

We will assume that the evidence made it a question of fact for the jury to determine whether the neglect of the defendant was a proximate cause of the injuries from which death ensued, and that, unless a separate defense pleaded in the answer barred the plaintiff's recovery, a verdict should not have been directed.

The facts alleged as constituting that defense are that the deceased was employed by the Transit Development Company in a hazardous employment, within the meaning of the Workmen's Compensation Law (chapter 41 of the Laws of 1914, as amended by chapter 316 of the Laws of 1914, constituting chapter 67 of the Consolidated Laws); that his death resulted from an accidental personal injury arising out of and in the course of his employment, and that the Transit Development Company, on or about July 1, 1914, secured, and has ever since kept secure, the payment of compensation for the disability or death of its employees, as required by the Workmen's Compensation

* 181 App. Div. 53.

Law, under and in pursuance of subdivision 3 of section 50 of that law. All of this was admitted on the trial. The answer further alleged that Caroline Hanke, widow of the deceased, on behalf of herself and her child, Casimier Hanke, who was 12 days of age at the time of the father's death, filed on January 29, 1915, in accordance with the provisions of the Workmen's Compensation Law, a claim for compensation, and elected to take compensation from the Transit Development Company; that on March 16, 1915, the Workmen's Compensation Commission made an award to said Caroline Hanke and Casimier Hanke; and that all payments under such award, accruing to a given date, had been paid to and accepted by the said Caroline Hanke and Casimier Hanke. It also alleged that on April 20, 1915, the Transit Development Company commenced an action against the defendant to recover upon the cause of action arising out of the injury and death of said Antonio Hanke, the deceased, claiming to be subrogated to the rights and remedies of such Caroline Hanke and Casimier Hanke.

Evidence, not disputed, was offered on the trial in proof of the facts alleged. Among the documents received in evidence was a record of the proceeding in the matter of the claim of Caroline Hanke to recover for the death of her husband, including the findings of the Workmen's Compensation Commission and the award made by the Commission to both Caroline Hanke and Casimier Hanke. That record shows that the Commission awarded to Caroline and her child biweekly payments of \$10.84, of which \$8.14 was for herself and \$2.70 for the child. She received and accepted payments under that award. She made application to the Commission to withdraw her claim for compensation, and her application was denied on the ground that an award had been made and that she had accepted payments on account thereof.

Section 29 of the Workmen's Compensation Law, as it was at the time of the death of the intestate, read:

Sec. 29. *Subrogation to Remedies of Employee.* If a workman entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured workman, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund and otherwise with the written approval of the person, association or corporation liable to pay the same. Laws 1914, c. 41.

A point in the brief of the appellant presents this statute for interpretation. The point is stated:

The claim for compensation should not be construed as an election, or as an assignment, and in any event not an election or assignment upon the part of the infant, Casimier.

In developing her point, the appellant argues that the election and assignment are invalid, for the reason that on the date she signed the instrument in which she made the claim for compensation under section 16 of the Work-

men's Compensation Law and assigned the cause of action against the defendant, she was not in a position to make any election between the claim and the remedy by suit against the defendant tort-feasor, because, not then being administratrix, she had no control over the action for death given by the Code of Civil Procedure, and had no power or authority to waive it or assign it; and, furthermore, if she could elect to waive her own benefits accruing from a suit to recover for damages for the pecuniary injury she suffered through the death of her husband, and assign her claim, she could not, in her private capacity, waive or assign the claim of the other beneficiary, the decedent's child.

In support of her contention she offers the decision in *Stuber v. McEntee*, 142 N. Y. 200, 36 N. E. 878. That action was one by an administrator to recover damages in an action brought under sections 1902 to 1905 of the Code of Civil Procedure. The defendant paid a sum of money to one of the plaintiffs, not a statutory beneficiary, before his appointment as administrator of the goods, chattels, and credits which were of the decedent whose death was caused by the defendant's neglect. The plaintiff, who received the money, gave therefor a receipt which stated that the payment was for all expenses caused by the death and that he had no further claim against the defendant. The court held that the receipt was not a settlement of the claim or a bar to the action.

The appellant directs attention to the fact that after the action at bar was commenced, and by chapter 622 of the Laws of 1916, the Workmen's Compensation Law was amended by adding to section 29 thereof the following provision:

Whenever an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian, as the commission may determine by rule in each case.

It is now desirable to expose section 16 of the Workmen's Compensation Law:

Sec. 16. Death Benefits. If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

1. Reasonable funeral expenses, not exceeding one hundred dollars;
2. If there be a surviving wife (or dependent husband) and no child of the deceased under the age of eighteen years, to such wife (or dependent husband) thirty per centum of the average wages of the deceased during widowhood (or dependent widowerhood) with two years' compensation in one sum, upon remarriage; and if there be surviving child or children of the deceased under the age of eighteen years, the additional amount of ten per centum of such wages for each such child until the age of eighteen years, provided that the total amount payable shall in no case exceed sixty-six and two-thirds per centum of such wages.
3. If there be surviving child or children of the deceased under the age of eighteen years, but no surviving wife (or dependent husband) then for the support of each such child until the age of eighteen years, fifteen per centum of the wages of the deceased, provided that the aggregate shall in no case exceed sixty-six and two-thirds per centum of such wages.
4. If the amount payable to surviving wife (or dependent husband) and to children under the age of eighteen years shall be less in the aggregate than sixty-six and two-thirds per centum of the average wages of the deceased, then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the accident, fifteen per centum of such wages for the support of each such person until the age of eighteen years; and for the support of each parent, or grandchild, of the deceased if dependent upon him at the time of the accident, fifteen per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between sixty-six and two-thirds per centum of such wages, and the amount payable as hereinbefore provided to surviving wife (or dependent husband) or for the support of surviving child or children.

Any excess of wages over one hundred dollars a month shall not be taken into account in computing compensation under this section. All questions of dependency shall be determined as of the time of the accident.

This court, in the Third Department, in *Matter of Woodcock v. Walker*, 170 App. Div. 4, 155 N. Y. Supp. 702, decided that under section 16 of the Workmen's Compensation Law the surviving wife and principal dependent is entitled not only to 30 per centum of the average wages of the deceased during her widowhood, but also to the additional amount of ten per centum of such wages for each minor child until the age of 18 years.

We see no reason why a widow with a dependent child should not, for herself and her child, make an election under section 29 of the act; and we consider that the provision added to that section by chapter 622 of the Laws of 1916, which we have hereinbefore quoted, has no greater effect than to make plain a provision which before the amendment was not clear, and that it was not designed to give a power which theretofore did not exist.

The *McEntee* case presents no obstacle to the passing of a law whereby the widow, for herself and her infant children, next of kin of the deceased, for whose benefit the cause of action was given by the Code of Civil Procedure, might in certain cases and for certain purposes assign the cause of action. That is exactly what the Legislature has done in the Workmen's Compensation Law. The Legislature had the task of providing certain and speedy compensation for the dependents of those killed in hazardous employments, which it designated and grouped. In formulating the policy many rules of common-law liability had to be abolished and an insurance feature had to be established. The liability of joint tort-feasors had to be considered. A constitutional provision against abrogating the right of action to recover damages for injuries resulting in death had to be observed. The conservation of the home of the workman with a wife and minor children was a dominant circumstance. The incapacity of minors to contract and to waive without special legislative authority, even if mentally capable of contracting and waiving, had to be borne in mind. Tedious and expensive litigation was to be avoided, and unnecessary forms were to be dispensed with. To the success of the plan an exclusive remedy was necessary. The Legislature did not attempt to abrogate the right of action to recover damages for injuries resulting in death, when those injuries were caused by the negligence or wrong of another not employed by the same employer. It required the dependents, if they would have the full benefit under the act, to make an election. They are to elect whether to take from the decedent's employer, or to pursue their remedy against the person, other than the decedent's employer, whose negligence or wrong caused the death of the deceased. If they elect to take compensation from the employer, the cause of action against the other shall be assigned to the state, for the benefit of the state insurance fund, if compensation be payable therefrom, or otherwise to the person or association or corporation liable for the payment of such compensation; and, if they elect to proceed against such other, the state insurance fund, person, association, or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount recovered against such other person and actually collected and the compensation provided or estimated by the Workmen's Compensation Law.

We must presume that the Legislature, when it passed this law, knew

that the only right of action was that given by the Code of Civil Procedure (sections 1902 to 1905) and preserved by the Constitution (section 18, art. 1), and that it had no power to affect that right of action, except in so far as it was authorized so to do by section 19, art. 1, of the Constitution. In a case where the negligence or wrong of another wholly or partially caused the injury resulting in death, the Legislature did not wish to exclude from the benefits of the Workmen's Compensation Law the dependents of an employee whose death resulted from an accidental personal injury sustained by him in the course of his employment and arising out of it, without regard to his fault as to the cause of such injury, excepting the personal faults specifically condemned by the statute. Neither did it wish to disregard the salutary common-law rule that there shall not be a double satisfaction for the same injury. In conferring upon such dependents the benefits of the statute, the Legislature may not have been precise, and may not always have regarded with nicety words used in the Code of Civil Procedure in establishing the right of action; but it is quite plain that it regarded the substance rather than the form, and that it had in mind the beneficiaries rather than the legal representatives, as that term is ordinarily understood. It did not remit the dependents of an employee unless they, or the parent or other person authorized to speak for them, wished, to the hazards of a litigation which might be protracted and fruitless. It was enacting a workable statute to promote an important reform in jurisprudence. To make the procedure simple and inexpensive, the creator of statutory guardians dispensed with them. In the same effort to effect inexpensiveness and simplicity, it eliminated legal representatives and created another statutory agent to act in behalf of infant beneficiaries.

We have examined the other points of the appellant in which error is assigned, but we do not think it is necessary to discuss them.

The judgment and order should be affirmed, with costs. All concur.

When a third party, because of his responsibility for the injury, has paid moneys to the injured employee, the employer or his insurance carrier is entitled to deduction of the amount of such moneys from the compensation award. This is true even when such payment has been made to avoid a sentence of imprisonment in consequence of a criminal prosecution. The following decision is in point:

DIETZ v. SOLOMONWITZ, 179 App. Div. 560, Sept. 13, 1917.

LYON, J.: The award appealed from was made on account of injuries resulting from an assault made upon the claimant. Through the action of the criminal court the assailants have paid to the claimant certain sums of money. The question involved upon this appeal is whether the employer is entitled to have the moneys so paid applied in reduction of his liability under the Workmen's Compensation Law.

The claimant was a paperhanger. In April, 1916, while at work in the borough of Brooklyn, city of New York, he was approached by two members

of a rival labor union and told there was a strike upon the job, and asked to cease work. Upon his refusal to do so the men assaulted him inflicting severe injuries from which he had not sufficiently recovered to resume work August 14, 1916, the time to which the award was made.

On July 8, 1916, the claimant presented to the State Industrial Commission a claim for compensation embraced in which was the following provision:

"I hereby agree to accept the compensation awarded by the State Industrial Commission in lieu of any other right or cause of action which I may have or claim against any person, firm, or corporation, in consequence of such accident; and, in consideration of such compensation, if any, when awarded, I hereby assign and set over unto the State Industrial Commission, for the benefit of the State Insurance Fund, if compensation be payable therefrom and otherwise to the person or association or corporation liable for the payment of such compensation, all my right, title and interest, if any, in such cause of action for such injury, loss or damage against any person, firm or corporation.

"Signed, this 8th day of July, 1916, at Brooklyn, N. Y.

"(Signature) CHAS. B. DIETZ,
"1670 Prospect pl."

The assailants were indicted for assault in the second and third degrees respectively. The record upon appeal shows that on July 27, 1916, the assailants having been placed upon trial upon the indictments, and a conference having been had with the court by the claimant and his assailants and their counsel, the assailants pleaded guilty to the indictments. Thereupon their counsel stated to the court his desire to place upon record the proposition which he had urged upon both defendants "to make for the assistance of the unfortunate complainant in this case," which was in effect that the assailants would guarantee within the next twenty-four hours to pay to the complainant one hundred dollars in cash for his immediate needs, and to pay him fifteen dollars per week every Monday thereafter during his disability, and to guarantee him earnings of at least fifteen dollars per week after he should be able to go to work. The assailants having then waived the two days' period, the court paroled them under suspended sentences, one for five years and the other for two years, subject to their keeping the agreement to make said payments to the claimant, and to refrain from attacking any man, and from violating the law in any respect, the court stating that in the event of the breach of either condition, it would impose the limit of sentence upon each of the assailants.

The State Industrial Commission determining that the claimant's average weekly wage was twenty-three dollars and eight cents, made an award to him against the employer and insurance carrier of fifteen dollars per week for a period of fourteen weeks from May 8 to August 14, 1916, and continued the claim for further hearing. The Commission also found that the payments of one hundred dollars, and of fifteen dollars weekly had been continuously made to the claimant by the assailants, but that the employer and insurance carrier were entitled to no credit or diminution of the award on account of such payments theretofore made or any payments to be thereafter made to the claimant by the assailants "under the conditions upon which they obtained the suspended sentence * * *." This holding of the Commission constitutes the sole grievance of which the employer and insurance carrier complain.

Section 29 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) provided: "Subrogation to remedies of employee. If a workman entitled to compensation under this chapter be injured or

killed by the negligence or wrong of another not in the same employ, such injured workman, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the Commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the State for the benefit of the State Insurance Fund, if compensation be payable therefrom, and otherwise to the person or association or corporation liable for the payment of such compensation, and if he elect to proceed against such other, the State Insurance Fund, person or association or corporation, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the State may be prosecuted or compromised by the Commission. A compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the Commission, if the deficiency of compensation would be payable from the State Insurance Fund, and otherwise with the written approval of the person, association or corporation liable to pay the same."

The claimant thus had the privilege of requiring the payment of compensation by his employer, or of pursuing his remedy against his assailants. He elected to take the former course, and executed the assignment hereinbefore set forth. Thereupon the employer became subrogated to all the remedies of the employee and possessed of the claimant's cause of action against the assailants with the right to prosecute the same and to demand and receive payments thereon to an extent sufficient to indemnify him against his liability to the claimant. Thereafter all moneys paid by the assailants to the claimant on account of the damages sustained as the result of the assault were practically moneys belonging to the employer and must be deemed to have been received and applied by the defendant in reduction of the employer's liability to the claimant. I think the Commission erred in not making such application.

The argument advanced by respondent's counsel is that it is probable the court in imposing the conditional penalty did it as a punishment rather than as satisfying the civil claim for damages which the claimant would have against his assailants; and that the argument of the appellants would not apply unless the amount paid to the claimant could be offset or proved in mitigation of the damages which the claimant was entitled to recover. The payment of these sums was not imposed as a fine, which is payable to the People, not to the prosecutor. In fact no sentence was given, and hence no fine was imposed, but the passing of sentence was suspended and the assailants placed upon parole. It is immaterial as bearing upon the question as to the proper application of these moneys that the assailants or the union which they represented, may have been induced to make the payments in the expectation of thereby avoiding punishment of the assailants by imprisonment. The payments were required by the court to be made in recognition of an obligation both legal and moral on the part of the assailants to compensate

the claimant in part at least for the loss of earning power on account of such injuries, and to be made weekly as his wages were paid, and to be continued until he should be able to resume work. The plain purpose of the court was to require the assailants to indemnify the claimant for loss of wages to the extent of the payments made.

The suggestion is also made upon the part of the respondent that the payments made to the claimant could in some sense be taken as liquidating his claim for physical suffering and for the indignity suffered by him, leaving his claim for compensation for loss of wages unaffected. This suggestion is coupled with the admission that such a holding might put into the claimant's hands more money than he would be entitled to receive under the Workmen's Compensation Law. The assignment by the claimant did not assume to split the cause of action into one for loss of wages and one for suffering, but was of the entire cause of action.

In answer to the suggestion of the respondent that the argument of the appellants as to the application of the moneys paid to the claimant by the assailants in reduction of the employer's liability to the claimant would not apply unless the amount paid to the claimant could be offset or proved in mitigation of the damages which the claimant would be entitled to recover in an action at law against the assailants, it is to be observed that the employer's recovery is limited to a sum sufficient to indemnify him, and hence that the application of the moneys in reduction of the employer's liability to the claimant necessarily reduces the employer's right of recovery against the assailants correspondingly. If the respondent's position is correct, and this application of the moneys be not made, the claimant will receive double compensation, or approximately one-third more during the greater part of his disability than he received as full wages, and that at the expense of an employer whose acts were in no way responsible for claimant's injuries. Furthermore, if the respondent's position is correct, the assailants can be called upon to make a second payment of the sums now being paid by them to the claimant. Thus, the claimant would be allowed to retain moneys which he has received from the assailants upon the cause of action since he disposed of it, which he would be compelled to credit had he remained the owner of his cause of action, or had the moneys been paid to him before he disposed of the cause of action.

It was said in *Lester v. Otis Elevator Co.* (169 App. Div. 613): "Where an employee is injured by the act of a third party, in the course of his employment, he is nevertheless entitled to claim compensation under the statute. But it is only reasonable that, in such cases, the third party should be made to pay the damages caused by his wrongful act, and, of course, the employee is not entitled to such damages and the statutory compensation at the same time. Section 29 accordingly makes provision for the employer's 'Subrogation to remedies of employee.' * * * Section 29 does not, however, prevent an employee from bringing an action for damages against such third party himself; it recognizes his right to do so if he chooses. But if he does elect to do so, he can claim compensation under the statute only for the deficiency, if any, between the amount collected from such third party and the statutory compensation."

In the case of *Matter of Woodward v. Conklin & Son, Inc.* (171 App. Div. 736), this court held in effect that any moneys received from a third person responsible for the accident should be applied in reduction of the liability of the employer to the employee for compensation, although in that action a release had been given by the employee to the third party without consideration.

In the case of *Miller v. New York Railways Co.* (171 App. Div. 316), which was an action brought by the employee against a third party to recover damages on account of its alleged negligence causing the injuries to the plaintiff, it was held that an answer which alleged that the plaintiff prior to the commencement of the action had made a claim under the Workmen's Compensation Law for compensation for his disability due to the accident which was the basis of the award and had received an award of compensation, constituted a good defense. Referring to section 29 the court said: "The reason for the statutory declaration as to election is founded upon the common-law rule that there should not be a double satisfaction for the same injury."

The provision of section 29 requiring the employer to contribute only the deficiency should the employee elect to proceed against the wrongdoer, impliedly requires the application in reduction of the employer's liability of any amounts received from the third party. The effect of the acceptance of these payments by the claimant was to correspondingly reduce the liability of the employer to the claimant. Hence the award should have been only for the balance which existed up to the time the award was made.

The award must be reversed and the case remitted to the Commission to allow the modification of the award by deducting from it the moneys so received by the claimant from the assailants up to August 14, 1916. All concurred. Award reversed and matter remitted to the Commission to allow modification of the award by deducting from it the moneys received by the claimant from the assailants up to August 14, 1916.

In a curious seafaring case the injured employee, having elected to sue the third party and having taken \$250 in settlement, put in a claim against his employer for compensation for a second accidental injury alleged to have happened four days after the first one. The Commission found that there had been but one accident, the original one, and deducted the \$250 from \$308, the sum the employee would have been entitled to had he claimed compensation, leaving the insurance carrier to pay \$58: *Maley v. O'Boyle*, S. D. R., vol. 10, p. 612, October 25, 1916.

The text of the Appellate Division decision in *Winter v. Doelger Brewing Co.*, holding that an employer cannot stand in a double relation of employer and third party as concerns an accidental injury to his employee, has been reproduced above, pages 251, 252.

A brickyard laborer was struck and fatally injured by an engine while crossing railroad tracks from his employer's clay bank to his employer's moulding machine or pit. The railroad belonged to a third party. The accident occurred October 7, 1915. His widow, having been appointed administratrix, settled with the railroad company for \$400 without having elected to sue. The settlement was approved by the surrogate of Dutchess County. Neither the employer nor the insurance carrier consented to or approved of the settlement. The Commission made an award, crediting the \$400 to the insurance carrier and holding that the settlement constituted no obstacle to prosecution of an assigned claim by the employer or the insurance carrier. The Appellate Division approved the award unanimously and without opinion but granted leave to appeal to the Court of Appeals: *Matta v. Denning's Point Brick Works*, Death File, No. 14895, October 25, 1917; 182 App. Div. —, January 18, 1918.

In *Ridout v. Rodgers & Haggerty*, S. D. R., vol. 14, p. 710, Bul., vol. 3, p. 101, December 11, 1917, the injured employee having elected to sue, failed to get damages. The Commission held that a clause in his election to sue reserving "all further rights and remedies" constituted a sufficient filing of a claim for compensation within one year after the accident. This case was argued in the Appellate Division, May 14, 1918.

P. Extra-territoriality.—In the leading New York extra-territorial case the Court of Appeals upheld an award of compensation by the State Industrial Commission to a resident of New York who entered into a contract of employment in New York and, having been sent by his employer to New Jersey, was injured there: *Post v. Burger & Gohlke*, Bulletin 81, pages 236+248. The employee, Post, worked for his employer both in New York and in New Jersey. In two later cases, residents of New York were hired in New York for work to be done wholly without the State. The Court of Appeals, upon authority of its decision in the Post case, affirmed their compensation awards without opinion: *Klein v. Stoller & Cook Co.*, S. D. R., vol. 8, p. 440, April 10, 1916; 175 App. Div. 958, November 15, 1916; 220 N. Y. Rep. 670, March 20, 1917; *Fitzpatrick v. Blackall & Baldwin Co.*, S. D. R., vol. 8, p. 456, April 14, 1916; — App. Div. —, December 1, 1916; 220 N. Y. Rep. 671, March 20, 1917.

The Commission's award in an earlier and similar case of a resident of New York hired in New York by a New York corporation to do work wholly without the State had been reversed by the Appellate Division and remitted to the Commission, the court saying: "The mere fact that the contract was made in the State, if it was made in the State, is not material here when we understand that the contract related to work to be performed outside of the State." The Commission having reconsidered this case renewed the award, April 27, 1917. Upon a second appeal, the Klein and Fitzpatrick awards having meanwhile been affirmed both by the Appellate Division and the Court of Appeals, the Appellate Division affirmed the award, November 28, 1917, without opinion, one justice dissenting: *Gardner v. Horseheads Construction Co.*, S. D. R., vol. 4, p. 437, June 30, 1915; 171 App. Div. 66, January 5, 1916; Claim No. 60909, April 27, 1917; 181 App. Div. 915, November 28, 1917. The full text of the Appellate Division's opinion of January 5, 1916, has been presented in Bulletin 81, pages 154-156. A resident of New York, having entered into his contract of employment in New York, was injured in New Jersey; the Commission awarded him compensation; upon appeal, the insurance carrier argued against extra territoriality *in toto*; the Appellate Division, one justice dissenting, affirmed the award; the Court of Appeals dismissed appeal because notice had not been served in time: *Landes v. Lupton's Sons*, S. D. R., vol. 9, p. 340, June 28, 1916; 176 App. Div. —, Dec. 1, 1916; 221 N. Y. 574, June 12, 1917. In all five of the above cases the injured employee was a resident of New York. The Commission, on February 3, 1916, denied compensation to a resident of New Jersey hired in New York and injured in West Virginia; *Lloyd v. Power Specialty Co.*, Bulletin 81, pages 157, 158. In line with this ruling, it denied compensation, September 28, 1917, to a resident of Rhode Island hired in New York by a New Jersey corporation and injured in Texas: *Carlson v. Ogden Co.*, Bul., vol. 3, p. 49, September 28, 1917. Commissioner Lyon, who wrote the rulings in both cases, based their findings upon the fact that the injured employee or his dependents would not become public charges upon New York and that they had right of action for negligence under the laws of the States in which they received

their injuries, notwithstanding that their employers had complied with the compensation law of New York. The Commission, however, decided to certify to the Appellate Division the question whether Carlson was entitled to compensation. The Court replied that he was, citing the Court of Appeals in *Post v. Burger & Gohlke* as authority. This answer appears to hold that the sole requisite to coverage of extra-territorial accidents by the New York Workmen's Compensation Law is an employment contract made within New York State. At times the Commission finds difficulty in determining where the employment contract has been made. An illustrative case is *Argento v. International Stevedoring Co.*, S. D. R., vol. 12, p. 586, February 21, 1917.

An employee of a Missouri corporation was killed by the breaking of a ladder in Maine in 1916. He was a resident of New York and had entered into his contract of employment in 1900 in New York City. In the meantime the corporation had removed its offices, except a selling office, from New York to Pennsylvania. The employment contract had been made years before the enactment of the Workmen's Compensation Law. Just before the accident the employer had promised the employee an increase of wages. The insurance carrier pleaded all these circumstances to no effect. The Appellate Division sustained an award to the employee's widow and children without opinion, one justice dissenting: *Smith v. Heine Safety Boiler Co.*, Death Case, No. 18197, October 18, 1917; — App. Div. —, March 7, 1918. The Court of Appeals reversed the award with opinion, May 28, 1918.

In the case of an award for an accident occurring in the United States navy yard in Brooklyn, the insurance carrier argued upon appeal that the Commission lacked jurisdiction; the Appellate Division and the Court of Appeals affirmed the award unanimously and without opinion: *Burns v. Products Mfg. Co.*, Case No. 3278, June 15, 1917; 181 App. Div. 910, Nov. 14, 1917; 223 N. Y. Rep. —, May 14, 1918.

An extra-territorial accident to an employee whose contract of employment has been made in New York may not be compensatable by reason of the fact that it has occurred in interstate commerce. Cases in point are *Gobrecht v. Wells Fargo & Co.* and *Charlton v. Hilton-Dodge Transportation Co.*, below, page 304, in the first of which the accident occurred on a railroad in Pennsylvania and in the second on a vessel at sea.

Other extra-territorial cases in which decision has turned upon other than extra-territorial points are *Kennedy v. Kennedy Mfg. & Engineering Co.*; *Markham v. United Breeders' Co.*; and *Benjamin v. Rosenberg Bros.*, noticed elsewhere in this Bulletin. (See Table of Cases.)

Certain corporations operate in two or more States and take out compensation insurance under the laws of each State. If such a corporation enters into an employment contract with an employee in New York State and if the employee, having been injured in another State, obtains compensation under the laws of that State, can the employee then obtain compensation in New York? The State Industrial Commission and the Appellate Division of New York have answered that he can. In such cases the New York decisions have credited the insurance carrier with payments already made under the Compensation Law of the other State.

A corporation hired a colored resident of New York city and sent him to New Jersey to work. The hiring was in New York city. The employee having been awarded compensation by the New York Commission for an accidental injury in New Jersey, the company's insurance carrier appealed the case and meanwhile persuaded the employee, under the stress of poverty, to accept payment under the New Jersey Compensation Law and to release it from liability on account of the New York award. The Appellate Division held this agreement void and affirmed the Commission's award with credit to the insurance carrier for the payment made. The text of the decision is as follows:

JENKINS V. HOGAN & SONS, 177 App. Div. 36, March 7, 1917.

LYON, J.: The vital question presented by this appeal is whether the claimant was entitled to be awarded compensation under the New York Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41, as amd.), or under the New Jersey Workmen's Compensation Act (N. J. Laws of 1911, chap. 95, as amd.).

The claimant's employer, at the time the claimant received the injury, was a stevedore having its office in the city of New York, and engaged in loading and unloading vessels in New York harbor on both the New York and New Jersey shores, and was insured under the compensation statutes of both these States by the insurance carrier herein.

The claimant was a longshoreman, and at the time of receiving the disabling injuries, May 15, 1916, was at work unloading a vessel at a pier at West New York, State of New Jersey. His family resided at Hackensack, N. J., where he had voted during the last ten years.

The claimant, in order to be conveniently situated as to his work, and because he could not live so far away as Hackensack and follow his occupation, and not intending to return to Hackensack, hired a furnished room in New York city in December, 1915. From this room he went to his work each morning, returning at night, visiting his family every week or two, usually on Sundays unless then employed.

On April 28, 1916, the foreman of his employer came to claimant's said room and engaged him to go to work temporarily at said pier at West New York. Claimant commenced work there the next morning and continued at work there until he was injured. Following the receiving of the injury he presented a claim for compensation under the New York statute. The insurance carrier appeared at the hearing before the New York State Industrial Commission and contested the jurisdiction of the Commission. The objection of the insurance carrier was overruled and awards made, June twenty-ninth of four weeks' compensation, and July thirty-first of five weeks' compensation, each at fifteen dollars per week. July 18, 1916, an appeal was taken by the employer and insurance carrier from the award first made.

Subsequent to the appeal being taken the claimant, being in straitened circumstances, went to the office of the appellant insurance carrier for the purpose of obtaining compensation for his injury. Payment of the awards under the New York statute was refused, but claimant was told that if he would accept payment of ten dollars per week under the New Jersey statute, he would be paid for nine weeks' disability. He thereupon accepted ninety dollars, and executed an affidavit apparently acknowledging such payment, releasing the insurance carrier from liability, and repudiating all claim for compensation under the New York statute. Thereafter, and on October 30, 1916, the appellants moved to reopen the case for the purpose of introducing the affidavit in evidence. The State Industrial Commission declined to receive the affidavit and to make it a part of its record, and denied the application to reopen the case, but stated that if the appellants should decide to adjust the matter, the Commission would give credit for the payment of ninety dollars. The appellants refused to accept this proposition, electing to rely upon the contention that there was no jurisdiction of the claim under the New York statute. The Commission then closed the claim on the previous awards of nine weeks. Thereupon the employer and insurance carrier appealed from the order denying their motion to reopen the case for the introduction of further evidence.

Both appeals are submitted at this time. The grounds of the appeals as stated in the brief of the appellants are twofold: That the claimant was not covered by the New York statute as he was working in New Jersey when injured; and that if the court should hold the claim to be within the New York statute the case should be sent back to have evidence taken as to whether the claimant placed himself under the jurisdiction of the New Jersey statute and repudiated his claim under the New York statute. The State Industrial Commission found as conclusions of fact that at the time the claimant was injured he kept his home in New Jersey, in which State he voted, but that he resided in the city of New York, where he kept a room for the purpose of his business, and that the contract of employment was made at such room.

The decision in this case as to the liability of the employer under the

Workmen's Compensation Law is apparently controlled by that of *Matter of Post v. Burger & Gohlke* (216 N. Y. 544), in which case the employer and employee were residents of this State and the contract of employment was made here, and the employee was injured while working without the State, the court holding that the New York State Workmen's Compensation Law applied and that "The act, in view of its humane purpose, should be construed to intend that in every case of employment there is a constructive contract between the employer and employee, general in its terms and unlimited as to territory, that the employer shall pay as provided by the act for a disability or the death of the employee as therein stated. The duty under the statute defines the terms of the contract."

The award having been properly made, we do not think the State Industrial Commission erred in refusing to open the case for the purpose of receiving the affidavit in evidence, assuming it to have included a sworn statement by claimant of payment, a release by him of the insurance carrier from all liability and a repudiation by him of all claim for compensation under the New York statute. The award constituted an obligation on the part of the employer to the employee which could not be fully discharged simply by the payment by the employer to the employee of two-thirds of the amount of the award any more than could an ordinary contract indebtedness of any debtor to his creditor be discharged simply by such percentage payment.

Furthermore, section 33 of the Workmen's Compensation Law provides: "Claims for compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this chapter, and shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived. * * *." The purpose of this provision, which the appellants are presumed to have known, is not ambiguous. It was designed for the protection of the employee, in this case a colored man fifty-one years of age, "in bad circumstances, and laid up so long," he says. The attempted settlement was made without the consent of the State Industrial Commission having been obtained and in fact without their knowledge. The affidavit, so far as it assumed to release and repudiate the rights of the claimant, was utterly void. The Commission gave it all the force to which it was entitled by offering to accept it as a receipt for the payment of ninety dollars of the award. The appellants refusing to introduce it for that purpose, and it being incompetent and immaterial for any other purpose, I think the Commission was fully warranted in declining to receive it and in refusing to reopen the case for that purpose.

Both the award and order appealed from should be affirmed, but with the right to the appellants to file the affidavit as a receipt for the payment of ninety dollars, the affirmance to be with one bill of costs against the appellants in favor of the Commission.

Award and order appealed from unanimously affirmed, with the right to the appellants to file the affidavit as a receipt for the payment of ninety dollars, the affirmance to be with one bill of costs against the appellants in favor of the Commission.

The same course was followed by the Appellate Division in the following case, which differs from the Jenkins case in that the

injured employee had claimed and received compensation from the New Jersey commission before obtaining an award from the New York Commission:

GILBERT V. DES LAURIERS COLUMN MOULD CO., 180 App. Div. 59, Nov. 14, 1917.

WOODWARD, J.: We see no merits in this appeal. The claimant was employed under a New York contract. At the time of his injuries he was performing services for his employer away from the plant of such employer in the State of New Jersey. The claimant originally made application for compensation under the New Jersey statute (N. J. Laws of 1911, chap 95, as amd.), and the insurance carrier made some payments under the act. Subsequently, the claim was made in this State and an award has been made, crediting the insurance carrier with the amount paid under the New Jersey proceeding. The claim that the New Jersey Commission, having accepted jurisdiction and administered upon this claim, deprived the Commission of the State of New York of jurisdiction is, we believe, without force. It is doubtful if the New Jersey Commission ever had any jurisdiction of the case; it was one arising under the contract of this State and the contract growing out of such statute (*Matter of Post v. Burger & Gohlke*, 216 N. Y. 544, 554), and it was clearly a matter to be handled under the provisions of our statute (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd.), rather than under the statute law of New Jersey. The fact that the claimant was induced to invoke the New Jersey statute in the first instance did not deprive him of the right to have the law of his contract of employment enforced in the manner provided by law, and the insurance carrier, being credited with the amount it has paid under the provisions of the New Jersey statute, is not in law aggrieved. The award should be affirmed. Award unanimously affirmed.

An employee whose contract had been made in New York was injured in Connecticut, just over the state line. The case was like the Jenkins case in that the insurance carrier tried to forestall payments under the New York compensation law by making payments under the Connecticut law. The Appellate Division affirmed the award of the New York Commission and gave credit to the carrier for the payments made. The decision was without opinion, two justices dissenting: *Beaudet v. Metz Sons*, 181 App. Div. —, December 28, 1917. The Court of Appeals affirmed the award without opinion, May 28, 1918.

An employee hired in New York was injured in Connecticut. The company had taken out compensation insurance in both States with different carriers. Upon examining the two insurance policies, the New York Commission found that it could enforce compensation against one of the carriers but not against the other. Not having jurisdiction to determine rights as between

the carriers, the Commission made award against one of them with the suggestion that it obtain relief by action in court against the other. These findings were brought out by reversal of the award in the Appellate Division, and remanding of the case: *Connolly v. Tucker Electrical Construction Co.*, Case No. 9217, April 16, 1917; — App. Div. —; Bul., vol. 3, p. 119, January 2, 1918; affirmed by Appellate Division, May 21, 1918.

Q. *Interstate and intrastate commerce.*— The question of interstate commerce involves for the courts, first, theoretical determination of the relative spheres of the federal and state governments under the commerce clause of the Federal Constitution and the laws of Congress based thereon and, second, a practical task of drawing the line between interstate and intrastate commerce.

The theory being that the States occupy the field of interstate commerce except in so far as the United States by congressional legislation has dispossessed them, each federal law affecting interstate commerce has to be examined as to the extent to which it has reduced state jurisdiction. As Mr. Justice Brandeis intimates, the United States Supreme Court's decision in the Winfield case does not do away with the often very difficult task of determining whether the injured employee in a given case was engaged at the time of his accident in interstate or in intrastate commerce. Almost forty per cent of the railroad cases turn upon this point. The New York workmen's compensation cases in which the question has arisen are divisible into three classes: namely, cases determined to be in interstate commerce, cases remanded for further evidence and cases determined to be in intrastate commerce.

1. *Exclusiveness of the Federal Employers' Liability Act.*— The Court of Appeals of New York, speaking through Judge Seabury, restricted the application of the federal law entitled "An Act Relating to the Liability of Common Carriers by Railroad to their Employees in Certain Cases" to railroad accidents due to railroad negligence. Only in such cases, said Judge Seabury, does this so-called Federal Employers' Liability Act exclude the Workmen's Compensation Law of New York. The eye of a New York Central track laborer named Winfield had been hurt by a stone that flew up as he was tamping ties. The New York courts

affirmed a compensation award to Winfield on the ground that the railroad was not chargeable with negligence. The full texts of their opinions have been presented in Bulletin 81, pages 162-173. The date of the New York Court of Appeals decision in the Winfield case was November 23, 1915. The New York Central Railroad appealed to the Supreme Court of the United States. There the case was argued twice, with an interval of eleven months, and the judgment of the Court of Appeals was reversed May 21, 1917, two justices dissenting. Mr. Justice Van Devanter, who wrote the ruling opinion, based it upon examination of the intent of Congress and upon cited judicial precedents and held that the Federal Employers' Liability Act "is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words it is a regulation of the carrier's duty or obligation as to both." Mr. Justice Brandeis, in a dissenting opinion in which Mr. Justice Clarke concurred, compared the Federal Employers' Liability Act with workmen's compensation laws and concluded that they were not in conflict, nor the delimitation of their respective spheres impracticable. The full texts of the two opinions are as follows:

NEW YORK CENTRAL R. R. CO. v. WINFIELD, 244 U. S. 147, May 21, 1917.

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

While in the service of a railroad company in the State of New York, James Winfield sustained a personal injury whereby he lost the use of an eye. At that time the railroad company was engaging in interstate commerce as a common carrier and Winfield was employed by it in such commerce. The injury was not due to any fault or negligence of the carrier, or of any of its officers, agents or employees, but arose out of one of the ordinary risks of the work in which Winfield was engaged. He was a section laborer assisting in the repair of the carrier's main track and while tamping cross-ties struck a pebble which chanced to rebound and hit his eye. Following the injury he sought compensation therefor from the carrier under the Workmen's Compensation Law of the State* and an award was made to him by the state commission, one member dissenting. The carrier appealed and the award was affirmed by the Appellate Division of the Supreme Court, two judges dissenting, 168 App. Div. 351, and also by the Court of Appeals, 216 N. Y. 284. Before the commission and in the state courts the carrier insisted that its liability or obligation and the employee's right were governed

* See *New York Central R. R. Co. v. White*, 243 U. S. 188.

exclusively by the Employers' Liability Act of Congress, c. 149, 35 Stat. 65; c. 143, 36 Stat. 291, and therefore that no award could be made under the law of the State. That insistence is renewed here.

It is settled that under the commerce clause of the Constitution Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it also is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded by reason of the supremacy of the national authority.* Congress acted upon the subject in passing the Employers' Liability Act, and the extent to which that act covers the field is the point in controversy. By one side it is said that the act, although regulating the liability or obligation of the carrier and the right of the employee where the injury results in whole or in part from negligence attributable to the carrier, does not cover injuries occurring without such negligence, and therefore leaves that class of injuries to be dealt with by state laws; and by the other side it is said that the act covers both classes of injuries and is exclusive as to both. The state decisions upon the point are conflicting. The New York court in the present case and the New Jersey court in *Winfield v. Erie R. R. Co.*, 88 N. J. L. 619, hold that the act relates only to injuries resulting from negligence, while the California court in *Smith v. Industrial Accident Commission*, 26 Cal. App. 560, and the Illinois court in *Staley v. Illinois Central R. R. Co.*, 268 Ill. 356, hold that it has a broader scope and makes negligence a test,—not of the applicability of the act, but of the carrier's duty or obligation to respond pecuniarily for the injury.

In our opinion the latter view is right and the other wrong. Whether and in what circumstances railroad companies engaging in interstate commerce shall be required to compensate their employees in such commerce for injuries sustained therein are matters in which the Nation as a whole is interested and there are weighty considerations why the controlling law should be uniform and not change at every state line. *Baltimore and Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 378-379. It was largely in recognition of this that the Employers' Liability Act was enacted by Congress. *Mondou v. New York, New Haven & Hartford R. R. Co.*, 223 U. S. 1, 51. It was drafted and passed shortly following a message from the President advocating an adequate national law covering all such injuries and leaving to the action of the several states only the injuries occurring in intrastate employment. Cong. Rec., 60th Cong., 1st Sess., 1347. And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws and to apply to them a national law having a uniform operation throughout all the States. House Report No. 1386 and Senate Report No. 460, 60th Cong., 1st Sess. Thus, in the House Report it is said: "It [the

* *Mondou v. New York, New Haven & Hartford R. R. Co.*, 223 U. S. 1, 53-55; *St. Louis, Iron Mountain & Southern Ry. Co. v. Hesterty*, 228 U. S. 702; *St. Louis & San Francisco Ry. Co. v. Seale*, 228 U. S. 156; *Taylor v. Taylor*, 232 U. S. 363; *Chicago, Rock Island & Pacific Ry. Co. v. Devine*, 239 U. S. 52; *Texas & Pacific Ry. Co. v. Rigsby*, 241 U. S. 33, 41; *Northern Pacific Ry. Co. v. Washington*, 222 U. S. 370; *Erie R. R. Co. v. New York*, 238 U. S. 671; *Southern Ry. Co. v. Railroad Commission*, 236 U. S. 439.

bill] is intended in its scope to cover all commerce to which the regulative power of Congress extends * * * by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees. * * * A Federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States."

True, the act does not require the carrier to respond for injuries occurring where it is not chargeable with negligence, but this is because Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it. Every part of the act conforms to this principle, and no part points to any purpose to leave the States free to require compensation where the act withholds it. By declaring in § 1 that the carrier shall be liable in damages for an injury to the employee "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track," etc.,* the act plainly shows, as was expressly held in *Seaboard Air Line Ry. Co. v. Horton*, 233 U. S. 492, 501, that it was the intention of Congress to make negligence the basis of the employee's right to damages, and to exclude responsibility of the carrier to the employee for an injury not resulting from its negligence or that of its officers, agents or other employees. The same principle is seen also in § 3, which requires that where the carrier and the employee are both negligent the recovery shall be diminished in proportion to the employee's contribution to the total negligence, and in § 4, which regards injuries arising from risks assumed by the employee as among those for which the carrier should not be made to respond. The committee reports upon the bill show that this principle was adopted deliberately, notwithstanding there were those within and without the committees who looked with greater favor upon a different principle which puts negligence out of view and regards the employee as entitled to compensation wherever the injury is an incident of the service in which he is employed. A few years after the passage of the act a legislative commission drafted and the Committees on the Judiciary in the two houses of Congress favorably reported a bill substituting the latter principle for the other, Senate Report No. 553, 62d Cong., 2d Sess., House Report No. 1441, 62d Cong., 3d Sess., but that bill did not become a law.

That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. Thus, in *Missouri, Kansas & Texas Ry. Co. v. Wulf*, 226 U. S. 570, 576, and other cases, it is pointed out that the subject which the act covers is "the responsibility of interstate carriers by railroad to their employees injured in such commerce"; in *Michigan Central R. R. Co. v. Freeland*, 227 U. S. 59, 66, 67, it is said that "we may not piece out this act of Congress by resorting to the local statutes of the State of procedure or that of the injury", that by it "Congress has undertaken to cover the subject of the liability of railroad companies to their employees

* The Act is printed in full in *Mondou v. New York, New Haven & Hartford R. R. Co.*, 223 U. S. 1, 6-10.

injured while engaged in interstate commerce," and that it is "paramount and exclusive"; in *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 256, it is held that where it appears that the injury occurred while the carrier was engaged and the employee employed in interstate commerce the Federal act governs to the exclusion of the state law; in *Seaboard Air Line Ry. Co. v. Horton*, *supra*, pp. 501, 503, it is said not only that Congress intended "to exclude responsibility of the carrier to its employees" in the absence of negligence, but that it is not conceivable that Congress "intended to permit the legislatures of the several States to determine the effect of contributory negligence and assumption of risk, by enacting statutes for the safety of employees, since this would in effect relegate to state control two of the essential factors that determine the responsibility of the employer;" and in *Wabash R. R. Co. v. Hayes*, 234 U. S. 86, 89, it is said: "Had the injury occurred in interstate commerce, as was alleged, the Federal act undoubtedly would have been controlling and a recovery could not have been had under the common or statute law of the State; in other words, the Federal act would have been exclusive in its operation, not merely cumulative [citing cases]. On the other hand, if the injury occurred outside of interstate commerce, the Federal act was without application and the law of the State was controlling."

The act is entitled, "An Act Relating to the liability of common carriers by railroad to their employees in certain cases", and the suggestion is made that the words "in certain cases" require that the act be restrictively construed. But we think these words are intended to do no more than to bring the title into reasonable accord with the body of the act, which discloses in exact terms that it is not to embrace all cases of injury to the employees of such carriers, but only such as occur while the carrier is engaging and the employee is employed in "commerce between any of the several States", etc. See *Employers' Liability Cases*, 207 U. S. 463.

Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress. As before indicated, it is a mistake to suppose that injuries occurring without negligence are not reached or affected by the act, for, as is said in *Prigg v. Pennsylvania*, 16 Pet. 539, 617, "if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it." Thus the act is as comprehensive of injuries occurring without negligence, as to which class it impliedly excludes liability, as it is of those as to which it imposes liability. In other words, it is a regulation of the carriers' duty or obligation as to

both. And the reasons which operate to prevent the States from dispensing with compensation where the act requires it equally prevent them from requiring compensation where the act withholds or excludes it.

It follows that in the present case the award under the state law cannot be sustained. Judgment reversed.

Mr. Justice BRANDEIS (dissenting): I dissent from the opinion of the Court; and the importance of the question involved induces me to state the reasons.

By the Employer's Liability Act of April 22, 1906, Congress provided, in substance, that railroads engaged in interstate commerce shall be liable in damages for their negligence resulting in injury or death of employees while so engaged. The majority of the Court now holds that by so doing Congress manifested its will to cover the whole field of compensation or relief for injuries suffered by railroad employees engaged in interstate commerce; or, at least, the whole field of obligation of carriers relating thereto; and that it thereby withdrew the subject wholly from the domain of state action. In other words the majority of the Court declares, that Congress by passing the Employers' Liability Act prohibited States from including within the protection of their general Workmen's Compensation Laws, employees who *without fault on the railroad's part* are injured or killed while engaged in interstate commerce; although Congress itself offered them no protection. That Congress *could* have done this is clear. The question presented is: Has Congress done so? Has Congress so willed?

The Workmen's Compensation Law of New York here in question has been declared by this court to be among those which "bear so close a relation to the protection of the lives and safety of those concerned that they properly may be regarded as coming within the category of police regulations." *New York Central Railroad Co. v. White*, 243 U. S. 188, 207. And this court has definitely formulated the rules which should govern in determining when a Federal statute regulating commerce will be held to supersede state legislation in the exercise of the police power. These rules are:

1. "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country." (*Sherlock v. Alling*, 93 U. S. 99, 103.)

2. "If the purpose of the Act cannot otherwise be accomplished — if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect — the state law must yield to regulation of Congress within the sphere of its delegated power." * * *

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State." (*Savage v. Jones*, 225 U. S. 501, 533.)

3. "The question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance

or conflict is so direct and positive that the two acts cannot be reconciled or stand together." (*Missouri, Kansas & Texas Pac. Ry. v. Haber*, 169 U. S. 613, 623.)

Guided by these rules and the cases in which they have been applied¹ we endeavor to determine whether Congress in enacting the Employers' Lia-

¹ The following cases show that Congress, in legislating upon a particular subject of interstate commerce, will not be held to have inhibited by implication the exercise by the States of their reserved police power, unless such state action would actually frustrate or impair the intended operation of the Federal legislation.

1. In *Shught v. Kirkwood*, 237 U. S. 52, 62, it was held that the Federal Food and Drugs Act, dealing, among other things with shipment in interstate commerce of fruit in filthy, decomposed, or putrid condition did not prevent a State from penalizing the shipment of citrus fruits "which are immature or otherwise unfit for consumption."

2. In *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 293, it was held that Congress did not, by the passage of the Federal Safety Appliance Acts, dealing with the equipment of locomotives, as well as of cars, and the Act to Regulate Commerce, preclude the States from legislating concerning locomotive headlights, as to which Congress had not specifically acted.

3. In *Missouri, Kansas & Texas Ry. Co. v. Harris*, 234 U. S. 412, 420, it was held that the Carmack Amendment (34 Stat. 584, 595), regulating the carrier's liability for loss of interstate shipments, did not prevent a State from providing for the allowance of a moderate attorney's fee in a statute applicable both in the case of interstate and intrastate shipments.

4. In *Savage v. Jones*, 225 U. S. 501, 529, it was held that the passage by Congress of the Food and Drugs Act of 1906, which, among other things, prohibited misbranding, did not prevent the States from regulating the sale and requiring to be affixed a statement of ingredients and minimum percentage of fat and proteins.

5. In *Missouri Pacific Ry. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 623, it was held that Congress, by granting, in the Act to Regulate Commerce, power to the Interstate Commerce Commission to compel equal switching service on cars destined to interstate commerce, did not, in the absence of the exercise by the Commission of its power, prohibit States from legislating on the subject.

6. In *Asbell v. Kansas*, 209 U. S. 251, 257, it was held that Congress, in providing that a certificate of inspection issued by the National Bureau of Animal Industry should entitle cattle to be shipped into any State without further inspection, did not prevent a State from penalizing the importation of cattle which had not been inspected either by the Federal Bureau or by designated State Officials.

7. In *Crossman v. Lurman*, 192 U. S. 189, 199, it was held that the Act of Congress of August 30, 1890 (26 Stat. 414) prohibiting importation into the United States of adulterated and unwholesome food, did not prevent the States from legislating for the prevention of the sale of articles of food so adulterated, as come within valid prohibition of their statutes.

8. In *Reid v. Colorado*, 187 U. S. 137, 149, it was held that Congress, by making it an offense under the Animal Industry Act for anyone to send from State to State cattle known to be affected with communicable disease, did not prevent the States from penalizing the importation of cattle without inspection by designated State Officials.

9. In *Missouri, Kansas and Texas Ry. Co. v. Haber*, 169 U. S. 613, 623, it was held that the Federal Animal Industry Act, making it a misdemeanor for any person or corporation to transport cattle known to be affected with contagious disease, did not prevent a State from imposing a civil liability for damages sustained by owners of domestic cattle by reason of the importation of such diseased cattle.

10. In *Smith v. Alabama*, 124 U. S. 456, 482, it was held that Congress did not, by the passage of the Act to Regulate Commerce, prohibit the states from enacting laws requiring persons to undergo examination before being permitted to act as locomotive engineers.

11. In *Sherlock v. Alling*, 93 U. S. 99, it was held that Congress did not, by the passage of many laws regulating navigation, with a view to safety, and providing for liability in certain cases, prohibit the application to an accident in navigable waters of a State of a statute providing for liability for wrongful death.

The following cases, holding that the Federal Employers' Liability Act supersedes the common or statutory laws of the States relating to the liability of railroads for negligent injuries to their employees while engaged in interstate commerce, are, of course, wholly consistent with the cases above referred to, the "field" of both Federal and State laws there under consideration being identical; *Second Employers' Liability Cases*, 223 U. S. 1, 55; *Missouri, Kansas and Texas Ry. Co. v. Wulf*, 226 U. S. 570, 576; *Michigan Central R. R. Co. v. Vreeland*, 227 U. S. 59, 66; *St. Louis, Iron Mountain & Southern Ry. Co. v. Hesterly*, 228 U. S. 702, 704; *St. Louis, San Francisco & Texas v. Seale*, 229 U. S. 156; *Taylor v. Taylor*, 232 U. S. 363, 368; *Seaboard Air Line v. Horton*, 233 U. S. 492, 501; *Wabash R. R. Co. v. Hayes*, 234 U. S. 86, 89; *Toledo, St. L. & W. R. Co. v. Slavin*, 236 U. S. 454, 458; *St. Louis, Iron Mountain & Southern Ry. Co. v. Craft*, 237 U. S. 640; *Chicago, R. I. & P. Ry. Co. v. Devine*, 239 U. S. 52, 54; *Chicago R. I. & P. Ry. Co. v. Wright*, 239 U. S. 548, 561; *Seaboard Air Line v. Kenney*, 240 U. S. 489, 493; *Osborne v. Gray*, 241 U. S. 16, 19.

bility Act intended to prevent States from entering the specific field of compensation for injuries to employees arising *without fault on the railroad's part*, for which Congress made no provision.

To ascertain the intent we must look, of course, first at what Congress has said; then at the action it has taken, or omitted to take. We look at the words of the statute to see whether Congress has used any, which in terms express that will. We inquire whether, without the use of explicit words, that will is expressed in specific action taken. For Congress must be presumed to have intended the necessary consequences of its action. And if we find that its will is not expressed, or is not clearly expressed, either in words or by specific action, we should look at the circumstances under which the Employers' Liability Act was passed; look, on the one hand, at its origin, scope and purpose; and, on the other, at the nature, methods and means of State Workmen's Compensation Laws. If the will is not clearly expressed in words we must consider all these in order to determine what Congress intended.

First.—As to words used: The Act contains no words expressing a will by Congress to cover the whole field of compensation or relief for injuries received by or for death of such employees while engaged in interstate commerce; or the whole field of carriers' obligations in relation thereto. The language of the act, so far as it indicates anything in this respect, points to just the contrary. For its title is: "An Act relative to the liability of common carriers by railroad in certain cases."*

Second.—As to specific action taken: The power exercised by Congress is not such that when exercised, it necessarily excludes the state action here under consideration. It would obviously have been possible for Congress to provide in terms, that wherever such injuries or death result from the railroad's negligence, the remedy should be sought by action for damages; and wherever injury or death results from causes other than the railroad's negligence, compensation may be sought under the Workmen's Compensation Laws of the States. Between the Federal and the State law there would be no conflict whatsoever. They would, on the contrary, be complementary.

Third.—As to origin, purpose and scope of the Employers' Liability Act and the nature, methods and means of State Workmen's Compensation Laws: The facts are of common knowledge. Do they manifest that by entering upon one section of the field of indemnity or relief for injuries or death suffered by employees engaged in interstate commerce, Congress purposed to occupy the whole field?

(A) *The origin of the Federal Employers' Liability Act:*

By the common law as administered in the several States, the employee, like every other member of the community, was expected to bear the risks necessarily attendant upon life and work; subject only to the right to be indemnified for any loss inflicted by wrongdoers. The employer, like every other member of the community, was in theory liable to all others for loss

* The title of this act may be profitably compared with that of the bill (not enacted) prepared by the Employers' Liability and Workmen's Compensation Commission pursuant to Joint Resolution No. 41, approved June 25, 1910 (36 Stat. p. 884) proposing a Federal Workmen's Compensation Law which reads: "A bill to provide an exclusive remedy and compensation for accidental injuries resulting in disability or death, to employees of common carriers by railroad engaged in interstate or foreign commerce or in the District of Columbia, and for other purposes." (Sen. Doc. 338, p. 107, 62d Cong. 2d Sess.)

resulting from his wrongs; the scope of his liability for wrongs being amplified by the doctrine of *respondet superior*. This legal liability, which in theory applied between employer and employee as well as between others, came, in course of time, to be seriously impaired in practice. The protection it provided employees seemed to wane as the need for it grew. Three defenses—the doctrines of fellow servant's negligence, of assumption of risk and of contributory negligence rose and flourished. When applied to huge organizations and hazardous occupations as in railroading, they practically abolished the liability of employers to employees; and in so doing they worked great hardship and apparent injustice. The wrongs suffered were flagrant; the demand for redress insistent; and the efforts to secure remedial legislation widespread. But the opponents were alert, potent and securely entrenched. The evils of the fellow-servant rule as applied to railroads were recognized as early as 1856, when Georgia passed the first law abolishing the defense. Between the passage of that act and the passage of the first Federal Employers' Liability Act, (Act of June 11, 1906, 34 Stat. 232) fifty years elapsed. In those fifty years only four more States had wholly abolished the defense of fellow servant's negligence. Furthermore, in only one State had a statute been passed making recovery possible, where the employee had been guilty of contributory negligence.¹ Meanwhile, the number of accidents to railroad employees had become appalling. In the year 1905-1906 the number killed while on duty was 3,807, and the number injured 55,524.² The promoters of remedial action, unable to overcome the efficient opposition presented in the legislatures of the several States, sought and secured the

¹ At the time the first Federal Employers' Liability Act was passed the so-called common law defenses remained in force, in large part, in most of the States, as to railroad employees.

A. *The Fellow Servant Rule.* (See Compilation of Statutes in "Liability of Employers," Senate Hearings, 1906, pp. 188-206; and in Senate Document No. 207, 60th Congress, 1st Session.)

(1) It had been completely abolished as to railroad employees in only 5 States: Georgia (1856), Kansas (1874), North Carolina (1897), Colorado (1901), North Dakota (1903).

(2) It remained in full force, or substantially so, in 25 States or Territories: Arizona, California, Connecticut, Delaware, Idaho, Illinois, Kentucky, Louisiana, Michigan, Maine, Maryland, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wyoming.

(3) In 16 other States it had been modified; abolished either as to certain more dangerous kinds of work, or as to certain classes of employees: Alabama, Arkansas, Florida, Indiana, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, New York, Oregon, South Carolina, Texas, Utah, Virginia, Wisconsin.

(4) The passage of the first Federal Act immediately stimulated further state legislation. In 1907 the fellow-servant rule was abolished as to railroads in Arkansas, Nevada, Oklahoma, South Dakota; and largely in California, Nebraska, Pennsylvania and Wisconsin.

B. *Contributory Negligence.* (See compilations cited, *supra*.)

(1) In all but 1 State there had been no statutory change of the rule that contributory negligence constituted a complete defence. Georgia (1895) had substituted the comparative negligence doctrine. In Kansas and Illinois early cases at common law seeming to apply this doctrine had been repudiated. The common law of Tennessee also contained some traces of the doctrine.

(2) During the year following the passage of the first Federal Act, which adopted the rule of comparative negligence, with mitigation of damages proportionate to the degree of plaintiff's negligence, several States introduced this modification: Nebraska, Nevada, North Dakota, South Dakota, Wisconsin.

C. *Assumption of Risk.* (See the compilations cited, *supra*.)

The harshness of this rule had been mitigated by statute or other statutory action taken in only 14 States: Alabama, California, Colorado, Georgia, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Virginia. In 1907 Iowa abolished the rule as to employees giving notice of a known defect.

² See Report of Interstate Commerce Commission for the year 1906. Summary of Casualties, Table A, p. 161.

powerful support of the President.¹ Congress was appealed to and used its power over interstate commerce to afford relief. The promotion of safety was of course referred to in the Committee's report as justifying congressional action; but the moving cause for the Federal Employers' Liability Act was not the desire to promote safety or to secure uniformity, as in standardizing equipment by the Safety Appliance Acts.² There was, in the nature of things, no more reason for providing a Federal remedy for negligent injury to employees, than there would have been for providing such a remedy for negligent injury to passengers or to other members of the public. The Federal Employers' Liability Act was, in a sense, emergency legislation. The circumstances attending its passage were such as to preclude the belief that thereby Congress intended to deny to the States the power to provide for compensation or relief for injuries not covered by it.

(B) *The scope of the Federal Employers' Liability Act:*

(1.) The Act leaves uncovered a large part of the injuries which result from the railroad's negligence. The decision of this court in the first *Employers' Liability Cases*, 207 U. S. 463, had declared that Congress lacked power to legislate in respect to any injuries occurring otherwise than to employees engaged in interstate commerce. Later decisions disclose how large a part of the injuries resulting from the railroads' negligence are thus excluded from the operation of the Federal law. For the Act was held to apply only to those directly engaged in interstate commerce. This excludes not only those engaged in intrastate commerce, but also the many who—while engaged on work for interstate commerce, as in repairing engines or cars—are not directly engaged in it. Likewise it excludes employees who, though habitually engaged directly in interstate commerce, happen to be injured or killed through the railroads' negligence, while performing some work in intrastate commerce.³

(2.) The Act leaves uncovered all of the injuries which result otherwise

¹ President's Messages, December 2, 1902; December 6, 1904; December 5, 1905; January 31, 1908.

² The following facts are significant as showing that employers' liability was not deemed a factor in safety to employees or the public, or a matter in which uniformity was desirable, or as otherwise presenting a railroad problem:

(1) The Annual Reports of the Interstate Commerce Commission to Congress for the eleven years ending December, 1908, deal each year at large with accidents, casualties to employees, and the promotion of safety. These reports contain numerous recommendations for legislation concerning safety appliances, hours of labor, block signals, train control, inspection and accident reporting; but no recommendation or even mention of employers' liability.

(2) The National Convention of Railroad Commissioners, an association comprising the commissioners of the several States, is formed for the purpose of discussing and aiding in the solution of American railroad problems. Likewise, in its reports for eleven years ending October, 1908, no reference has been found, either in the annual President's address, or in the report of the Committee on Legislation, or in the discussions, to the subject of employers' liability; or any mention of the passage by Congress of the two Employers' Liability Acts, or of the decision of this court on the first Act.

The absence of such reference is particularly noteworthy in the legislative report for the year 1908, pp. 218-233, which is devoted to a consideration of harmonious or uniform legislation. It contains a resume of the legislation in Congress recommended and supported by the National Convention of Railroad Commissioners during a period of 19 years and attendances at Congressional hearings on safety appliances, block signal, and hours of labor legislation.

³ Compare *Illinois Central Railroad v. Behrens*, 233 U. S. 473; *New York Central Railroad v. Carr*, 238 U. S. 260; *Delaware Lackawanna & Western Railroad Co. v. Yarbont*, 238 U. S. 439; *Shanks v. Delaware, Lackawanna & Western R. R.*, 239 U. S. 556; *Chicago Burlington & Quincy Railroad Co. v. Harrington*, 241 U. S. 177; *Erie Railroad Co. v. Welch*, 242 U. S. 303; *Raymond v. Chicago, Milwaukee & St. Paul Ry. Co.*, 243 U. S. 43.

than from the railroad's negligence, though occurring when the employee is engaged directly in interstate commerce.

The scope of the Act is so narrow as to preclude the belief that thereby Congress intended to deny to the States the power to provide compensation or relief for injuries not covered by it.

(C) *The purpose of the Employers' Liability Act:*

The facts showing the origin and scope of the act discussed above, indicate also its purpose. It was to end the denial of the right to damages for injuries due the railroad's negligence—a right denied under judicial decisions through the interposition of the defenses of fellow-servant, assumption of risk and contributory negligence. It was not the purpose of the Act to deny to the States the power to grant *the wholly new right* to protection or relief in the case of injuries suffered otherwise than through fault of the railroads.

The Federal Employers' Liability Act was, in no respect, a departure from the individualistic basis of right and of liability. It was, on the contrary, an attempt to enforce truly and impartially the old conception of justice as between individuals. The common law liability for fault was to be restored by removing the abuses which prevented its full and just operation. The liability of the employer, under the Federal Act as at common law, is merely a penalty for wrongdoing. The remedy assured to the employee is merely a more efficient means of making the wrongdoer indemnify him whom he has wronged. This limited purpose of the Employers' Liability Act precludes the belief that Congress intended thereby to deny to the States the power to provide compensation or relief for injuries not covered by the Act.

(D) *The nature of Workmen's Compensation Acts:*

In the effort to remove abuses, a study had been made of facts; and of the world's experience in dealing with industrial accidents. That study uncovered as fiction many an assumption upon which American judges and lawyers had rested comfortably. The conviction became widespread, that our individualistic conception of rights and liability no longer furnished an adequate basis for dealing with accidents in industry. It was seen that no system of indemnity dependent upon fault on the employers' part, could meet the situation; even if the law were perfected and its administration made exemplary. For, in probably a majority of cases of injury there was no assignable fault; and in many more it must be impossible of proof. It was urged: Attention should be directed, not to the employer's fault, but to the employee's misfortune. Compensation should be general, not sporadic; certain, not conjectural; speedy, not delayed; definite as to amount and time of payment; and so distributed over long periods, as to insure actual protection against lost or lessened earning capacity. To a system making such provision, and not to wasteful litigation, dependent for success upon the coincidence of fault and the ability to prove it, society, as well as the individual employee and his dependents, must look for adequate protection. Society needs such a protection as much as the individual; because ultimately society must bear the burden, financial and otherwise, of the heavy losses which accidents entail. And since accidents are a natural, and in part an inevitable, concomitant of industry as now practiced, society which is served thereby, should in some way provide the protection. To attain this end,

cooperative methods must be pursued; some form of insurance—that is, some form of taxation. Such was the contention which has generally prevailed. Thus out of the attempt to enforce individual justice, grew the attempt to do social justice. But when Congress passed the Employers' Liability Act of April 22, 1908, these truths had gained little recognition in the United States. Not one of the thirty-seven States or Territories which now have Workmen's Compensation Laws had introduced the system. Yet the conception and value of compensation laws was not unknown to Congress. It then had under consideration the first Compensation Law for Federal Employees which was enacted in the following month (Act of May 30, 1908, 35 Stat. 556). The need of its speedy passage had been called to the attention of Congress by the President in the same special message which urged the passage of this Employers' Liability Act.

Can it be contended that Congress by simply passing the Employers' Liability Act prohibited the States from providing in *any* way for the maintenance of such employees (and their dependents) for whose injuries a railroad, innocent of all fault, could not be called upon to make indemnity under that act? It is the State which is both primarily and ultimately concerned with the care of the injured and of those dependent upon him; even though the accident may occur while the employee is engaged directly in interstate commerce. Upon the State falls the financial burden of dependency, if provision be not otherwise made. Upon the State falls directly the far heavier burden of the demoralization of its citizenry and of the social unrest, which attend destitution and the denial of opportunity. Upon the State also rests under our dual system of government, the duty owed to the individual, to avert misery and promote happiness so far as possible. Surely we may not impute to Congress the will to deny to the State the power to perform either this duty to humanity or their fundamental duty of self-preservation. And if the States are left free to provide compensation, what is there in the Employers' Liability Act to show an intent on the part of Congress to deny to them the power to make the provision by raising the necessary contributions, in the first instance, through employers?

(E) *Methods and means of Workmen's Compensation Laws:*

The principle underlying Workmen's Compensation Laws is the same in all the States. The methods and means by which that principle is carried out vary materially. The principle is that of insurance, the premiums to which are contributed by employers generally. How the insurance fund shall be raised and administered; what the scale of compensation or relief shall be; how the contributing groups of employers shall be formed; whether or not a state fund shall be created; whether the individual employer shall be permitted to become a self-insurer; whether he shall be permitted to deal directly with the employee in making settlement of the compensation to be awarded; on all these questions the laws of the several States do and properly may differ radically.

What methods and means the State shall adopt in order to provide compensation for injuries to citizens or residents where Congress has left it free to legislate, rests (subject to constitutional limitations) wholly within the judgment of the State. It might conclude, in view of the hazard involved, that no one should engage in the occupation of railroading without providing

determination of the New York Court of Appeals in the same case, Bulletin 81, pages 174, 175, that the Federal Employers' Liability Act does not cover steamship lines owned and operated by railroad corporations. The same point appears to have been raised in *Mack v. N. Y. Dock Co.*, Death Case, No. 24142, July 16, 1917; 181 App. Div. —, December 28, 1917; 223 N. Y. Rep., May 14, 1918.

2. *Cases determined to be in interstate commerce.*—The New York Appellate Division has held that interstate commerce forbids a compensation award in the following two instances:

(1) *Express messenger service.*—An express messenger who accompanied shipments from New York city across state lines was run over and killed while getting a can of drinking water. The Appellate Division held, unanimously and without opinion, that his dependents were not entitled to death benefits because he was engaged in interstate commerce: *Gobrecht v. Wells, Fargo & Co.*, Claim No. 28898, February 19, 1915; 179 App. Div. 952, July 3, 1917.

(2) *Vessel used by foreign corporation.*—The engineer of a tug belonging to a company chartered in Georgia injured his hand upon the vessel while in Long Island Sound enroute from Portland, Maine, to New York City. He was a resident of New York. The contract of employment was made, the corporation maintained an office, and the vessel was registered in New York. Nevertheless the Appellate Division held that the company was exempt from the New York Workmen's Compensation Law's provisions under its clause, "other than vessels of other states or countries used in interstate or foreign commerce," in group 8 of section 2. The court said that such foreign owner would have been subject to the compensation law had its vessel been engaged in intrastate commerce at the time of the accident. The majority and dissenting opinions in the case are as follows:

CHARLTON V. HILTON-DODGE TRANSPORTATION CO., 178 App. Div. 385, May 2, 1917.

WOODWARD, J.: There is no dispute as to the facts in this case. The Hilton-Dodge Transportation Company is a Georgia corporation with its principal place of business in Savannah. Its business is the transportation of lumber between Atlantic ports from Philadelphia to Portland, Me. Among

its vessels was the tug *W. B. Keene*, which was enrolled or registered in the custom house in the port of New York, and had painted upon its stern the words "W. B. Keene, New York, N. Y." On the 25th of March, 1916, while said tug was *en route* between Portland, Me., and New York, N. Y., an accident occurred which resulted in injuries to the right hand of William T. Charlton, chief engineer of the tug. The accident occurred while the tug was off New London, Conn., on Long Island Sound, and while the tug was engaged in interstate commerce. Mr. Charlton is a resident of Brooklyn, N. Y., and was hired in the port of New York. The question presented upon this appeal is whether the injuries are subject to compensation under the provisions of the Workmen's Compensation Law of the State of New York.

The State Industrial Commission has held that the injuries are such as could be compensated under the laws of this State, and the appellant challenges this ruling.

Group 8 of section 2 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) provides for the compensation of persons injured in the "operation, within or without the State, including repair, of vessels other than vessels of other States or countries used in interstate or foreign commerce, when operated or repaired by the company," and the respondent urges that this is sufficient to justify the award; that the mere fact that the owner of the vessel resides in Georgia is not sufficient to take the case out of the operation of the statute. We are of the opinion, however, that the award may not be sustained; that the whole statute is to be read and construed, and that it does not undertake to charge corporations of a sister State, or of a foreign government, carrying on interstate or foreign commerce, with the burdens of this act.

The language of group 8 of section 2, it should be observed, does not hinge entirely upon the question of the "vessels of other States or countries;" it is the fact that the "vessels of other States or countries" are "used in interstate or foreign commerce," which excepts them from the operation of the group. The vessels of any State or country, engaged in intrastate commerce, are unquestionably included in the group; the fact that in the conduct of such intrastate commerce they might pass outside of territorial waters of the State would make no difference. If, however, they were engaged in interstate commerce then the clear language of the statute excludes them from its operations. It is the "operation, within or without the State, * * * of vessels other than vessels of other States or countries used in interstate or foreign commerce" which is declared to constitute a hazardous employment, and when any vessel of another State or country is shown to have been engaged in interstate or foreign commerce it is clearly beyond the jurisdiction of the Industrial Commission of the State of New York to impose a burden such as is contemplated by the Workmen's Compensation Law. It is the operation of vessels in intrastate commerce, whether these vessels are of foreign or domestic ownership, that gives legitimate jurisdiction for the operation of the legislation of this State upon employees operating such vessels, and the effort to make it cover the present case cannot find support in this court.

That the above is the true construction of group 8 is clear when we come to consider the provisions of section 114, for it is not to be doubted that

this is a limitation upon this group. It provides that the "provisions of this chapter shall apply to employers and employees engaged in intrastate * * * commerce * * * only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce," with a like provision for those engaged in interstate or foreign commerce "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States." It is only when the employer and employee are mutually connected with intrastate work in such a manner that it may be clearly separable and distinguishable from interstate or foreign commerce that the chapter is to have effect, "except that such employer and his employees working only in this State may, subject to the approval and in the manner provided by the Commission and so far as not forbidden by any act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

In other words, the Workmen's Compensation Law does not undertake to usurp the powers of Congress, or to legislate for persons or corporations not within its jurisdiction. For those engaged in intrastate commerce in vessels, whether within or without the State, it provides for compensating employees, but it is careful to exclude all matters of interstate commerce, except under conditions which cannot offend against the laws of Congress; and the State Industrial Commission has no power to go beyond the limits fixed by the statute.

The award appealed from should be reversed. All concurred, except KELLOGG, P. J., who dissented, with opinion, in which LYON, J., concurred.

KELLOGG, P. J. (dissenting): The Workmen's Compensation Law substantially enters into every contract of employment made within the State, without reference to where the service is to be rendered. (*Matter of Post v. Burger & Gohlke*, 216 N. Y. 544.)

The injured employee resides in this State, was hired and paid here, and has the benefit of that law, which, as we have seen, is a part of his contract of employment. By group 8 of section 2 of the law, "The operation, within or without the State, including repair, of vessels other than vessels of other States or countries used in interstate or foreign commerce, when operated or repaired by the company," is a hazardous employment.

The vessel in question was registered at New York, and that was her home port. Section 4141 of the United States Revised Statutes requires vessels to be registered "by the collector of that collection-district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be but one, * * * usually resides." The name of the vessel and the "home port" must be marked upon the stern. (U. S. R. S. § 4178.) By our Navigation Law (§19) the vessel is to have the name and "the port to which she belongs painted on her stern." The transportation company, the alleged owner, was a foreign corporation, with its office at Savannah, Ga. It also had a New York office and was engaged in interstate transportation from New York south and New York north, and at the time of the accident the vessel was making the return trip from Portland to New York.

But the law required that she be registered in the district in which she belonged, which is deemed that nearest to where the owner resides. Quite probably the corporation, while in effect transacting its principal business from New York, had a Georgia charter, and for that reason was required to keep an office in that State. By section 4137 of the United States Revised Statutes, registration of a boat belonging to a corporation may be in the name of the president or secretary. I think we are justified in concluding that the company is not in a position to deny that the vessel is properly registered in New York or that New York is in fact the residence of the party to whom registration was granted. It is not very material where the technical residence of the real owner was. We may assume, as the company did when it registered the vessel, that it belonged to New York, and such assumption is well within the favorable presumption of the Workmen's Compensation Law.

If the vessel was taxable in Georgia, as indicated by *Southern Pacific Co. v. Kentucky* (222 U. S. 63) that is not very important. This is not a case of taxation, but the question is whether, in interpreting the Workmen's Compensation Law of this State, the vessel was a vessel of another State or country, and we conclude that the Commission was justified in saying that it was not.

Section 114 of the Workmen's Compensation Law is construed as removing from the other provisions of the law only cases which are covered by the Federal statutes. (*Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514; *Matter of Winfield v. N. Y. C. & H. R. R. Co.*, 216 id. 284; *Matter of Burns v. Southern Pacific Co.*, 215 id. 738.) The Federal Employers' Liability Act has no application here, as no negligence is shown, and it is not alleged that there is any Federal statute covering the case of a workman who seeks compensation for an injury caused without fault of the employer. I, therefore, favor an affirmance.

LYON, J., concurred.

Award reversed and claim dismissed.

3. *Cases remanded for further evidence.*—The decision of the United States Supreme Court in the Winfield case has caused the New York Court of Appeals to order new hearings in the following two cases on the ground that the findings of the State Industrial Commission do not show generally whether the employees at the time of their accidents were engaged in interstate or intrastate commerce.

(1) *Making light repairs on engines.*—The Appellate Division had decided the first of the two cases without opinion. The opinion of the Court of Appeals is as follows:

SAXON v. ERIE R. R. Co., 221 N. Y. 179, July 11, 1917.

HISCOCK, Ch. J.: The findings disclose that at the time of the death of claimant's husband he was in the employ of the Erie Railroad Company,

which was engaged in moving both interstate and intrastate commerce. The deceased was a machinist's helper and on the day in question had been assigned to help in making light repairs on certain engines. As he was proceeding from a spot where he had been waiting to the place where he was to engage in making these repairs he was run over by an engine and killed. The findings do not state generally whether the intestate at the time of his death was engaged in performing services which were connected with and a part of interstate commerce or whether they were connected with and a part of intrastate commerce; they do not state even controlling evidentiary facts from which the conclusion of law might be drawn that he was engaged in one rather than the other kind of employment.

The inquiry arises whether with this omission the findings are sufficient to sustain the award, that being the only question which can be argued by appellant in view of the unanimous affirmance. We do not think they are.

The only controversy on the hearing was the one concerning the nature of the employment of claimant's husband when killed. The appellant produced a large amount of evidence in the form of uncontradicted affidavits to show that his employment was to be regarded as connected with and a part of interstate business. Assuming that the determination of this claim was governed by the rule stated in the Compensation Act (L. 1914, ch. 41), that a claim is presumed to come within the provisions of the act in the absence of substantial evidence to the contrary (Section 21), a question was presented which lay at the very foundation of the claimant's right to recover. If the deceased was engaged in services pertaining to and a part of interstate commerce she was not entitled to recover. (*N. Y. C. & H. R. R. Co. v. Winfield*, 244 U. S. 147.)

The appellant not only by evidence but by motion to dismiss the claim and by request to find, pressed this proposition upon the attention of the commission, but, as stated, the latter entirely failed to pass upon it and to find either way. Of course it should be said that this does not indicate any intention on the part of the commission to avoid decision of a material issue. That tribunal had a perfect right at the time of the hearing to assume in view of the decision of this court in *Matter of Winfield v. N. Y. C. & H. R. R. Co.* (216 N. Y. 284) that it did not make any difference whether the deceased was engaged in one or the other form of employment. But now in view of the decision of the United States Supreme Court holding that compensation cannot be awarded under our statute for injuries received in the course of interstate commerce, it is apparent that the question was material and we must review the action of the commission in the light of the law as it has now been declared. Doing this we find that it has omitted to pass upon a decisive question which was presented to it by evidence and argument and the decision of which in favor of the appellant would have led to a dismissal of the claim. We think that such failure resulted in what was equivalent to a mistrial and necessitates a new hearing. (*Dougherty v. Lion Fire Ins. Co.*, 183 N. Y. 302, 306; *Morehouse v. Brooklyn Heights R. R. Co.*, 185 N. Y. 520.) As we have before pointed out, the application of liberal and simple rules of practice, such as should be applied to the hearing and determination of claims under the Workmen's Compensation Act, cannot be regarded as obviating the necessity of observing certain

fundamental rules which are really essential to the administration of substantial justice between the parties. (*Matter of Bloomfield v. November*, 219 N. Y. 374.) In view of the restrictions placed by the United States Supreme Court upon the application of our statute we think that it is necessary that the commission should pass upon the nature of the employment of the injured employee where, as in this case, the contention is seriously made and supported by evidence that the employment at the time of the injury was in the course of interstate commerce.

The order of the Appellate Division and the award of the commission should be reversed and a new hearing granted, with costs to abide event. CHASE, COLLIN, CUDDERBACK, HOGAN and CARDOZO, JJ., concur. Order reversed, etc.

(2) *Cutting and removing grass from rights of way.*—The opinion of the Appellate Division in the second case has been published in Bulletin 81, page 205. The opinion of the Court of Appeals is as follows:

PLASS V. CENTRAL N. E. RY. CO., 221 N. Y. 472, Nov. 13, 1917.

COLLIN, J.: The findings of the state industrial commission, unanimously sustained by the Appellate Division, establish as facts: The Central New England Railway Company was a corporation engaged in both intrastate and interstate commerce. The husband of the claimant, while employed by it, in cutting grass and removing poison ivy and other weeds along the line of its railroad in New York state, contracted ivy poisoning which caused his death. Whether or not he in such work was securing the safety of the railroad, or was performing services which were connected with either interstate or intrastate commerce was not found.

If there was any evidence that the work contributed to the safety and integrity of the railroad, the work was connected with and a part of interstate commerce by the railroad. "Tracks and bridges are as indispensable to interstate commerce by railroads as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair." (*Pederson v. D. & W. R. R. Co.*, 229 U. S. 146, 151; *N. Y. Central R. R. Co. v. Winfield*, 244 U. S. 147.) If the deceased was engaged in services pertaining to and a part of interstate commerce, the claimant was not entitled to an award. (*N. Y. Central R. R. Co. v. Winfield*, 244 U. S. 147.)

A witness in behalf of the employer testified that the object of the work was the safety of the bridges of the railroad and of the adjoining property and to keep fire from spreading; if the grass and weeds caught fire it might destroy parts of the railroad, and the weeds and grass, not cut and removed, would to a certain extent destroy the track, would come upon the track and cause the engines to slip. This testimony could not be wholly disregarded by the commission. It constituted some evidence, demanding a determination, that the work of the deceased was or was not within interstate commerce. The employer by the evidence, objections, request to find and argument directed the attention of the commission to its claim that an award could not be made because the deceased was engaged in interstate commerce. It

was necessary to a lawful hearing and award that the commission should pass, under the evidence, upon the nature of the employment in which the deceased received his injuries. (*Matter of Sacon v. Erie R. R. Co.*, 221 N. Y. 179.)

The order of the Appellate Division and the award of the commission should be reversed, and a new hearing ordered, with costs to abide event. *HISCOCK*, Ch. J., *CHASE*, *HOGAN*, *CARDOZO*, *MOLLAUGHLIN* and *CRANE*, JJ., concur. Order reversed, etc.

4. *Cases determined to be in intrastate commerce.*—The texts of four cases in which the New York courts affirmed awards to injured railroad employees on the ground that they were engaged in intrastate, rather than in interstate, commerce have been published in Bulletin 81, pages 175–181. They relate to car repairing, intrastate carriage of interstate baggage, etc., inventory of new materials or supplies, and new construction work. Following are additional decisions.

(1) *New construction work.*—The ruling of the State Industrial Commission to the effect that new construction work on railroads is not interstate commerce, having been affirmed without opinion by the New York courts, has been affirmed also by the Supreme Court of the United States. The case is *White v. New York Central R. R. Co.* The full text of the United States Supreme Court's opinion appears above, page 11. Here may be repeated its paragraph concerning new construction work:

The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce does not bring the case within the federal act. The test is "Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?" *Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558. Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work, which is clearly distinguishable, as was pointed out in *Pedersen v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152. And see *Chicago, Burlington & Quincy R. R. Co. v. Harrington*, 241 U. S. 177, 180; *Raymond v. Chicago, Milwaukee & St. Paul Ry. Co.*, this day decided, *ante*, 43.

(2) *Repair of coal pocket.*—A carpenter repairing a railroad coal pocket on a side track is not engaged in interstate commerce. The Appellate Division, two justices dissenting, so holds in the following decision, affirmed without opinion by the Court of Appeals, 222 N. Y. 649, January 22, 1918.

GALLAGHER v. NEW YORK CENTRAL R. R. CO., 180 App. Div. 88, Nov. 14, 1917.

KELLOGG, P. J.: The appellant contends that the intestate was engaged in repairing an instrumentality of interstate commerce and, therefore, that

the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd.) has no application. The decedent was a carpenter, in the general employ of the company, and at the time he met his death he was repairing its coal pockets, about half a mile north of Ravena, on a side track. Coal from the pockets was used from time to time for locomotives engaged in interstate or intrastate commerce as desired.

It is unprofitable to comment upon the numerous decisions bearing upon this question. A late decision of the Circuit Court of Appeals, Third Circuit, seems to be nearly on all fours with this case and decisive of it. *Kelly v. Pennsylvania Railroad Co.* (238 Fed. Rep. 95) involved the case of a carpenter who had been sent to repair a coal chute, and while on the way to the chute he stopped to direct the movement of a car of lumber from a storage track to the chute, for use upon the chute, and was injured. It was held that he was not engaged in interstate commerce at the time of the accident. If he was handling lumber to use in repairing the chute, he was to all intents and purposes repairing the chute, as the furnishing of the lumber was a necessary incident to the repairs.

Some of the cases go quite far in holding that the repairs of a railroad track used for the passage of interstate commerce is an employment in interstate commerce. The later cases seems to indicate that that reasoning is not to be extended, and the *Barlow* case (*Lehigh Valley R. R. Co. v. Barlow*, 244 U. S. 183) and other late cases seem to indicate that the rule is satisfied by limiting it to the track which is a direct instrumentality of interstate commerce.

I favor an affirmance of the award. All concurred, except WOODWARD and COCHRANE, JJ., who dissented. Award affirmed.

(3) *Care of plumbing beneath a station.*—A plumber regularly employed in the maintenance of way department of an interstate railroad is not engaged in interstate commerce when run down and killed while crossing tracks as an incident to inspection and repair of plumbing beneath a station. The Court of Appeals has so held in its decision without opinion, March 19, 1918, reversing the order of the Appellate Division and affirming the award of the Commission in *Vollmers v. N. Y. Central R. R. Co.* It bases the decision upon its own decision in the Gallagher coal pocket case immediately above and upon *Shanks v. D. L. & W. R. R. Co.*, 214 N. Y. 414; s. c. 239 U. S. 556. The opinion of the Appellate Division had been as follows:

VOLLMERS v. N. Y. CENTRAL R. R. CO., 180 App. Div. 60, Nov. 14, 1917.

WOODWARD, J.: There is only one question involved in this appeal, and that is whether Conrad H. Vollmers was engaged in interstate commerce at the time he was run over and killed at Hillisdale, on the Harlem branch of the New York Central Railroad Company. There is no doubt that the New York Central Railroad Company, as now organized, is engaged in interstate

commerce generally, and, of course, its Harlem division is a part of the general system. Vollmers was a plumber employed in the maintenance of ways department of the New York Central Railroad Company, and had been so employed for a period of two years, and the general scope of his employment would seem to suggest that he was engaged in interstate commerce operations. The true test is, "Is the work in question a part of the interstate commerce in which the carrier is engaged?" say the court in *Pedersen v. D., L. & W. R. R.* (229 U. S. 146, 152), and then adds: "Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such." (See *New York Central R. R. Co. v. White*, 243 U. S. 188, 192.) Vollmers was an employee in the maintenance of ways department of an interstate railroad, and he was engaged at the time in the inspecting and repairing of pipes, which constituted a part of the plumbing apparatus beneath the station, and while thus employed he had occasion to cross the tracks in front of the station, and was struck by an engine and killed. The fact is found that his crossing of the tracks was in connection with his employment. It seems clear, under the rule prevailing in the Supreme Court of the United States, that Vollmers was engaged in the maintenance of an instrumentality of interstate commerce; he was doing the work necessarily involved in the maintenance of ways department. The stations actually in use in the carrying on of interstate commerce are clearly instrumentalities of such commerce, and it is necessary to their proper maintenance that the plumbing should be kept in repair. The position of Vollmers was not merely of a plumber called in to do an incidental job; he was in the employ of a department of the corporation devoted, not to the construction, but to the maintenance of ways, and this required him to be in and about the railroad properties generally, doing such repairs as were needed, whether in the station houses or outside of them. To say that such a man, identified with a department for the particular purpose, is not engaged in interstate commerce is to ignore the facts and the rulings of law made by the courts of last resort, and may not be sustained.

The award should be reversed, and the claim dismissed. All concurred, except KELLOGG, P. J., and LYON, J., who dissented. Award reversed and claim dismissed.

(4) *Repair of private spur track.*—A laborer fatally injured by fall from a hand car while proceeding to work along a private spur track which his employer, an intrastate railroad corporation, is repairing under contract is not engaged in interstate commerce. The Appellate Division, two justices dissenting, so holds in the following decision:

LIBERTY v. STATEN ISLAND R. R. Co., 180 App. Div. 90, Nov. 14, 1917.*

KELLOGG, P. J.: The only question presented on this appeal is whether or not the employee, at the time of the accident, was engaged in interstate

*Affirmed by Court of Appeals, 223 N. Y. Rep. —, May 14, 1918.

commerce. He was a common laborer, and he and a number of other laborers were running a handcar upon the spur track which runs from at or near the defendant's station into the grounds of the Mission of the Immaculate Virgin, a short distance from the appellant's line. He fell from the car, receiving injuries from which he died. The track was owned by the mission and maintained by the railroad company at the expense of and for the mission, and was its private track for the carrying of its supplies. The defendant is a domestic railroad corporation, and its tracks are entirely within the State, but cars come to it from without the State and are sent by it outside the State, and cars about once a week come over its line to its station at Pleasant Plains and are frequently taken by a switch engine from the station to the mission. About once a week coal or other articles from without the State are so carried to the mission, and daily cars and intrastate freight go to the mission.

There are many cases in the books bearing upon the question whether an employee in a local freight yard, or upon railroad tracks, whose work is exclusively in the State, may be considered as engaged in interstate commerce because interstate trains pass through the yard or over the tracks. The cases are not in harmony; the later cases show an inclination not to extend farther the theory that a person working upon a railroad track over which interstate trains pass may be considered as engaged in interstate commerce. It is unnecessary to cite and distinguish the various cases. Each case, as it arises, must stand upon its peculiar facts, and it is seldom that one case is an exact precedent for another, or that a general rule can be laid down as to strict limits between the Federal and State jurisdiction in such cases. Those cases, however, do not apply here, as the matter is entirely outside the realm of interstate commerce. The mission was not a common carrier or engaged in interstate commerce. Upon its own lands, for its own purpose, it was repairing a track owned by it, the work being done by the railroad company under agreement as a special contractor. The fact that the railroad company, instead of some other contractor, was doing the work, does not change the character of the work. The receipt of freight at the mission, or carrying it to the station, was evidently a matter of private arrangement between the mission and the company. The company was handling the freight between the mission and its station, as domestic freight, under a private arrangement. The remote origin of incoming freight, or the destination of outgoing freight, is immaterial. The mission's track was solely for its use and for the carrying of freight from the station to the mission, as a convenience to the company and the mission. The property of the mission, its spur track, and those who were working upon it, are subject to the state law and are not governed by the Federal Employers' Liability Act. If the company was drawing interstate freight over the spur for delivery at the mission, and the accident had occurred to an employee engaged therein, a different question might arise, but this case seems to be entirely outside of the question of interstate commerce and is purely a matter of domestic concern and arrangement.

We conclude, therefore, that the Commission had jurisdiction of the claim and that the award should be affirmed. All concurred, except WOODWARD, and COCHRANE, JJ., who dissented. Award affirmed.

(5) *Work in repair shops or yards.*—In three rulings in which the State Industrial Commission held that railroad employees injured while at work in repair shops or yards were not engaged in interstate commerce, the point does not appear to have been pleaded by the carrier upon appeal. The Appellate Division's opinions, reversing awards in two of these, on other grounds than interstate commerce, are presented in Part Two of this Bulletin. In one of them, *Sugg v. Erie R. R. Co.*, S. D. R., vol. 10, p. 609, October 19, 1916; 180 App. Div. 133, November 14, 1917, the employee, a plumber, hurt his fingers while helping to remove a hydrant in his employer's repair yards; in the other, *Supple v. Erie R. R. Co.*, S. D. R., vol. 10, p. 611, October 19, 1916, 180 App. Div. 135, November 14, 1917, the employee, a car repairer, hurt his fingers while setting a pair of wheels on a track. In the third ruling, unanimously affirmed without opinion, an employee working in an engine house or repair shop was fatally hurt while handling heavy iron pipes: *McNeil v. N. Y. Central R. R. Co.*, Death Claim No. 14239, July 11, 1916; 181 App. Div. 912, Nov. 14, 1917. For two earlier repair shop decisions see Bulletin 81, pages 175-178.

(6) *Scrubbing station floor.*—A scrub woman slipped and fell on the oiled floor of a railroad station while carrying a heavy pail and wringer. The insurance carrier argued that she was engaged in interstate commerce. The Appellate Division affirmed her compensation award unanimously and without opinion: *Hawthorne v. N. Y. Central R. R. Co.*, Claim No. 15873, March 29, 1916; 181 App. Div. 908, November 14, 1917.

(7) *Coupling cars under Federal Safety Appliance Act.*—The following opinion suggests possible exclusion of state workmen's compensation acts by other existing Federal laws besides the employers' liability act. The Federal law involved in this case was enacted March 2, 1893. It regulates car couplings and locomotive brakes. Congress has extended its application and requirements by Acts of 1902-3, ch. 976. A later Federal law, Acts of 1907-8, ch. 225, requires interstate railroads to provide ash pans that do not necessitate employees going under locomotives. In the case in hand the Appellate Division finds no evi-

dence of violation of Federal law and accordingly affirms the Commission's award. The text is as follow:

ZIMMERMAN V. NEW YORK CENTRAL R. R. Co., 180 App. Div. 98, Nov. 14, 1917.

KELLOGG, P. J.: The intestate met his death at about the time when two cars of a milk train, on the employer's tracks, were being coupled. The train was engaged in intrastate commerce. He was the brakeman who had charge of the coupling.

The appellant's contention is that the death was caused by non-compliance by the railroad company with the Federal Safety Appliance Act (27 U. S. Stat. at Large, 531, chap. 196, as amd.) and, therefore, that the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41] as amd.) has no application. There is no evidence that the cars making up the train were not fully and properly equipped according to the Safety Appliance Acts. The Commission has found as a fact, and the evidence sustains the finding, that there was no negligence of the employer, and that the injuries were not caused by reason of the defective condition of the couplings or by reason of the defective condition of any appliance used in connection therewith, and that the intestate was not engaged in interstate commerce. The last person who saw the brakeman alive was either Mr. O'Neil or the flagman Warren. The flagman says he saw him upon the cars a few feet from the place of the accident. O'Neil says he saw him upon the ground a few feet from the accident.

The claim that the Safety Appliance Act removes this case from the Workmen's Compensation Law is that while the company's cars were properly equipped with couplers, coupling automatically by impact, that sometimes in rounding a curve such couplings would not meet. It is, therefore, claimed that probably the brakeman was between the cars to make the coupling. It seems to be conceded that ordinarily the couplings would meet at this place, and that in fact they did meet at this time. The dead body of the workman was found lying lengthways of the track, outside the track. If there were any question about the cars not coupling, the ordinary practice would be, before the cars came in close proximity, to adjust the coupling so that they would meet. It appears that the brakeman might have been under the cars at this time coupling the air hose. No one saw the accident.

O'Neil, an employee, in his affidavit says that the deceased met his death while coupling the cars, but he concedes he does not know how it happened, and gives his theory. "The way I figured it, the ground is low at that point, on that side of the rail on the north side of the rail the ground is low and the rail is up higher than the ground and he being a small man, leaning over, watching that coupling to see if these would enter or not, never suspecting the curve, and there was room enough in there to catch his head at the end of the cars. That's the only way I can figure it out." This theory does not indicate any defect in the couplers or that they would not readily couple by impact. The witness felt that the deceased was leaning over, watching to see if the coupling would occur by impact, and in some way forgot himself. The evidence of the undertaker, in a way, supports this theory. "It appeared to me like the skull was pushed up, like he seemed to be stooping over and something struck him and pushed it up."

The Commission was right in saying that there was no violation of the Safety Appliance Act and no negligence of the employer. The cases cited by the appellant, therefore, have no application. There was no eye-witness, different theories were suggested, the entire evidence was before the Commission and it was its duty to decide the question of fact. It was unable to say what was the cause of the death, but it found that there was nothing the matter with the train equipment and that the death in some way resulted from the carelessness of the employee. It is not known and it is immaterial just how it happened so long as the appliances, equipment and cars were within the law. The award should be affirmed. Award unanimously affirmed.

5. *Suggested legislation.*—Following upon the United States Supreme Court decisions of May 21, 1917, excluding accidents in interstate commerce and admiralty from the operation of state compensation laws, demand arose for remedy by legislation of Congress. As a result a law was enacted governing admiralty cases. It is noticed below, page 321. It had been framed by a committee consisting of the United States Commissioner of Labor Statistics, Royal Meeker, the Chairman of the New York State Industrial Commission, John Mitchell, and the Chairman of the California Industrial Accident Commission, A. J. Pillsbury. This committee was the nucleus for later conferences that attacked the problem of compensation for interstate commerce accidents. Railroad employers and employees were called into consultation. Different proposals for legislation met with divided support. Bills were framed for introduction into Congress. For a full account of the conferences see Monthly Review of the U. S. Bureau of Labor Statistics, December, 1917, pages 148–157.

6. *Suit under the Federal Employers' Liability Act after award of state compensation.*—A case of this character was tried in the New York Supreme Court previously to the United States Supreme Court's reversal of the Winfield award. The opinions of the Special Term and the Appellate Division are as follows:

CORICO v. SMITH, 97 Misc. 447, Nov., 1916.

BROWN, J.: Plaintiff seeks to recover damages for injuries received while in defendant's employ engaged in interstate commerce, occasioned by the defendant's negligence under the Federal Employers' Liability Act. Defendant's answer alleges the affirmative defense that the plaintiff, pursuant to the provisions of the Workmen's Compensation Law, made application to the State Workmen's Compensation Commission for compensation for the same injuries set forth in the complaint; that an award of \$1,750.30 was duly and

properly made by such Commission to the plaintiff, as provided in said act; that the defendant is ready and willing to pay said award to the plaintiff, and that said award and the proceedings upon which it is based are a bar to this action. To this answer the plaintiff demurs upon the ground that it is insufficient in law upon the face thereof.

Upon the argument of the demurrer plaintiff asserted that, plaintiff's cause of action being based upon the charge of defendant's negligence, the Workmen's Compensation Law had no application; that the State Workmen's Compensation Commission had no jurisdiction; that the Federal Employers' Liability Act was the paramount law prescribing plaintiff's rights.

There has been left no room for controversy over the hitherto disputed question whether state or federal law defined the remedy for injuries received for interstate employees of interstate railroads occasioned by negligence, by the Court of Appeals in *Matter of Winfield v. N. Y. C. & H. R. R. Co.*, 216 N. Y. 284. It is there distinctly held that an interstate employee of an interstate railroad injured through the negligence of the railroad, when asking damages for his injuries, is restricted to the remedies afforded by the Federal Employers' Liability Act, and that the Workmen's Compensation Law of the state affords such an employee no relief. Congress having exclusive jurisdiction under the Federal Constitution of interstate commerce, and having provided by the Federal Employers' Liability Act precisely what remedies are afforded an employee engaged in interstate commerce, the provisions of that act are exclusive and paramount to any legislation of the State upon the same subject. It is thus held that congress, having failed to provide any remedy for an interstate employee of an interstate railroad who is injured without the negligence of the railroad, the State Workmen's Compensation Law does apply to such an employee. It thus appears that if the plaintiff was injured through the negligence of defendant, as he alleges in his complaint, the State Workmen's Compensation Commission had no jurisdiction to make the award, and the award would be no defense to plaintiff's cause of action. It also appears that if the plaintiff was injured, but not through the defendant's negligence, the State Workmen's Compensation Commission did have jurisdiction to make the award, and that such act would be a complete defense to plaintiff's cause of action. The allegation of the answer is that the award was duly and properly made, and plaintiff by his demurrer admits the truth of such allegation. It could not have been duly and properly made unless the Commission had jurisdiction to make it. The Commission could not have properly made the award unless the plaintiff was injured without the negligence of the defendant. The conclusion seems irresistible that the Commission must have determined that there was no negligence on the part of defendant that caused the plaintiff's injuries when it properly made the award. The fact of want of negligence on the part of defendant was a vital, essential prerequisite to the proper making of an award to the plaintiff. The holding must be that the non-existence of negligence on the part of defendant has been adjudicated and passed upon by the Commission and that it has been adjudged and established that there was no negligence on the part of the defendant that produced plaintiff's injuries. The only method whereby plaintiff could have been properly awarded any compensation for his injuries by the State Workmen's Compen-

sation Commission was to make his application therefor as provided in the Workmen's Compensation Law. He thus selected his tribunal, had his hearing, was a participant in the proceedings, had due and timely notice of and was a party to the adjudication. Such an adjudication is a bar to this action. *Miller v. New York R. Co.*, 171 App. Div. 316.

The demurrer of the plaintiff challenges the sufficiency of the answer; the sufficiency of the answer depends upon the sufficiency of the complaint. It is believed that the complaint does not state a cause of action under the Federal Employers' Liability Act. That act provides: "That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued." There is no allegation in the complaint stating that the action was commenced within two years. The Federal Employers' Liability Act creates a cause of action that was unknown to the common law; the right to prosecute such new cause of action is dependent upon its being brought within two years. It is a part of the cause of action to prove that it was prosecuted within two years; it is a condition precedent and cannot be proved unless alleged. *Reming v. City of Buffalo*, 102 N. Y. 308; *Winter v. Niagara Falls*, 190 id. 198; *Sharrow v. Inland Lines*, 82 Misc. Rep. 482; *Lyons v. Syracuse*, 115 App. Div. 733. The demurrer must be overruled, with costs.

Demurrer overruled, with costs.

CORICO v. SMITH, 178 App. Div. 33, Apr. 4, 1917.

KRUSE, P. J.: The plaintiff challenges the sufficiency of the sixth separate defense of the defendant contending that the matters therein stated are no defense to the action. It is therein alleged that pursuant to the provisions of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd.) an award was made to the plaintiff for damages sustained by him resulting from the injuries set forth in the complaint and that the defendant stands ready and willing to pay the same; that the plaintiff was a party to the proceeding and that the award was duly and properly made by the Commission. The allegation that the award was duly made is the same in effect as though the answer had set forth the facts showing that the Commission had jurisdiction to make the same. If the plaintiff controverts that allegation, the defendant is required on the trial to make proof of the facts but they need not be pleaded. (Code Civ. Proc. § 532.)

It is true, as plaintiff contends, that if the defendant was engaged in interstate commerce and the plaintiff was injured through its negligence in doing interstate commerce work while he was so employed by it in such commerce as alleged in the complaint, his claim is covered by the Federal Employers' Liability Act (35 U. S. Stat. at Large, 65, chap. 149, as amd. by 36 id. 291, chap. 143) and not by the Workmen's Compensation Law (*Matter of Winsfield v. New York Central & Hudson River Railroad Company*, 216 N. Y. 284), but these allegations of the complainant are not consistent with the admissions that the award was duly made. He cannot bring to his aid these allegations in his attack upon the answer by demurrer; he is required to stand upon the allegations in the answer and there is nothing in the answer showing that these facts were made to appear before the Commission. The inference is quite to the contrary because the allegation

is that the award was duly made. If the plaintiff had contended before the Commission as he does here and the facts had been made to appear to support his contention that plaintiff's injuries were sustained in interstate commerce work through the negligence of the defendant, the award could not be properly made under the Workmen's Compensation Law.

Furthermore, I am of the opinion that the plaintiff could waive his claim under the Federal Employers' Liability Act by omitting to state the facts showing that his claim was within that act. If that question was not raised by any party to the proceeding, I am unable to see how the plaintiff could now avail himself of his right to maintain an action under the provisions of the Federal statute. As well might the defendant urge now for the first time that it should not pay the award made by the Commission to plaintiff for his injuries because he was engaged in interstate commerce work at the time he was injured. Clearly, the defendant would be required to raise that question upon the trial in the action or proceeding brought for the determination and adjudication of the claim, otherwise it would be waived. (*Atlantic Coast Line R. R. Co. v. Mims*, 242 U. S. 532; *Minneapolis & St. Louis R. R. Co. v. Winters*, Id. 353.)

2. The defendant also challenges the sufficiency of the complaint, which it may do to offset plaintiff's contention that his answer is bad. (*Baeter v. McDonnell*, 154 N. Y. 432.) It is contended that the plaintiff should have specifically alleged that the action was commenced within two years from the time the cause of action accrued since the Federal Employers' Liability Act provides that no action should be maintained unless commenced within that time. As to that it is sufficient to say that it appears by the complaint that the plaintiff was injured on the 28th day of January, 1916, so the two years have not even yet expired and besides the reasoning of the Court of Appeals in a recent case would seem to indicate that this limitation is upon the remedy and not upon the right. (*Sharrow v. Inland Lines, Ltd.*, 214 N. Y. 101.) Although it should be stated in this connection that the United States Supreme Court has recently held that where the record shows that the action was not begun until the time had elapsed, the point is available to the defendant even if the defendant did not raise the objection in his pleading. (*Atlantic Coast Line Railroad v. Burnette*, 239 U. S. 199.)

While the demurrer was properly overruled I think the complaint should not have been dismissed. The plaintiff should not be precluded from controverting the allegations of this answer simply because he has failed in his effort to test its legal sufficiency.

The judgment should be, therefore, modified by permitting the plaintiff to withdraw his demurrer within twenty days upon the payment of the costs of the demurrer, and as so modified the judgment should be affirmed, without costs to either party upon this appeal.

All concurred, LAMBERT and DE ANGELIS, JJ., in result only, except FOOTE, J., who dissented and voted to sustain the demurrer, with leave to the defendant to amend his answer, if so advised, upon payment of costs, upon the ground that it is not alleged that plaintiff presented his claim to the Workmen's Compensation Commission and himself sought to secure the award which was made.

Judgment modified by giving leave to the plaintiff to withdraw his

demurrer within twenty days, upon payment of the costs of the demurrer, and as so modified affirmed, without costs of this appeal to either party.

R. *Admiralty or maritime jurisdiction.*—The principle that governs the relation of Federal and State law under the commerce clause of the Federal Constitution, as stated above, governs also the relation of Federal and State law under the clause of the Federal Constitution that extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. Congress, by legislative act, may exclude from the benefit of State Workmen's Compensation Acts not only railroad employees who meet with accidents upon interstate railroad lines but steamship and other vessel employees who meet with accidents upon the high seas and upon certain navigable bays, lakes and streams within state boundaries. Such legislation may affect not only sailors upon the ocean but longshoremen in harbors and steamboat or canal boat employees on inland rivers or canals.

Under the Workmen's Compensation Law of New York the question arose whether Congress had enacted such legislation. The State Industrial Commission and the New York courts decided that Congress in legislating relative to maritime affairs had reserved to the States a remedy under their compensation laws that was concurrent with an action in the Federal courts in admiralty for negligence. They based their opinion upon a clause in the Judicial Code of the United States that saved common law remedies to suitors. The New York Court of Appeals held in *Walker v. Clyde Steamship Co.* that the remedy provided by the Workmen's Compensation Law was valid as a substitute for this common law remedy and upon authority of its opinion in the Walker case, made the same point in *Jensen v. Southern Pacific Co.*, decided on the same day, July 13, 1915. The texts of its opinions in the two cases have been presented in Bulletin 81, pages 22-30. The Supreme Court of the United States to which the employers carried appeals reversed both decisions on the same day that it reversed the Winfield decision, May 21, 1917. It held, with opinion in the Jensen case and without opinion in the Walker case, that the Federal remedy in admiralty utterly excluded state compensation benefits. The court divided five to four. Two justices wrote dissenting opinions. The practical

importance of the decision is evidenced by the fact that it withdrew from the protection of compensation laws the host of long-shoremen employees and stevedoring employers who operate along the wharves of New York City, San Francisco and other seaports. Suggestion at once arose that Congress should legislate to remedy the situation. This, Congress did, by adding to the clause "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it," as it occurs in two places in the United States Judicial Code, the clause "and to claimants the rights and remedies under the workmen's compensation law of any State." Both branches of Congress passed the bill *viva voce* without debate. President Wilson made it a law by signature, October 6, 1917. Some question has been raised as to its constitutionality. It restores to employees engaged in maritime pursuits the compensation privileges that they had prior to the United States Supreme Court decision in the *Jensen* and *Walker* cases. In sequence to the remedial legislation of Congress, the legislature of New York, by L. 1918, ch. 249, effective April 17, 1918, has re-enacted Workmen's Compensation Law, § 2, *grs.* 8 and 10, relative to maritime employments. Employees injured by maritime accidents during the four months and a half between the court's decision on May 21st and the amendment of October 6th are without compensation remedy. This is possibly true also of the six months and more between October 6th and April 17th. This interval was marked in New York by stoppage of compensation payments to maritime beneficiaries by insurance carriers, by efforts of employers to recover premiums paid on account of maritime risks, by ruling of the Commission in opposition to these measures, and by an opinion of the Attorney-General interpretative of maritime jurisdiction. These topics are treated below, pages 355-375. Though the prompt action of Congress has nullified the United States Supreme Court decisions relative to maritime commerce and has lessened the interest of these New York events of the interval, the decisions are presented in full here for their historical and other future value.

Notes of United States Supreme Court decisions.—Justice [unclear] wrote the prevailing opinion in the *Jensen* case; [unclear] wrote dissenting opinions in which

Justices Brandeis and Clarke concurred. The majority and minority opinions are as follows:

SOUTHERN PACIFIC CO. v. JENSEN, 244 U. S. 205, May 21, 1917.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Upon a claim regularly presented, the Workmen's Compensation Commission of New York made the following findings of fact, rulings and award, October 9, 1914:

1. "Christen Jensen, the deceased workman, was, on August 15, 1914, an employee of the Southern Pacific Company, a corporation of the State of Kentucky, where it has its principal office. It also has an office at Pier 49, North River, New York City. The Southern Pacific Company at said time was, and still is, a common carrier by railroad. It also owned and operated a steamship *El Oriente*, plying between the ports of New York and Galveston, Texas.

2. "On August 15, 1914, said steamship was berthed for discharging and loading at Pier 49, North River, lying in navigable waters of the United States.

3. "On said date Christen Jensen was operating a small electric freight truck. His work consisted in driving the truck into the steamship *El Oriente* where it was loaded with cargo, then driving the truck out of the vessel upon a gangway connecting the vessel with Pier 49, North River, and thence upon the pier, where the lumber was unloaded from the truck. The ship was about ten feet distant from the pier. At about 10:15 A. M., after Jensen had been doing such work for about three hours that morning, he started out of the ship with his truck loaded with lumber, a part of the cargo of the steamship *El Oriente*, which was being transported from Galveston, Texas, to New York City. Jensen stood on the rear of the truck, the lumber coming about to his shoulder. In driving out of the port in the side of the vessel and upon the gangway, the truck became jammed against the guide pieces on the gangway. Jensen then reversed the direction of the truck and proceeded at third or full speed backward into the hatchway. He failed to lower his head and his head struck the ship at the top line, throwing his head forward and causing his chin to hit the lumber in front of him. His neck was broken and in this manner he met his death.

4. "The business of the Southern Pacific Company in this state consisted at the time of the accident and now consists solely in carrying passengers and merchandise between New York and other States. Jensen's work consisted solely in moving cargo destined to and from other states.

5. "Jensen left surviving him Marie Jensen, his widow, 29 years of age, and Howard Jensen, his son, seven years of age, and Evelyn Jensen, his daughter, three years of age.

6. "Jensen's average weekly wage was \$19.60 per week.

7. "The injury was an accidental injury and arose out of and in the course of Jensen's employment by the Southern Pacific Company and his death was due to such injury. The injury did not result solely from the intoxication of the injured employee while on duty, and was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another.

"This claim comes within the meaning of Chapter 67 of the Consolidated Laws as re-enacted and amended by Chapter 41 of the Laws of 1914, and as amended by Chapter 316 of the Laws of 1914.

"Award of compensation is hereby made to Marie Jensen, widow of the deceased, at the rate of \$5.87 weekly during her widowhood with two years' compensation in one sum in case of her marriage; to Harold Jensen, son of the deceased, at the rate of \$1.96 per week and to Evelyn Jensen, daughter of the deceased, at the rate of \$1.96 per week until the said Harold Jensen and Evelyn Jensen respectively shall arrive at the age of eighteen years, and there is further allowed the sum of One Hundred (\$100) dollars for funeral expenses."

In due time the Southern Pacific Company objected to the award "upon the grounds that the Act does not apply because the workman was engaged in interstate commerce on board a vessel of a foreign corporation of the State of Kentucky which was engaged solely in interstate commerce; that the injury was one with respect to which Congress may establish, and has established, a rule of liability, and under the language of Section 114,* [copied in the margin] the Act has no application; on the ground that the Act includes only those engaged in the operation of vessels other than those of other states and countries in foreign and interstate commerce, while the work upon which the deceased workman was engaged at the time of his death was part of the operation of a vessel of another state engaged in interstate commerce, and hence does not come within the provisions of the Act; further, that the Act is unconstitutional, as it constitutes a regulation of and burden upon commerce among the several states in violation of Article I, Section 8, of the Constitution of the United States; in that it takes property without due process of law in violation of the 14th Amendment of the Constitution; in that it denies the Southern Pacific Company the equal protection of the laws in violation of the 14th Amendment of the Constitution because the Act does not afford an exclusive remedy, but leaves the employer and its vessels subject to suit in admiralty; also that the Act is unconstitutional in that it violates Article III, Section 2, of the Constitution conferring admiralty jurisdiction upon the courts of the United States."

Without opinion, the Appellate Division approved the award and the Court of Appeals affirmed this action (215 N. Y. 514, —) holding that the Workmen's Compensation Act applied to the employment in question and was not obnoxious to the Federal Constitution. It said: "The scheme of the statute is essentially and fundamentally one by the creation of a state fund to insure the payment of a prescribed compensation based on earnings for disability or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments. The state fund is created from premiums paid by employers based on the payroll, the number

* Section 114. "The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any Act of Congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

of employees and the hazards of the employment. The employer has the option of insuring with any stock corporation or mutual association authorized to transact such business, or of furnishing satisfactory proof to the commission of his own financial ability to pay. If he does neither he is liable to a penalty equal to the pro rata premium payable to the state fund during the period of his non-compliance and is subject to a suit for damages by the injured employee, or his legal representative in case of death, in which he is deprived of the defenses of contributory negligence, assumed risk and negligence of a fellow-servant. By insuring in the state fund, or by himself or his insurance carrier, paying the prescribed compensation, the employer is relieved from further liability for personal injuries or death sustained by employees. Compensation is to be made without regard to fault as a cause of the injury, except where it is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or another or results solely from his intoxication while on duty. Compensation is not based on the rule of damages applied in negligence suits but in addition to providing for medical, surgical or other attendance or treatment and funeral expenses it is based solely on loss of earning power. Thus the risk of accidental injuries occurring with or without fault on the part either of employee or employer is shared by both and the burden of making compensation is distributed over all the enumerated hazardous employments in proportion to the risk involved." See also *Clyde Steamship Company v. Walker*, 215 N. Y. 529.

In *New York Central R. R. Co. v. White* (decided March 6th), we held the statute valid in certain respects; and, considering what was there said, only two of the grounds relied on for reversal now demand special consideration. First: Plaintiff in error being an interstate common carrier by railroad is responsible for injuries received by employees while engaged therein under the Federal Employers' Liability Act of April 22, 1908 (35 Stat. c. 149, p. 65), and no state statute can impose any other or different liability. Second: As here applied, the Workmen's Compensation Act conflicts with the general maritime law, which constitutes an integral part of the Federal law under Art. III, Sec. 2, of the Constitution, and to that extent is invalid.

The Southern Pacific Company, a Kentucky Corporation, owns and operates a railroad as a common carrier; also the steamship *El Oriente* plying between New York and Galveston, Texas. The claim is that therefore rights and liabilities of the parties here must be determined in accordance with the Federal Employers' Liability Act. But we think that Act is not applicable in the circumstances.

The First Federal Employers' Liability Act (June 11, 1906, 34 Stat. 232, ch. 3073) extended in terms to all common carriers engaged in interstate or foreign commerce, and because it embraced subjects not within the constitutional authority of Congress was declared invalid. *The Employers' Liability Cases*, 207 U. S. 463; January 6, 1908. The later Act is carefully limited and provides that "every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States and Territories, or between the District of Columbia and any of the States and Territories and any foreign nation or nations, shall be liable

in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. The word "boats" in the statute refers to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice.

The fundamental purpose of the Compensation Law as declared by the Courts of Appeals is "the creation of a State fund to insure the payment of a prescribed compensation based on earnings for disability, or death from accidental injuries sustained by employees engaged in certain enumerated hazardous employments", among them being "longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage." Its general provisions are specified in our opinion in *New York Central R. R. Co. v. White, ante*, and need not be repeated. Under the construction adopted by the state courts no ship may load or discharge her cargo at a dock therein without incurring a penalty, unless her owners comply with the Act which, in order to secure payment of compensation for accidents, generally without regard to fault and based upon annual wages, provides (Sec. 50) that—"An employer shall secure compensation to his employees in one of the following ways:

"1. By insuring and keeping insured the payment of such compensation in the state fund, or—2. By insuring and keeping insured the payment of such compensation with any stock corporation or mutual association authorized to transact the business of workmen's compensation insurance in this state. If insurance be so effected in such a corporation or mutual association the employer shall forthwith file with the commission, in form prescribed by it, a notice specifying the name of such insurance corporation or mutual association together with a copy of the contract or policy of insurance, or—3. By furnishing satisfactory proof to the commission of his financial ability to pay such compensation for himself, in which case the commission may, in its discretion, require the deposit with the commission of securities of the kind prescribed in section thirteen of the insurance law, in an amount to be determined by the commission, to secure his liability to pay the compensation provided in this chapter."

"If an employer fail to comply with this section, he shall be liable to a penalty during which such failure continues of an amount equal to the pro rata premium which would have been payable for insurance in the state fund for such period of noncompliance to be recovered in an action brought by the commission."

Article III, Section 2, of the Constitution, extends the judicial power of the United States "To all cases of admiralty and maritime jurisdiction;" and Article I, Section 8, confers upon the Congress power "To make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof." Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. *Butler v. Steamship Co.*, 130 U. S. 527. *In re Garnett*, 141 U. S. 1, 14. And further, that in the absence of some controlling statute the general maritime law as accepted by the Federal Courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction. *The Lottawanna*, 21 Wall. 558; *Butler v. Boston S. S. Co.*, 130 U. S. 527, 557; *Workman v. New York*, 179 U. S. 552.

In *The Lottawanna*, Mr. Justice Bradley speaking for the Court said: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' * * * One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been intended to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

By section 9, Judiciary Act of 1789 (1 Stat. 76, 77), the District Courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; * * * saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." And this grant has been continued. Judicial Code, Secs. 24 and 256.

In view of these constitutional provisions and the Federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute, *The Lottawanna*, 21 Wall. 568, 579, 580, *The J. E. Rumbell*, 148 U. S. 1; pilotage fees fixed, *Cooley v. Board of Wardens*, 12 How. 290, *Ex parte McNiel*, 13 Wall. 236, 242; and the right given to recover in death cases, *The Hamilton*, 207 U. S. 398, *La Bourgogne*, 210 U. S. 95, 138. See *The City of Norwalk*, 55 Fed. 98,

106. Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. They cannot authorize proceedings *in rem* according to the course in admiralty. *The Moses Taylor*, 4 Wall. 411, *Steamboat Co. v. Chase*, 16 Wall. 522, 534, *The Glide*, 167 U. S. 606; nor create liens for materials used in repairing a foreign ship, *The Roanoke*, 189 U. S. 185. See *Workman v. New York City*, 179 U. S. 552. And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. These purposes are forcefully indicated in the foregoing quotations from *The Lottacanna*.

A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established. "Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free." *Bowman v. Chicago, etc. Railway Co.*, 125 U. S. 465, 507, 508; *Vance v. Vandercook*, 170 U. S. 438, 444; *Clark Distilling Co. v. Western Maryland Railway Company, etc.*, decided January 8, 1917. And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the States to interpose where maritime matters are involved.

The work of a stevedore in which the deceased was engaging is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 59, 60.

If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded. A far more serious injury would result to commerce than could have been inflicted by the Washington statute authorizing a materialman's lien condemned in *The Roanoke*. The Legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid.

Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal District Court, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement

by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction. *The Hine*, 4 Wall. 571, 572; *The Belfast*, 7 Wall. 624, 644; *Steamboat Co. v. Chase*, 16 Wall. 522, 531, 533; *The Glide*, 167 U. S. 606, 623. And finally this remedy is not consistent with the policy of Congress to encourage investments in ships manifested in the Acts of 1851 and 1884 (R. S. 4283-4285; Sec. 18, Act of June 26, 1884, 23 Stats. 57, Ch. 121) which declare a limitation upon the liability of their owners. *Richardson v. Harmon*, 222 U. S. 96, 104.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion. Reversed.

Mr. Justice HOLMES, (dissenting): The Southern Pacific Company has been held liable under the statutes of New York for an accidental injury happening upon a gang-plank between a pier and the company's vessel and causing the death of one of its employees. The company not having insured as permitted, the statute may be taken as if it simply imposed a limited but absolute liability in such a case. The short question is whether the power of the State to regulate the liability in that place and to enforce it in the State's own Courts is taken away by the conferring of exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction upon the Courts of the United States.

There is no doubt that the saving to suitors of the right of a common law remedy leaves open the common law jurisdiction of the State Courts, and leaves some power of legislation at least, to the States. For the latter I need do no more than refer to State pilotage statutes, and to liens created by State laws in aid of maritime contracts. Nearer to the point it is decided that a statutory remedy for causing death may be enforced by the State Courts, although the death was due to a collision upon the high seas. *Steamboat Company v. Chase*, 16 Wall. 522. *Sherlock v. Ailing*, 93 U. S. 99, 104. *The Knapp, Stout & Company v. McCaffrey*, 177 U. S. 638, 646. *Minnesota Rate Cases*, 230 U. S. 352, 409. The misgivings of Mr. Justice Bradley were adverted to in *The Hamilton*, 207 U. S. 398, and held at least insufficient to prevent the admiralty from recognizing such a State-created right in a proper case, if indeed they went to any such extent. *La Bourgogne*, 210 U. S. 95, 138.

The statute having been upheld in other respects, *New York Central R. R. Co. v. White*, 243 U. S. 188, I should have thought these authorities conclusive. The liability created by the New York act ends in a money judgment, and the mode in which the amount is ascertained, or is to be paid, being one that the State constitutionally might adopt, cannot matter to the question before us if any liability can be imposed that was not known to the maritime law. And as such a liability can be imposed where it was unknown not only to the maritime but to the common law, I can see no difference between one otherwise constitutionally created for death caused by accident and one for death due to fault. Neither can the statutes limiting the liability of owners affect the case. Those statutes extend to non-maritime torts, which of course are the creation of State law. *Richardson v. Harmon*, 222 U. S. 96, 104. They are paramount to but not inconsistent with the new cause of action. However, as my opinion stands on grounds that equally would support a judgment for a maritime tort not ending in death, with which admiralty Courts have begun to deal, I will state the reasons that satisfy my mind.

No doubt there sometimes has been an air of benevolent gratuity in the admiralty's attitude about enforcing State laws. But of course there is no gratuity about it. Courts cannot give or withhold at pleasure. If the claim is enforced or recognized it is because the claim is a right, and if a claim depending upon a State statute is enforced it is because the State had constitutional power to pass the law. Taking it as established that a State has constitutional power to pass laws giving rights and imposing liabilities for acts done upon the high seas when there were no such rights or liabilities before, what is there to hinder its doing so in the case of a maritime tort? Not the existence of an inconsistent law emanating from a superior source, that is, from the United States. There is no such law. The maritime law is not a *corpus juris*—it is a very limited body of customs and ordinances of the sea. The nearest to anything of the sort in question was the rule that a seaman was entitled to recover the expenses necessary for his cure when the master's negligence caused his hurt. The maritime law gave him no more. *The Osceola*, 189 U. S. 158, 175. One may affirm with the sanction of that case that it is an innovation to allow suits in the admiralty by seamen to recover damages for personal injuries caused by the negligence of the master and to apply the common law principles of tort.

Now, however, common law principles have been applied to sustain a libel by a *stavedore in personam* against the master for personal injuries suffered while loading a ship. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, and *The Osceola* recognizes that in some cases at least seamen may have similar relief. From what source do these new rights come? The earliest case relies upon "the analogies of the municipal law," *The Edith Godden*, 23 Fed. Rep. 43, 46,—sufficient evidence of the obvious pattern, but inadequate for the specific origin. I recognise without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. A common law judge could not say: "I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my Court." No more could a judge exercising the limited jurisdiction of admiralty say: "I think well of the common law rules of master and servant and propose to introduce them here *en bloc*." Certainly he could not in that way enlarge the exclusive jurisdiction of the District Courts and cut down the power of the States. If admiralty adopts common law rules without an act of Congress it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a State. The only authority available is the common law or statutes of a State. For from the often repeated statement that there is no common law of the United States, *Wheaton v. Peters*, 8 Pet. 591, 658; *Western Union Telegraph Co. v. Call Publishing Co.*, 161 U. S. 92, 191, and from the principles recognized in *Atlantic Transport Co. v. Imbrovek* having been unknown to the maritime law, the natural inference is that in the silence of Congress this Court has believed the very limited law of the sea to be supplemented here as in England by the common law, and that here that means, by the common law of the State. *Sherlock v. Alling*, 93 U. S. 99, 104. *Taylor v. Curry*, 20 How. 583, 598. So far as I know, the State Courts have made this assumption without criticism or attempt at revision from the beginning to this day;

e. g. *Wilson v. MacKensie*, 7 Hill, N. Y. 95. *Gabrielson v. Waydell*, 135 N. Y. 1, 11. *Kalleck v. Deering*, 161 Mass. 469. See *Ogle v. Barnes*, 8 T. R. 188. *Nicholson v. Mounsey*, 15 East, 384. Even where the admiralty has unquestioned jurisdiction the common law may have concurrent authority and the State Courts concurrent power. *Schoonmaker v. Gilman*, 102 U. S. 118. The invalidity of State attempts to create a remedy for maritime contracts or torts, parallel to that in the admiralty, that was established in such cases as *The Moses Taylor*, 4 Wall. 411, and *The Ad. Hine*, 4 Wall. 555, is immaterial to the present point.

The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact. It always is the law of some State, and if the District Courts adopt the common law of torts, as they have shown a tendency to do, they thereby assume that a law not of maritime origin and deriving its authority in that territory only from some particular State of this Union also governs maritime torts in that territory — and if the common law, the statute law has at least equal force, as the discussion in *The Osceola* assumes. On the other hand the refusal of the District Courts to give remedies coextensive with the common law would prove no more than that they regarded their jurisdiction as limited by the ancient lines — not that they doubted that the common law might and would be enforced in the Courts of the States as it always has been. This Court has recognized that in some cases different principles of liability would be applied as the suit should happen to be brought in a common law or admiralty Court. Compare *The Mas Morris*, 137 U. S. 1, with *Belden v. Chase*, 150 U. S. 674, 691. But hitherto it has not been doubted authoritatively, so far as I know, that even when the admiralty had a rule of its own to which it adhered, as in *Workman v. New York*, 179 U. S. 552, the State law, common or statute, would prevail in the Courts of the State. Happily such conflicts are few.

It might be asked why, if the grant of jurisdiction to the Courts of the United States imports a power in Congress to legislate, the saving of a common law remedy, i. e., in the State Courts, did not import a like if subordinate power in the States. But leaving that question on one side, such cases as *Steamboat Co. v. Chase*, 16 Wall. 522, *The Hamilton*, 207 U. S. 398, and *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, show that it is too late to say that the mere silence of Congress excludes the statute or common law of a State from supplementing the wholly inadequate maritime law of the time of the Constitution, in the regulation of personal rights, and I venture to say that it never has been supposed to do so, or had any such effect.

As to the spectre of a lack of uniformity I content myself with referring to *The Hamilton*, 207 U. S. 398, 406. The difficulty really is not so great as in the case of interstate carriers by land, which "in the absence of Federal statute providing a different rule are answerable according to the law of the State for non-feasance or misfeasance within its limits." *The Minnesota Rate Cases*, 230 U. S. 352, 406, and cases cited. The conclusion that I reach accords with the considered cases of *Lindstrom v. Mutual Steamship Co.*, 132 Minn. 328, *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, and *North Pacific S. S. Co. v. Industrial Accident Commission of California*, 163 Pac. Rep. 199, as well as with the New York decision in this case. 215 N. Y. 514.

Mr. Justice PITNEY (dissenting): While concurring substantially in the dissenting opinion of Mr. Justice Holmes, I deem it proper, in view of the momentous consequences of the decision, to present some additional considerations.

This dissent is confined to that part of the prevailing opinion which holds that the Workmen's Compensation Act of New York, as applied by the State Court to a fatal injury sustained by a stevedore while engaged in work of a maritime nature upon navigable water within that State, conflicts with the Constitution of the United States and the Act of Congress conferring admiralty and maritime jurisdiction in civil cases upon the District Courts of the United States, and is to that extent invalid. Except for the statute, an action might have been brought in a court of admiralty. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 62. No question is raised respecting the jurisdiction of the State Court over the subject matter. But plaintiff in error contends, and the prevailing opinion holds, that it was a violation of a Federal right for the State Court to apply the provisions of the local statute to a cause of action of maritime origin, because, by the Constitution of the United States, admiralty jurisdiction was conferred upon the Federal Courts.

It should be stated, at the outset, that the case involves no question of penalties imposed by the New York Act, but affects solely the responsibility of the employer to make compensation to the widow, in accordance with its provisions, which are outlined in *New York Central R. R. Co. v. White*, 243 U. S. 188, 192-195.

The argument is that even in the absence of any Act of Congress prescribing the responsibility of a shipowner to his stevedore, the general maritime law, as accepted by the Federal Courts when acting in the exercise of their admiralty jurisdiction, must be adopted as the rule of decision by State Courts of common law when passing upon any case that might have been brought in the admiralty; and that just as the absence of an Act of Congress regulating interstate commerce in some cases is equivalent to a declaration by Congress that commerce in that respect shall be free, so non-action by Congress amounts to an imperative limitation upon the power of the States to interpose where maritime matters are involved.

This view is so entirely unsupported by precedent, and will have such novel and far-reaching consequences, that it ought not to be accepted without the most thorough consideration.

Section 2 of Article III of the Constitution reads as follows: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." Acting under the authority of Article I, section 8, which empowers Congress to make all laws necessary and proper for carrying

into execution the powers vested in the Government or in any department or officer thereof, the First Congress, in the original Judiciary Act (Act of September 20, 1789, c. 20, sec. 9, 1 Stat. 73, 77), conferred upon the Federal District Courts "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." The saving clause has been preserved in all subsequent revisions. R. S. § 563 (8); Jud. Code, § 24 (3), 36 Stat. 1067, 1091, c. 231.

From the language quoted from the Constitution, read in the light of the general purpose of that instrument and the contemporaneous construction found in the Judiciary Act, with regard also to the mischiefs that called for the establishment of a national judiciary, and from what I believe to be the unbroken current of decisions in this court from that day until the present, I draw the following conclusions: (1) That the framers of the Constitution intended to *establish jurisdiction*—the power to hear and determine controversies of the various classes specified—and *not to prescribe particular codes or systems of law* for the decision of those controversies; (2) That the civil jurisdiction in admiralty was not intended to be exclusive of the courts of common law, at least not until Congress should deem it proper to enact; (3) That by the law of England, and by the practice of the colonial governments, the courts of common law, of equity, and of admiralty, were controlled in their decisions by separate and in a sense independent systems of substantive law, and the constitutional grant of judicial power in "all cases in law and equity", and in "all cases of admiralty and maritime jurisdiction", was no more intended (in the absence of legislation by Congress) to make the rules of maritime law binding upon the Federal Courts of common law when exercising their concurrent jurisdiction, than to make the rules of the common law binding upon the courts of admiralty; (4) That if not binding upon the Federal Courts, it results, *a fortiori*, that the rules of maritime law were not intended to be made binding upon the courts of the States; (5) That it is not necessary, in order to give full effect to the grant of admiralty and maritime jurisdiction, to imply that the rules of decision prevailing in admiralty must be binding upon common-law courts exercising concurrent jurisdiction in civil causes of maritime origin, and to give such a construction to the Constitution is to render unconstitutional the saving clause in section 9 of the Judiciary Act, and also to trench upon the proper powers of the States by interfering with their control over their water-borne internal commerce; and (6) That, in the absence of legislation by Congress abrogating the saving clause, the States are at liberty to administer their own laws in their own courts when exercising a jurisdiction concurrent with that of admiralty, and at liberty to change those laws by statute.

That the language of section 2 of Article III of the Constitution speaks only of establishing jurisdiction, and does not prescribe the mode in which or the substantive law by which the exercise of that jurisdiction is to be governed, seems to me entirely plain; and upon this point I need only refer to the language itself, which I have quoted.

That this view is in harmony with the general purpose of the Constitution seems to me equally plain. At this late date it ought not to be necessary to repeat that the object of the framers of that instrument was to lay the

foundations of a government, to set up its frame-work, and to establish merely the general principles by which it was to be animated; avoiding, as far as possible, any but the most fundamental regulations for controlling its operations, and these usually in the form of restrictions. *Van Horne v. Dorrance*, 2 Dall. 304, 308; *Martin v. Hunter's Lessee*, 1 Wheat. 304, 326.

The object was to enumerate, rather than to define, the powers granted. *Gibbons v. Ogden*, 9 Wheat. 1, 189, 194; *Passenger Cases*, 7 How. 283, 549; *Lottery Case*, 188 U. S. 321, 346. To delineate only the great outlines of the judicial power, leaving the details to Congress, while providing for the organization of the legislative department and the mode in which and the restrictions under which its authority should be exercised. *Rhode Island v. Massachusetts*, 12 Pet. 657, 721. The reason for adopting general outlines only was well expressed by Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 407: "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language."

The adoption of any particular system of substantive law was not within the purpose of the Constitutional Convention; and the clause establishing the judicial power was ill-adapted to the purpose had it existed. So far as they intended to prescribe permanent rules of substantive or even procedural law in connection with the establishment of the judicial system, the framers employed express terms for the purpose, as appears from other provisions of Article III, including the definition of treason, the character of proof required, the limitation of the punishment, and the requirement of a jury trial for this and other crimes.

In a somewhat exhaustive examination of various sources of information, including Elliot's Debates, Farrand's Records of the Federal Convention, and The Federalist, Nos. 80-83, I have been unable to find anything even remotely suggesting that the judicial clause was designed to establish the maritime code or any other system of laws for the determination of controversies in the courts by it established, much less any suggestion that the maritime code was to constitute the rule of decision in common law courts, either federal or state.

Certainly, there is nothing in the mere provision establishing jurisdiction in admiralty and maritime causes to have that effect, unless the jurisdiction so established was in its nature exclusive. But, in civil causes, the jurisdiction was not exclusive by the law of England and of the Colonies, and it was not made an exclusive jurisdiction by the Constitution.

In discussing this point, the distinction between the instance court and the prize court of admiralty must be observed. It was held in England that the question of prize or no prize, and other questions arising out of it, were exclusively cognizable in the admiralty, because that court took jurisdiction

owing to the fact of possession of a prize of war, and the controversy turned upon belligerent rights and was determinable by the law of nations, and not the particular municipal law of any country. *Le Caux v. Eden* (1781), Doug. 572, 579-590; 99 E. R. 375, 379-385; *Lindo v. Rodney*, reported in a note to *Le Caux v. Eden*, Doug. 591; 99 E. R. 385; *Smart v. Wolff* (1789), 3 T. R. 323, 340, *et seq.*; *Lord Camden v. Home* (1791), 4 T. R. 382, 393, *et seq.* But of civil actions *in personam* the instance court exercised a jurisdiction concurrent with that of the courts of common law. As *Id.* Mansfield said in *Lindo v. Rodney*, Doug. 592: "A thing being done upon the high sea don't exclude the jurisdiction of the court of common law. For seizing, stopping, or taking a ship, upon the high sea, *not as prize*, an action will lie; but for taking *as prize*, no action will lie. The nature of the question excludes; not the locality." And again, referring to the effect of certain statutes (p. 593): "The taking a ship upon the high sea is triable at law to repair the plaintiff in damages; but a taking on the high sea *as prize* is not triable at law to repair the plaintiff in damages. The nature of the ground of the action—*prize or no prize*—not only authorizes the prize court, but excludes the common law. These statutes don't exclude the common law in any case, and they confine the admiralty by the locality of the thing done, which is the cause of action. It must be done upon the high sea."

So, with respect to actions *ex contractu*, Mr. Justice Blackstone says, 3 Black. Com. 107: "It is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the royal exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster Hall." The concurrent jurisdiction of the courts of common law was affirmed by Dr. Browne, the first edition of whose work was published in 1797-1799. 2 Browne's Civ. & Adm. Law (1st Am. ed.), 112, 115.

The declaration of Mr. Justice Nelson, speaking for this court in *New Jersey Steam Navigation Co. v. Merchants Bank*, 6 How. 344, 390, that the lodging by the Constitution of the entire admiralty power in the federal judiciary, and the ninth section of the Judiciary Act, with its saving of common law remedies, left the concurrent power of the courts of common law and of admiralty where it stood at common law, was not a chance remark. It has been so ruled in many other cases, to which I shall refer hereafter. The principles and history of the common law were well known to the framers of the Constitution and the members of the First Congress; it was from that system that their terminology was derived; and the provisions of the Constitution and contemporaneous legislation must be interpreted accordingly.

The statement that there is no common law of the United States (*Wheaton v. Peters*, 8 Pet. 591, 658; *Smith v. Alabama*, 124 U. S. 465, 478) is true only in the sense that the Constitution neither of its own force imposed, nor authorized Congress to impose, the common law or any other general body of laws upon the several States for the regulation of their internal affairs. As was pointed out in *Smith v. Alabama* (p. 478), "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history."

As was well expressed by Shiras, District Judge, in *Murray v. Chicago & N. W. Ry. Co.*, 62 Fed. 24, 31: "From them [citations of the decisions of this court] it appears beyond question, that the Constitution, the Judiciary Act of 1789, and all subsequent statutes upon the same subject are based upon the general principles of the common law, and that, to a large extent, the legislative and judicial action of the government would be without support and without meaning if they cannot be interpreted in the light of the common law. When the Constitution was adopted, it was not the design of the framers thereof to create any new systems of general law, nor to supplant those already in existence. At that time there were in existence and in force in the Colonies or States, and among the people thereof, the law of nations, the law admiralty and maritime, the common law, including commercial law, and the system of equity. Upon these foundations the Constitution was erected. The problem sought to be solved was not whether the Constitution should create or enact a law of nations, of admiralty, of equity, or the like, but rather how should the executive, legislative, and judicial powers and duties based upon these systems, and necessary for the proper development and enforcement thereof, be apportioned between the national and state governments."

And it is not to be supposed that the framers of the Constitution, familiar with the institutions and the principles of the common law, by which the admiralty jurisdiction was allowed on sufferance, and with a degree of jealousy born of the fact that the courts of admiralty were not courts of record, that they followed the practice of the civil law, allowed no trial by jury, and administered an exotic system of laws (3 Black. Com. 69, 86, 87, 106-108)—it is not to be supposed, I say, that the framers of the Constitution, in granting judicial power over cases of admiralty and maritime jurisdiction, along with like power over all cases in law and equity arising under the laws of the United States, intended to exclude common law courts, state or national, from any part of their concurrent jurisdiction in cases of maritime origin, or to deprive them of the judicial power, theretofore existing, to decide such cases according to the rules of the common law.

It is matter of familiar history that one of the chief weaknesses of the Confederation was in the absence of a judicial establishment possessed of general authority. Except that the Continental Congress, as an incident of the war power, was authorized to establish rules respecting captures and the disposition of prizes of war and to appoint courts for the trial of piracies and felonies committed on the high sea, and for determining appeals in cases of capture, and except that the Congress itself, through commissioners, was to exercise jurisdiction in disputes between the States and in controversies respecting conflicting land grants of different States, there was no provision in the Articles of Confederation for establishing a judicial system under the authority of the general government.

The result was that not only private parties, in cases arising out of the laws of the Congress, but the United States themselves, were obliged to resort to the courts of the States for the enforcement of their rights. Many cases of this character are reported, some even antedating the Confederation. *Respublica v. Swears* (1779), 1 Dall. 41; *Respublica v. Powell* (1780), 1 Dall. 47; *Respublica v. De Longchamps* (1784), 1 Dall. 111. Even treason was

punished in state courts and under state laws. See cases of *Molder, Malin, Carlsle and Roberts* (1778), 1 Dall. 33-39.

Before the Revolution, courts of admiralty jurisdiction were a part of the judicial systems of the several Colonies. *Waring v. Clarke*, 5 How. 441, 454-456; *Benedict on Admiralty*, §§ 118-165. Upon the outbreak of the war questions of prize law became acute, and the colonial Congress, by resolutions of November 25, 1775, passed in the exercise of the war power (3 Dall. 84, 80) made appropriate recommendations for the treatment of prizes of war, but remitted the jurisdiction over such questions to the courts of the several Colonies, reserving to itself only appellate authority. This system continued until the year 1780 (after the submission of the Articles of Confederation, but before their final ratification), when the Congress established a court for the hearing of appeals from the state courts of admiralty in cases of capture. The opinions of this court are reported in 2 Dall. 1-42, and numerous cases decided without opinion, as well as some of these decided by committees of the Congress prior to the establishment of the court, are referred to in the late Bancroft Davis' "Federal Courts Before the Constitution," 131 U. S., Appendix, xix-xlix. The weak point of this system was the want of power in the central government to enforce the judgment of the appellate tribunal when it chanced to reverse the decree of a state court. There were some curious cases of conflicting jurisdiction, illustrated by *Doane v. Penhallow* (1787), 1 Dall. 218, 221; *Penhallow v. Deane* (1795), 3 Dall. 54, 79, 86; and *United States v. Peters* (1800), 5 Cranch 115, 135, 137.

It was under the influence of numerous experiences of the inefficiency of a general government unendowed with judicial authority that the Constitutional Convention assembled in the year 1787. The fundamental need, to which the Convention addressed itself in framing the judiciary article, was to set up a judicial power covering all subjects of national concern. There was no greater need to establish jurisdiction over admiralty and maritime causes than over controversies arising under the Constitution and laws of the Union. There was no purpose to establish a system of substantive law in any of the several classes of cases included within the grant of judicial power. The language employed makes it plain that, with the few express exceptions already noted (treason, etc.) the rules of decision were to be sought elsewhere. The entire absence of a purpose to establish a maritime code is manifest not only from the omission of any reference to the laws of Oleron, the laws of Wisbuy, or any other of the maritime codes recognized by the nations of Europe, but further from the fact that the Colonies differed among themselves as to maritime law and admiralty practice, and that their system in general differed from that which was administered in England. The evident purpose, in this as in the other classes of controversy, was that the courts of admiralty should administer justice according to the previous course and practice of such courts in the Colonies, just as the courts of common law and equity jurisdiction were to proceed according to the several systems of substantive law appropriate to courts of their respective kinds; subject, of course, to the power of Congress to change the rules of law respecting matters lying within its appropriate sphere of action.

Undoubtedly the framers of the Constitution were advised of the ancient controversy in England between the common-law courts and the courts of

admiralty respecting the extent of the jurisdiction of the latter. They were aware of the dual function of the admiralty courts as courts of instance and as prize courts, and of the established rule that in civil causes the jurisdiction of the instance court was concurrent with that of the courts of common law. They must have known that, whatever question had existed as to the territorial limits of the jurisdiction of the admiralty, it never had been questioned that in suits for mariners' wages and suits upon policies of marine insurance, and in other actions *ex contractu* having a maritime character, and also in actions of tort arising upon the sea, the courts of common law exercised, and long had exercised, concurrent jurisdiction. Whatever early doubts may have existed had been based not upon any inherent incapacity of the common-law courts to deal with the subject matters, but upon the ancient theory of the venue, and disappeared with the recognition of the fictitious venue.

The grant of judicial power in cases of admiralty and maritime jurisdiction never has been construed as excluding the jurisdiction of the courts of common law over civil causes that before the Constitution were subject to the concurrent jurisdiction of the courts of admiralty and the common-law courts. The First Congress did not so construe it, as the saving clause in the Judiciary Act conclusively shows. And, assuming that the States, in the absence of legislation by Congress, would be without power over the subject matter, this saving clause, still maintained upon the statute book, is a sufficient grant of power. Jurisdiction in prize cases, as has been shown, springs out of the possession of a prize of war. Civil proceedings *in rem*, to be mentioned hereafter, are based upon the maritime lien, where possession in the claimant is neither necessary nor usual as is the case with common law liens. With these exceptions, both resting upon grounds peculiar to the forum of the admiralty, concurrent jurisdiction of the courts of common law in civil cases of maritime origin always has been recognized by this court. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 390; *Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 458; *The Belfast*, 7 Wall. 624, 644-645; *Insurance Co. v. Dunham*, 11 Wall. 1, 32; *Leon v. Galceran*, 11 Wall. 185, 187-188; *Steamboat Co. v. Chase*, 16 Wall. 522, 533; *Schoonmaker v. Gilmore*, 102 U. S. 118; *Manchester v. Massachusetts*, 139 U. S. 240, 262.

Nor is the reservation of a common law remedy limited to such causes of action as were known to the common law at the time of the passage of the Judiciary Act. It includes statutory changes. *Steamboat Company v. Chase*, 16 Wall. 522, 533, 534; *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 644. These remedies which were held not to be common law remedies, within the saving clause, in *The Moses Taylor*, 4 Wall. 411, 427, 431; *The Hine v. Trevor*, 4 Wall. 555, 571, 572; *The Belfast*, 7 Wall. 624, 644; *Steamboat Company v. Chase*, 16 Wall. 522, 533, and *The Glide*, 167 U. S. 606, 623, provided for imposing a lien on the ship by proceedings in the nature of admiralty process *in rem*, and it was for this reason only that they were held to trench upon the exclusive admiralty jurisdiction of the courts of the United States. The distinction was noticed in *Leon v. Galceran*, 11 Wall. 185, 188, and again in *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638, 642. In the latter case it was pointed out (p. 644) that the reservation of a common law remedy where the common law is competent to give it, was not con-

fined to common-law actions but included remedies without action, such as a distress for rent or for the trespass of cattle; a bailee's remedy by detaining personal property until paid for work done upon it or for expenses incurred in keeping it; the lien of an innkeeper upon the goods of his guests, and that of a carrier upon things carried; the remedy of a nuisance by abatement, and others. The most recent definition of the rule laid down in *The Hine v. Trevor* and other cases of that class is in *Round v. Cloverport Foundry*, 237 U. S. 303.

I have endeavored to show, from a consideration of the phraseology of the constitutional grant of jurisdiction and the act of the First Congress passed to give effect to it, from the history in the light of which the language of those instruments is to be interpreted, and from the uniform course of decision in this court from the earliest time until the present, these propositions: first, that the grant of jurisdiction to the admiralty was not intended to be exclusive of the concurrent jurisdiction of the common law courts theretofore recognized; and, secondly, that neither the Constitution nor the Judiciary Act was intended to prescribe a system of substantive law to govern the several courts in the exercise of their jurisdiction, much less to make the rules of decision, prevalent in any one court, obligatory upon others, exercising a distinct jurisdiction, or binding upon the courts of the States when acting within the bounds of their respective jurisdictions. In fact, while courts of admiralty undoubtedly were expected to administer justice according to the law of nations and the customs of the sea, they were left at liberty to lay hold of common-law principles where these were suitable to their purpose, and even of applicable state statutes, just as courts of common law were at liberty to adopt the rules of maritime law as guides in the proper performance of their duties. This eclectic method had been practiced by the courts of each jurisdiction prior to the Constitution, and there is nothing in that instrument to constrain them to abandon it.

The decisions of this court show that the courts of admiralty in many matters are bound by local law. The doubt expressed by Mr. Justice Bradley in *Butler v. Boston Steamship Company*, 130 U. S. 527, 558, as to whether a state law could have force to create a liability in a maritime case at all, was laid aside in *The Corsair*, 145 U. S. 335, and definitely set at rest in *The Hamilton*, 207 U. S. 398, 404. The fact is that, long before *Butler v. Boston Steamship Company*, it had been recognized that state laws might not merely create a liability in a maritime case, but impose a duty upon the admiralty courts of the United States to enforce such liability. Thus, while it was recognized that by the general maritime law a foreign ship, or a ship in a port of a State to which she did not belong, was subject to a suit *in rem* in the admiralty for repairs or necessities, the case of a ship in a port of her home state was governed by the municipal law of the State, and no lien for repairs or necessities would be implied unless recognized by that law. *The General Smith* (1819), 4 Wheat. 438, 443; *The Lottawanna*, 21 Wall. 558, 571, 578. Conversely, it was held in the case of *The Planter* (*Peyroux v. Howard*, 1838,) 7 Pet. 324, 341, that a libel *in rem* in the admiralty might be maintained against a vessel for repairs done in her home port where a local statute gave a lien in such a case. To the same effect, *The J. E. Rumbell*, 149 U. S. 1, 12. As elsewhere pointed out herein, where a state statute

conferred a lien operative strictly *in rem*, it was uniformly held not enforceable in the state courts, but only because it entrenched upon the peculiar jurisdiction of the admiralty, and therefore was not a "common-law remedy" within the saving clause of the Judiciary Act of 1789. *The Moses Taylor*, 4 Wall. 411, 427, 431; *The Hine v. Trevor*, 4 Wall. 555, 571, 572; *The Belfast*, 7 Wall. 624, 644; *Steamboat Company v. Chase*, 16 Wall. 522, 533; *The Glide*, 167 U. S. 606, 623.

Under these decisions, and others to the same effect, the substance of the matter is that a State may, by statute, create a right to a lien upon a domestic vessel, in the nature of a maritime lien, which may be enforced in admiralty in the courts of the United States; but a State may not confer upon its own courts jurisdiction to enforce such a lien, because the federal jurisdiction in admiralty is exclusive. *The J. E. Rumbell*, 148 U. S. 1, 12, and cases cited. But a lien imposed not upon the *rem* but upon defendant's interests in the *res* may be made enforceable in the state courts. *Rounds v. Cloverport Foundry*, 237 U. S. 303, 307, and cases cited.

The Roanoke, 189 U. S. 185, 194, 198, while approving *The General Smith*, *The Planter*, *The Lottawanna*, and *The J. E. Rumbell*, *supra*, gave a negative answer to the very different question whether a State could, without encroaching upon the federal jurisdiction, create a lien against foreign vessels to be enforced in the courts of the United States.

In the present case there is no question of lien, and, I repeat, no question concerning the jurisdiction of the state court; the crucial inquiry is, to what law was it bound to conform in rendering its decision? Or, rather, the question is the narrower one: Do the Constitution and laws of the United States prevent a state court of common law from applying the state statutes in an action *in personam* arising upon navigable water within the State, there being no Act of Congress applicable to the controversy? I confess that until this case and kindred cases submitted at the same time were brought here, I never had supposed that it was open to the least doubt that the reservation to suitors of the right of a common law remedy had the effect of reserving at the same time the right to have their common law actions determined according to the rules of the common law, or state statutes modifying those rules. This court repeatedly has so declared, at the same time recognizing fully that the point involves the question of state power. In *United States v. Bevans*, 3 Wheat. 336, 388, the court, by Mr. Chief Justice Marshall, said: "Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise? This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction. It is obviously designed for other purposes. * * * In describing the judicial power, the framers of our Constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction. It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of the sovereignty

not yet given away." In *Steamboat Company v. Chase*, *supra*, the court, by Mr. Justice Clifford, said (p. 534): "State statutes, if applicable to the case, constitute the rules of decision in common-law actions, in the circuit courts as well as in the state courts."

In *Atlee v. Packet Company*, 21 Wall. 389, 395, 396, the court, by Mr. Justice Miller, said: "The plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. * * * An important difference as regards this case is the rule for estimating the damages. In the common-law court the defendant must pay all the damages or none. If there has been on the part of plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court, where there has been such contributory negligence, or in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. * * * Each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially." And see *The Max Morris*, 137 U.S. 1, 10; *Belden v. Chase*, 150 U. S. 674, 691; *Benedict Adm.*, Sec. 201.

In the prevailing opinion, great stress is laid upon certain expressions quoted from *The Lottavanna*, 21 Wall. 558, 574, but it seems to me they have been misunderstood, because read without regard to context and subject matter. That was an admiralty appeal, and involved the question whether by the general maritime law, as accepted in the United States, there was an implied lien for necessities furnished to a vessel in her home port, where no such lien was recognized by the municipal law of the State. In the course of the discussion, the court, by Mr. Justice Bradley, said: "That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction.' But by what criterion are we to ascertain the precise limits of the law thus adopted? *The Constitution does not define it.* It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country. *Nor does the Constitution attempt to draw the boundary line between maritime law and local law; nor does it lay down any criterion for ascertaining that boundary.* It assumes that the meaning of the phrase 'admiralty and maritime jurisdiction' is well understood. It treats this matter as it does the cognate ones of common law and equity, when it speaks of 'cases in law and equity,' or of 'suits at common law', *without defining those terms, assuming them to be known and understood.*"

In this language there is the clearest recognition that the Constitution, in establishing and distributing the judicial power, did not intend to define substantive law, or to make the rules of decision in one jurisdiction binding

proprio vigore in tribunals exercising another jurisdiction. The courts of common law were to administer justice according to the common law, the courts of equity according to the principles of equity, and the courts of admiralty and maritime jurisdiction according to the maritime law. The expression on page 375 respecting the uniform operation of the maritime law was predicated only of the operation of that law as administered in the courts of admiralty, for it is not to be believed that there was any purpose to overrule *Atlee v. Packet Co.*, 21 Wall. 389, 396, decided at the same term and only about two months before *The Lottawanna* by a unanimous court including Mr. Justice Bradley himself, in which it was held that where there was concurrent jurisdiction in the courts of common law and the courts of admiralty each court was at liberty to adopt its own rules of decision. Moreover, the principal question at issue in *The Lottawanna* was whether the case of *The General Smith*, 4 Wheat. 438, should be overruled, in which it had been held that, in the absence of state legislation imposing the lien, a ship was not subject to a libel *in rem* in the admiralty for repairs furnished in her home port. The general expressions referred to relate to that state of the law — the absence of State legislation, as well as of legislation by Congress — and upon this the decision in *The General Smith* was upheld (p. 578). But in proceeding to discuss the subordinate question whether there was a lien under the state statute, it was held (p. 580): "It seems to be settled in our jurisprudence that so long as Congress does not interpose to regulate the subject, the rights of materialmen furnishing necessaries to a vessel in her home port may be regulated in each State by State legislation." And again (p. 581): "Whatever may have been the origin of the practice, and whether or not it was based on the soundest principles, it became firmly settled, and it is now too late to question its validity. * * * It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted (supposing Congress to have the power) the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions."

Again, in *Workman v. New York City*, 179 U. S. 552, which, like *The Lottawanna*, was a proceeding in admiralty, the court, in quoting the declarations contained in that case respecting the general operation of the maritime law throughout the navigable waters of the United States, was dealing only with its application in the courts of admiralty. This is plain from what was said as a preface to the discussion (p. 557): "In examining the first question, that is, whether the local law of New York must prevail, though in conflict with the maritime law, it must be borne in mind that the issue is not — as was the case in *Detroit v. Osborne* (1890), 135 U. S. 492 — whether the local law governs as to a controversy arising in the courts of common law or of equity of the United States, but does the local law, if in conflict with the maritime law, control a court of admiralty of the United States in the administration of maritime rights and duties, although judicial power with respect to such subjects has been expressly conferred by the Constitution (Art. III, sec. 2) upon the courts of the United States."

In the argument of the present case and companion cases, emphasis was laid upon the importance of uniformity in applying and enforcing the rules of admiralty and maritime law, because of their effect upon interstate and foreign commerce. This, in my judgment, is a matter to be determined by

Congress. Concurrent jurisdiction and optional remedies in courts governed by different systems of law were familiar to the framers of the Constitution, as they were to English-speaking peoples generally. The judicial clause itself plainly contemplated a jurisdiction concurrent with that of the State courts in other controversies. In such a case, the option of choosing the jurisdiction is given primarily for the benefit of suitors, not of defendants. For extending it to defendants, removal proceedings are the appropriate means.

Certainly there is no greater need for uniformity of adjudication in cases such as the present than in cases arising on land and affecting the liability of interstate carriers to their employees. And, although the Constitution contains an express grant to Congress of the power to regulate interstate and foreign commerce, nevertheless, until Congress had acted, the responsibility of interstate carriers to their employees for injuries arising in interstate commerce was controlled by the laws of the States. This was because the subject was within the police power, and the divergent exercise of that power by the States did not regulate, but only incidentally affected, commerce among the States. *Sherlock v. Alling*, 93 U. S. 99, 103; *Second Employers' Liability Cases*, 223 U. S. 1, 54. It required an act of Congress (Act of April 22, 1908; 35 Stat. 65, c. 149) to impose a uniform measure of responsibility upon the carriers in such cases. So, it required an act of Congress (the so-called Carmack Amendment to the Hepburn Act of June 29, 1906; 34 Stat. 584, 595, c. 3591) to impose a uniform rule of liability upon rail carriers for losses of merchandise carried in interstate commerce. *Adams Express Co. v. Croninger*, 226 U. S. 491, 504. In a great number and variety of cases State laws and policies incidentally affecting interstate carriers in their commercial operations have been sustained by this court, in the absence of conflicting legislation by Congress. Among them are: Laws requiring locomotive engineers to be examined and licensed by the State authorities, *Smith v. Alabama*, 124 U. S. 465, 482; requiring such engineers to be examined for defective eyesight, *Nashville &c. Railway v. Alabama*, 128 U. S. 96, 100; requiring telegraph companies to receive dispatches and transmit and deliver them diligently, *Western Union Tel. Co. v. James*, 162 U. S. 650; forbidding the running of freight trains on Sunday, *Hennington v. Georgia*, 163 U. S. 299, 304, 308, etc.; regulating the heating of passenger cars, *New York, etc., R. R. Co. v. New York*, 165 U. S. 628; prohibiting a railroad company from obtaining by contract an exemption from the liability which would have existed had no contract been made, *Chicago, Milwaukee &c. Ry. Co. v. Solan*, 169 U. S. 133, 136, 137; a like result arising from rules of law enforced in the State courts in the absence of statute, *Pennsylvania R. R. Co. v. Hughes*, 191 U. S. 477, 488, 491; statutes prohibiting the transportation of diseased cattle in interstate commerce, *Missouri, Kansas & Texas Ry. v. Haber*, 169 U. S. 613, 630, 635; *Reid v. Colorado*, 187 U. S. 137, 147, 151; statutes requiring the prompt settlement of claims for loss or damage to freight, applied incidentally to interstate commerce, *Atlantic Coast Line R. R. v. Masursky*, 216 U. S. 122, even since the passage of the Carmack Amendment, *Missouri, Kansas & Texas Ry. Co. v. Harris*, 234 U. S. 412, 417, 420; statutes regulating the character of headlights used on locomotives employed in interstate commerce, *Atlantic Coast Line v. Georgia*, 234 U. S. 280; *Vandalia R. R. v. Public Service Comm.*, 242 U. S. 255. All these cases affected the responsibility of

interstate carriers. Until now, Congress has passed no act concerning their responsibility for personal injuries sustained by passengers or strangers, or for deaths resulting from such injuries, so that these matters still remain subject to the regulation of the several States. We have held recently that even the anti-pass provision of the Hepburn Act (34 Stat. 584, 585, ch. 3591, § 1) does not deprive a party who accepts gratuitous carriage in interstate commerce with the consent of the carrier, in actual but unintentional violation of the prohibition of the Act, of the benefit and protection of the law of the State imposing upon the carrier a duty to care for his safety; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 612.

In the very realm of navigation, the authority of the States to establish regulations effective within their own borders, in the absence of exclusive legislation by Congress, has been recognized from the beginning of our government under the Constitution. As to pilotage regulations, it was recognized by the First Congress (Act of August 7, 1789, c. 9, § 4, 1 Stat. 53, 54; R. S. § 4235), and this court, in many decisions, has sustained local regulations of that character. *Cooley v. Board of Wardens*, 12 How. 299, 320; *Steamship Co. v. Joliffe*, 2 Wall. 450, 459; *Ex parte McNiel*, 13 Wall. 236, 241; *Wilson v. McNamee*, 102 U. S. 572; *Olsen v. Smith*, 195 U. S. 332, 341; *Anderson v. Pacific Coast S. S. Co.*, 225 U. S. 187, 195.

It is settled that a State, in the absence of conflicting legislation by Congress, may construct dams and bridges across navigable streams within its limits, notwithstanding an interference with accustomed navigation may result. *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, 252; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turck*, 95 U. S. 459; *Escanaba Co. v. Chicago*, 107 U. S. 678, 683; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 208; *Hamilton v. Vicksburg & Co. Railroad*, 119 U. S. 280; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8; *Lake Shore & Michigan Railway v. Ohio*, 165 U. S. 365; *Manigault v. Springs*, 199 U. S. 473, 478.

So, as to harbor improvements, *County of Mobile v. Kimball*, 102 U. S. 691, 697; improvements and obstructions to navigation, *Huse v. Glover*, 119 U. S. 543, 549; *Leovy v. United States*, 177 U. S. 621, 625; *Cummings v. Chicago*, 188 U. S. 410, 427; inspection and quarantine laws, *Gibbons v. Ogden*, 9 Wheat. 1, 203; wharfage charges, *Packet Co. v. Keokuk*, 95 U. S. 80; *Packet Co. v. Catlettsburg*, 105 U. S. 559, 563; *Transportation Co. v. Parkersburg*, 107 U. S. 691, 702; *Ouachita Packet Co. v. Aiken*, 121 U. S. 444, 447; tolls for the use of an improved waterway, *Sands v. Manistee River Imp. Co.*, 123 U. S. 288, 295.

So, of provisions fixing the tolls for transportation upon an interstate ferry, *Port Richmond Ferry v. Hudson County*, 234 U. S. 317, 331; or upon vessels plying between two ports located within the same State, *Wilmington Transp. Co. v. California Railroad Commission*, 236 U. S. 151, 156.

In each of these cases, except the last, which related to intrastate transport, the State regulation had an incidental effect upon the very conduct of navigation in interstate or foreign commerce. If in such cases the States possess the power of regulation in the absence of inconsistent action by Congress, much more clearly do they possess that power where Congress is silent, with respect to a liability which arises but casually, through the accidental injury or death of an employee engaged in a maritime occupation.

Indeed, with respect to injuries that result in death, it already is settled that although the general maritime law, like the common law, afforded no civil remedy for death by wrongful act (*The Harrisburg*, 119 U. S. 199; *The Alaska*, 130 U. S. 201, 209), yet a right of action created by statute is enforceable in a State court although the tort was committed upon navigable water. (*Steamboat Company v. Chase*, 16 Wall. 522, 533; *Sherlock v. Alling*, 93 U. S. 99, 104), and the liability arising out of a State statute in such a case will be recognized and enforced in the admiralty (*The Hamilton*, 207 U. S. 398), although not by proceeding *in rem* unless the statute expressly creates a lien (*The Corsair*, 145 U. S. 335, 347).

In *Sherlock v. Alling*, *supra*, which was an action in a State court and based upon a State statute to recover damages for a death by wrongful act occurring in interstate navigation, it was contended that the statute could not be applied to cases where the injury was caused by a marine tort, without interfering with the exclusive regulation of commerce vested in Congress. The court, after declaring that any regulation by Congress, or the liability for its infringement, would be exclusive of State authority, proceeded to say, by Mr. Justice Field (93 U. S. 104): "But with reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern. The rules for the acquisition of property by persons engaged in navigation, and for its transfer and descent are with some exceptions, those prescribed by the State to which the vessels belong; and it may be said, generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water; or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment, the statute of Indiana falls under this class. Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies," etc.

I deem *The Hamilton*, *supra*, to be a controlling authority upon the question now presented. It was there held, not only that the constitutional grant of admiralty jurisdiction, followed and construed by the Judiciary Act of 1789, leaves open the common law jurisdiction of the State courts over torts committed at sea, but also that it leaves the States at liberty to change the law respecting such torts by legislation, as by a statute creating a liability for death by wrongful act, which was the particular legislation there in question.

To what extent uniformity of decision should result from the grant of jurisdiction to the courts of the United States concurrent with that of the state courts, is a subject that repeatedly has been under consideration in this court, but it never has been held that the jurisdictional grant required state courts to conform their decisions to those of the United States courts. The doctrine clearly deducible from the cases is that in matters of commercial law and general jurisprudence, not subject to the authority of Congress or where Congress has not exercised its authority, and in the absence of state legislation, the federal courts will exercise an independent judgment and reach a conclusion upon considerations of right and justice generally appli-

cable, the federal jurisdiction having been established for the very purpose of avoiding the influence of local opinion; but that where the State has legislated, its will thus declared is binding, even upon the federal courts, if it be not inconsistent with the expressed will of Congress respecting a matter that is within its constitutional power. The doctrine concedes as much independence to the courts of the States as it reserves for the courts of the Union. *Burgess v. Seligman*, 107 U. S. 20, 33, 34; *East Alabama Ry. v. Doe*, 114 U. S. 340, 353; *Gibson v. Lyon*, 115 U. S. 439, 446; *Anderson v. Santa Anna*, 116 U. S. 356, 362; *B. & O. R. R. v. Baugh*, 149 U. S. 368, 372; *Folsom v. Ninety-six*, 159 U. S. 611, 625; *Stanby County v. Coker*, 190 U. S. 437, 444; *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, 357, 360.

In *B. & O. R. R. v. Baugh*, *supra*, the court had under review the judgment of a circuit court of the United States in an action by a locomotive fireman injured through negligence of the engineer. The cause of action arose in the State of Ohio, and the question presented was whether the engineer and fireman were fellow-servants. Under the decisions of the Ohio courts they were, but this court held that, as there was no state statute, the question should not be treated as a question of local law, to be settled by an examination merely of the decisions of the state court of last resort, but should be determined upon general principles; the courts of the United States being under an obligation to exercise an independent judgment. The court, by Mr. Justice Brewer, said (149 U. S. 378): "There is no question as to the power of the States to legislate and change the rules of the common law in this respect as in others; but in the absence of such legislation the question is one determinable only by the general principles of that law. Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the States is a matter of national regulation, and to establish it as such was one of the principal causes which led to the adoption of our Constitution."

In other words, the general effect of the question upon interstate commerce rendered it one of the class that called for the application of general principles; nevertheless, state legislation would be controlling—in the absence of valid legislation by Congress, of course.

In *Chicago, Milwaukee, etc., Ry. Co. v. Solan*, *supra*, the doctrine was concisely stated by Mr. Justice Gray, speaking for the court, as follows (169 U. S. 136): "The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the courts of the State in which the cause of action arises. But the law to be applied is none the less the law of the State; and may be changed by its legislature, except so far as restrained by the constitution of the State or by the constitution or laws of the United States."

I freely concede the authority of Congress to modify the rules of maritime law so far as they are administered in the federal courts, and to make them binding upon the courts of the States so far as they affect inter-state or international relations, or regulate "commerce with foreign nations, and

among the several States, and with the Indian tribes." What I contend is that the Constitution does not, *proprio vigore*, impose the maritime law upon the States except to the extent that the admiralty jurisdiction was exclusive of the courts of common law before the Constitution; that is to say, in the prize jurisdiction, and the peculiar maritime process *in rem*; and that as to civil actions *in personam* having a maritime origin, the courts of the States are left free, except as Congress by legislation passed within its legitimate sphere of action may control them; and that Congress so far from enacting legislation of this character, has from the beginning left the State courts at liberty to apply their own systems of law in those cases where prior to the Constitution they had concurrent jurisdiction with the admiralty, for the saving clause in the Judiciary Act necessarily has this effect.

Surely it cannot be that the mere grant of judicial power in admiralty cases, with whatever general authority over the subject matter can be raised *by implication*, can, in the absence of legislation, have a greater effect in limiting the legislative powers of the States than that which resulted from the *express* grant to Congress of an authority to regulate interstate commerce,—the limited effect of which, in the absence of legislation by Congress, we already have seen. The prevailing opinion properly holds that, under the circumstances of the case at bar, although plaintiff in error was engaged in interstate commerce, and the deceased met his death while employed in such commerce, the provisions of the Federal Employers' Liability Act (April 22, 1908, 35 Stat. 65, c. 149) do not apply, because they cover only railroad operations and work connected therewith, whereas the deceased was employed upon an ocean-going ship. In effect it holds also that in the absence of applicable legislation by Congress the express grant of authority to regulate such commerce, as contained in the Constitution, does not exclude the operation of the State law. It seems to me a curious inconsistency to hold, at the same time, that the rules of the maritime law exclude the operation of a State statute without action by Congress, although the Constitution contains no express grant of authority to establish rules of maritime law, and the authority must be implied from the mere constitutional grant of judicial power over the subject matter; and most remarkable that this result is reached in the face of the fact that the judicial power in cases of admiralty jurisdiction has been put into effect by Congress subject to an express reservation of the previous concurrent jurisdiction of the courts of law over actions of this character. This, besides ignoring the reservation, gives a greater potency to an implied power than to a power expressly conferred.

The effect of the present decision cannot logically be confined to cases that arise in interstate or foreign commerce. It seems to be thought that the admiralty jurisdiction of the United States has limits coextensive with the authority of Congress to regulate commerce. But this is not true. The civil jurisdiction in admiralty in cases *ex contractu* is dependent upon the subject matter; in cases *ex delicto* it is dependent upon locality. In cases of the latter class, if the cause of action arise upon navigable waters of the United States, even though it be upon a vessel engaged in commerce wholly intrastate, or upon one not engaged in commerce at all, or (probably) not upon any vessel, the maritime courts have jurisdiction. *Propeller Gene-*

see *Chief v. Fitzhugh*, 12 How. 443, 452; *The Propeller Commerce*, 1 Black 574, 578, 579; *The Belfast*, 7 Wall. 624, 636, 638, 640; *Ex parte Boyer*, 109 U. S. 629, 632; *In Re Garnett*, 141 U. S. 1, 15, 17. It results that if the constitutional grant of judicial power to the United States in cases of admiralty and maritime jurisdiction is held by inference to make the rules of decision that prevail in the courts of admiralty binding *proprio vigore* upon State courts exercising a concurrent jurisdiction in cases of maritime origin, the effect will be to deprive the several States of their police power over navigable waters lying wholly within their respective limits, and of their authority to regulate their intrastate commerce so far as it is carried upon navigable waters.

The following additional consideration is entitled to great weight: The same Judiciary Act which in its 9th section conferred upon the district courts of the United States original cognizance of civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it, in its 25th section allowed a writ of error from this court to review the final judgment or decree of a State court of last resort resulting from a decision overruling any special claim of right, privilege, or exemption based upon the construction of any clause of the Constitution or statutes of the United States. By later legislation the review was broadened (Act of February 5, 1867, c. 28, § 2, 14 Stat., 385, 386; § 709, Rev. Stat.; § 237, Jud. Code), and by recent legislation the writ of certiorari has been substituted for the writ of error in many cases (Act of September 6, 1916, c. 448, 39 Stat. 726). But, at all times, the right to review in this court the decisions of the State courts upon questions of federal law has existed, so that if by the true construction of Art. III, sec. 2, of the Constitution, or of § 9 of the Judiciary Act of 1789, it had been the right of parties suing or sued in State courts upon causes of action of a maritime nature to insist that their cases should be determined according to the rules of decision found in the law maritime, this right or immunity might have been asserted as a federal right, and its denial made the ground of a review of the resulting judgment, under a writ of error (or, now, a writ of certiorari,) from this court to the State court of last resort. Yet, until the present case, and others submitted at the same time, the reported decisions of this court show not a trace of any such question raised. I can conceive of no stronger evidence to prove that from the foundation of the government until the present time it has been the opinion of the Bar and of the Judiciary, in the State courts as well as in the courts of the United States, that it was not the right of parties suing or sued in State courts of law or equity upon causes of action arising out of maritime affairs, to have them decided according to the principles that would have controlled the decision had the suits been brought in the admiralty courts.

There is no doubt that, throughout the entire life of the nation under the Constitution, State courts not only have exercised concurrent jurisdiction with the courts of admiralty in actions *ex contractu* arising out of maritime transactions, and in actions *ex delicto* arising upon the navigable waters, but that in exercising such jurisdiction they have, without challenge until now, adopted as rules of decision their local laws and statutes, recognizing no obligation of a federal nature to apply the law maritime. State courts of

last resort, in several recent cases, have had occasion to consider the precise contention now made by plaintiff in error, and upon full consideration have rejected it. *Lindstrom v. Mutual S. S. Co.*, 152 Minn. 328; 156 N. W. Rep. 669; *North Pacific S. S. Co. v. Industrial Accident Commission* [Cal.], 163 Pac. Rep. 199; *Kennerson v. Thomas Towboat Co.*, 89 Conn. 367, 373. See also *Matter of Walker v. Clyde S. S. Co.*, 215 N. Y. 529, 531; *Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514 (this case). I have found no case to the contrary except a decision by the United States District Court for the Northern District of Ohio in *Schaefer v. Zenith S. S. Co.*, 216 Fed. Rep. 666, now under consideration by this court. The reasoning is unsatisfactory, and it was repudiated in *Keithley v. North Pacific S. S. Co.*, 232 Fed. Rep. 255, 259.

I may remark, in closing, that there is no conflict between the New York Workmen's Compensation Act and the acts of Congress for limiting the liability of shipowners (Rev. Stat. §§ 4283-5; Act of June 26, 1884, c. 121, § 18; 23 Stat. 53, 57). So long as the aggregate liabilities of the owner, including that under the New York law, do not amount to as much as the interest of the owner in the vessel and freight pending, the act of Congress does not come into play. Where it does apply, it reduces all liabilities proportionally, under whatever law arising; the liability under the New York law along with the others. *Butler v. Boston Steamship Co.*, 130 U. S. 527, 552, 558; *The Hamilton*, 207 U. S. 398, 406; *Richardson v. Harmon*, 222 U. S. 96, 104, 105.

Mr. Justice BRANDEIS and Mr. Justice CLARKE concur in the dissent, both upon the grounds stated by Mr. Justice HOLMES and upon those stated by Mr. Justice PITNEY.

Though the United States Supreme Court briefly dismissed the Walker case upon authority of its decision in the Jensen case, the decision is of interest for publication of the facts relative to the accident as found by the New York State Industrial Commission.

CLYDE STEAMSHIP CO. v. WALKER, 244 U. S. 255, May 21, 1917.

Mr. Justice McREYNOLDS delivered the opinion of the court:

Purporting to proceed under the Workmen's Compensation Law of New York (Consol. Laws, chap. 67), the State Commission on September 3, 1914, made an award to defendant in error, Walker.

It found:

"1. William Alfred Walker, a claimant, is a longshoreman, residing at 151 West 133d street, New York city. Prior to July 1, 1914, he was employed in the city of New York by the Clyde Steamship Company for longshore work. He was injured on July 1, 1914, while in the employ of the Clyde Steamship Company as a longshoreman.

"2. The Clyde Steamship Company is a corporation organized and existing under the laws of Maine, where it has its principal office. It also has an office at Pier 36, North river.

"3. During the discharge of the Cherokee and at the time of the accident, the claimant was on board the steamship Cherokee, owned and operated by the Clyde Steamship Company. During the year prior to the accident, Walker had been employed from time to time by the Clyde Steamship Company and could have been assigned to work upon the pier. The Cherokee was, at the time of the accident, moored to and alongside Pier 37, North river, New York city, lying in navigable waters of the Hudson river. Said pier is leased by Clyde Steamship Company from the city of New York.

"4. While claimant was hooking the rope of a derrick into a load of lumber in the between decks of said vessel, for the purpose of unloading it from that vessel, his hand was jammed against the lumber, resulting in laceration of the second finger of the left hand. Claimant was disabled by reason of the injury from July 1, 1914, to July 22, 1914, returning to work upon the latter date.

"5. The business of the Clyde Steamship Company in this State consists solely of carrying passengers and merchandise to New York from other States, and carrying passengers and merchandise from New York to other States. All cargo on board the Cherokee, including the lumber aforesaid had been taken on board in the State of North Carolina, and carried by water to New York, and was there unloaded from the steamship Cherokee. The claimant was engaged solely in handling said lumber.

"6. The injury was an accidental injury and arose out of and in the course of the employment of claimant by the Clyde Steamship Company. The injury did not result solely from the intoxication of the injured employee while on duty, and was not occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or another:

"7. The average weekly wage of claimant was \$17.30."

Without opinion the appellate division affirmed the award, and this action was approved by the court of appeals. 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B, 87.

In *Southern P. Co. v. Jensen* just decided [244 U. S. 205, ante, 524, 37 Sup. Ct. Rep. 524], we considered and disposed of the fundamental question here involved. The legislature exceeded its authority in attempting to extend the statute to conditions like these which the record discloses.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with our opinion in the former case. *Reversed.*

Dissenting: Mr. Justice HOLMES, Mr. Justice PITNEY, Mr. Justice BRANDEIS, and Mr. Justice CLARKE.

2. *Claims denied under the decisions.*—The decisions of the United States Supreme Court in the *Jensen* and *Walker* cases caused the State Industrial Commission to deny awards to the dependents of an employee fatally hurt while winding a cable aboard ship: *Cappadona v. Boulton & Co.*, Bul., vol. 2, p. 211, June 19, 1917; and to a longshoreman injured while working in a ship's hold: *Gizzone v. N. Y. & Phila. Stevedoring Co.*, Bul., vol. 2, p. 223, July 5, 1917. In the *Cappadona* ruling Commis-

sioner Lyon noticed the fact that the employer was not the ship-owner but a contracting stevedore.

The Commission has also denied awards to the dependents of two Italian laborers swept from a dredge by a falling timber and drowned in the Erie canal at Herkimer: *De Padova and Pulidori v. Acme Engineering and Constructing Co.*, Bul., vol. 3, p. 169, April 2, 1918.

3. *Claim determined not to be in admiralty.*—A watchman for a warehousing and storage company fell from a second story window of his employer's building while closing some iron shutters. The insurance carrier argued that his case lay in admiralty. The Attorney-General answered that to be under admiralty the employee "must be engaged in work upon the vessel upon navigable waters." The Appellate Division and the Court of Appeals unanimously affirmed the award without opinion: *Mack v. N. Y. Dock Co.*, Death Case No. 24142, July 16, 1917; 181 App. Div.—, Dec. 28, 1917; 223 N. Y. Rep., May 14, 1918.

4. *Attorney-General's opinion.*—The Attorney-General of New York in a letter of August 23, 1917, replying to inquiries of the State Industrial Commission, holds that injuries incurred by longshoremen upon docks and by dry dock employees in docks, ways and machine shops are not maritime injuries and are therefore compensatable. The opinion passes upon other important questions and suggests the legislative remedy that Congress has since put into effect. The correspondence is as follows:

NEW YORK, August 16, 1917.

HON. MERTON E. LEWIS, *Attorney-General, Albany, N. Y.*:

DEAR SIR.—Since the decision of the United States Supreme Court in the *Jensen* and *Walker* cases, various puzzling questions are continually fronting this Commission, and we should very much like to have your opinion upon the following:

1. Do these decisions cover longshoremen employed by steamship companies in loading ships, if the accident to the injured workman occurs on the dock?

2. Does a longshoreman employed by a stevedore in loading a vessel stand in any different relation under the decisions in the *Jensen* and *Walker* cases, than a workman injured who is in the employ of the steamship company, which is being loaded?

(a) If injured on the ship?

(b) If injured on the dock?

Note.—In this question it is understood that the stevedore is an independent contractor who takes the contract to load or unload a ship.

3. Are mechanics employed by dry dock companies in repairing vessels governed by the *Jensen* and *Walker* cases?

(a) Where the vessel is in dry dock proper?

(b) Where the vessel is on ways being drawn out of the water by marine railways?

Notes.—See the query raised by the U. S. Supreme Court in the matter of *Robert W. Parsons*, 191 U. S. 17.

4. It being understood that most dry dock companies have machine shops, the employees in which, do not at any time enter upon boats for work, but who make the parts to be put in boats, are these employees of dry dock companies covered by the *Jensen* and *Walker* cases, so as not to fall under the Compensation Law?

5. Is there any distinction to be drawn between domestic ships and foreign ships, so far as the doctrine laid down in the *Jensen* and *Walker* cases is concerned?

Note the following cases referred to by Justice McReynolds, in his opinion in the *Jensen* case: *The Lottawanna*, 21 Wall, 558; *The J. E. Rumbell*, 148 U. S. 1; *Cooley v. Board of Wardens*, 12 Howard, 299; *The Hamilton*, 207 U. S. 398; *LaBourgoine*, 210 U. S. 95, 138.

6. In many cases awards were made by the Commission to longshoremen injured on ships in which there were not only no appeals taken, but payments have been made on account and these continued up to the decision in the *Jensen* and *Walker* cases. In some of these cases, statutes of limitation may have run if actions were brought in admiralty or at common law and in some of them by lapse of time it has become impossible for the claimants to get the evidence for suits, either in admiralty or at common law. Is the Commission in these cases under any necessity, on the application of the insurance carrier, to open these awards and deny compensation?

7. The State fund has many policies of insurance covering dry docks about the harbor of New York. In most of these cases the ships are drawn out of the water by marine railways and repaired while on the railway. If in answer to the preceding questions, you decide that employees on these ships so repaired, are under the maritime law, following the *Jensen* and *Walker* cases and are not entitled as matter of right to compensation, would it be proper for the State Fund to continue these policies and renew them if the employer, understanding the situation, elects to take the chances of actions in admiralty or at common law, and he makes written agreements with his employees to accept compensation and would the State Industrial Commission be warranted, in such cases where both employer and employee appear and ask for compensation, in making awards? In other words, has the State Fund the right to continue to cover dry docks for such compensation as both parties can agree, shall be determined by the State Industrial Commission, and has the State Industrial Commission the right to make awards under those circumstances? It is understood that these dry dock companies probably have some employees which in any event, would be entitled to the protection of our Compensation Law.

You can see that these questions are coming up continuously before us, that some of them are extremely important and that the latter especially, concerns our State Fund very vitally.

352 COURT DECISIONS ON WORKMEN'S COMPENSATION LAW

The premiums from dry docks are very large and the business has been extremely desirable up to date. The dry dock companies probably, without exception, would prefer to remain in the State Fund if they can have any assurance that the Commission has the right and will make awards where both the employer and employee request it.

We should be glad to have your opinion on these points at as early a date as possible.

Yours very truly,

EDWARD P. LYON,

Commissioner.

P. S. 8: Can Congress give to the states the jurisdiction over these cases, which, under the *Jensen* decision, we have not now got?

Note.—*Butler v. S. S. Company*, 130 U. S. 527, and other cases cited at page 7 of McReynolds' opinion in the *Jensen* case.

AUGUST 23, 1917.

HON. EDWARD P. LYON, Commissioner, 230 Fifth Avenue, New York City:

DEAR SIR.—In answer to your letter of the 16th inst. will say that I have carefully considered the puzzling questions with which you are confronted, and will answer them in the order in which you have asked them as follows:

1. I do not think that the *Jensen* and *Walker* decisions cover the case of workmen injured on the docks. It seems to be undisputed that only such torts as occur upon navigable waters are considered maritime torts. Injury to the person when accompanied by negligence on the part of the master constitutes a tort. The Workmen's Compensation Law transfers the liability from the master to the business. Taking out the element of negligence and inserting that of hazard as the controlling element, the servant is not now permitted to sue his master for a tort, but may pursue his remedy under the Workmen's Compensation Law for the injury he receives. The gravamen in both cases is injury to the workman and the Court of Appeals have regarded the remedy provided by the Workmen's Compensation as a substitute for the action for negligence.

Hartnett v. Steen Company, 216 N. Y. 101. Judge Seabury says in this case: "The Workmen's Compensation Law was enacted to provide a new remedy to the employee who received accidental injuries in the course of the employment, or in the case of the death of the employee, to his dependents."

He then goes on to show that practice upon appeal to the Court of Appeals should be assimilated to the practice upon appeals from judgments in actions for damages for personal injuries resulting from negligence by reason of such substitution of remedies.

2. My opinion is that a longshoreman employed by a stevedore stands in no different position when injured upon board ship than if employed by the steamship company. This seems to be settled by the case of *Atlantic Transport Company v. Imbrovek*, 234 U. S. 52. In that case the stevedore company was loading a ship at Baltimore and the stevedore in the employ of the Atlantic Transport Company, who was loading the ship, was injured. He brought a libel against both the owner of the ship and the

stevedore company, and it was sustained as to the latter, but it would seem to place the Atlantic Transport Company, employing stevedores for the purpose of loading, in the same position as the steamship company so far as being subject to admiralty jurisdiction is concerned. If, however, the stevedore was injured upon the dock, we think the liability would be under the Workmen's Compensation Law for the reasons stated in answer to the first question.

3, 4 and 7. These questions I will answer together. I do not think that dry dock companies, or mechanics, or laborers, employed by them, are engaged in a maritime occupation, and that they are not subject to admiralty jurisdiction, either when the vessel is in a dry dock proper, or when the vessel is being drawn out of water by marine railways, or when repaired in a floating dock. In the case of *Roach v. Chapman*, 63 U. S. 129, an attempt was made to libel a ship in admiralty for a balance due for machinery furnished in its construction, but the libel is dismissed, the court saying a contract for building a ship, or supplying engines, or other materials for her construction, is clearly not a maritime contract, the court referring to the case of *People's Ferry Company v. Beers*, 61 U. S. 393. So in the case of *Norton, Assignee, v. Switzer*, 93 U. S. 355, 366, it is said: "Contracts for shipbuilding are held not to be maritime contracts, and of course they fall within the same category."

So in the case of *Cope v. Vallette Dry Dock Company*, 119 U. S. 625, it is held that a floating dock for the purpose of taking ships out of the water in order to repair them, and for no other purpose, and not designed for navigation, is not a subject of salvage service. In that case the plea was made that the case was not one of admiralty and maritime jurisdiction, the dry dock not being devoted to the purpose of transportation and commerce, nor intended for navigation. This plea was upheld by the court. In the case of *Robert W. Parsons*, 191 U. S. 17, the question arose as to the jurisdiction of the Supreme Court of the State of New York to enforce a lien *in rem* for repairs against a canal boat. The court held that the jurisdiction *in rem* against a vessel for repairs was in admiralty and reversed the judgment obtained in the Supreme Court of the State of New York, and there should be noted here the distinction that has to be made between the furnishing of repairs to a ship and the work done upon a dry dock or floating dock. A contract for repairs to a ship is a maritime contract and only enforceable in admiralty even if the ship is drawn up into the dry dock, but the court recognizes the fact that the dry dock is not the subject of admiralty jurisdiction, saying: "There is no doubt of the proposition that a dry dock itself is not a subject of salvage service, or of admiralty jurisdiction because it is not used for the purpose of navigation. That was settled in *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625. But the case was put upon the express ground that a dry dock was like a ferry bridge or sailors' floating meeting house, and was no more used for the purposes of navigation than a wharf or a warehouse projecting into or upon the water."

While therefore a workman who is injured if he elected to proceed against a steamship upon which repairs were being made would have to proceed in admiralty, if he proceeded against the dry dock company which employed him, his remedy would be under the Workmen's Compensation Law inasmuch as

dry docks and floating docks engage in building or repairing ships and are not engaged in a maritime enterprise, and such dry docks are not vessels engaged in navigation. I see no reason therefore why dry dock companies engaged in building or repairing vessels should not be insured in the State Fund for their liability under the Workmen's Compensation Law.

5. I think no distinction is drawn between domestic and foreign ships so far as the doctrine laid down in the *Jensen* and *Walker* cases is concerned. It is true that Mr. Justice McReynolds speaks of foreign vessels and in the *Lottawanna* case, 88 U. S. 558, 580, it was held that the State had a right to pass laws giving a lien upon vessels, and that this would hold so far as domestic vessels are concerned. Mr. Justice Bradley, however, states: "The rights of material-men furnishing necessities to a vessel in her home port may be regulated in each State by state legislation. State laws, it is true, cannot exclude the contract for furnishing such necessities from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed in rem for the enforcement of liens created by such state laws, for it is exclusively conferred upon the District Courts of the United States."

So in the case of *J. E. Rumbell*, 148 U. S. 1 and 12, the court held that whenever the statute of a State gives a lien, to be enforced by process in rem against the vessel, this lien being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States. Mr. Justice Grace says: "No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a State, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure."

The question decided in the *Jensen* and *Walker* cases was not a question as between domestic and foreign vessels, but as to the court in which a remedy must be pursued. That court they held must be the admiralty court. If liens for repairs given by a state against domestic vessels must be enforced in admiralty, the extent of such action is the giving of the right to such liens. They must be enforced in admiralty as Workmen's Compensation cannot be enforced in admiralty. The United States Supreme Court holds that they cannot be enforced at all inasmuch as they conflict with admiralty jurisdiction.

6. In cases where awards have been made and no appeals have been taken, it would seem that although the time for appeal has expired, as in case of judgment, ordinarily the judgment would be binding. This, however, is limited by the question of jurisdiction. If the court or body who made the award or judgment had no jurisdiction of the subject matter, the award would seem to be void and might be attacked collaterally. (See cases cited on memorandum of Mr. Rayher.)

8. I have given considerable thought as to the question of what legislation could be passed to remedy the situation. I make this tentative suggestion.

A good deal of stress seems to be laid by Mr. Justice McReynolds to the fact that the clause in sections 24 and 256 of the Judicial Code, "Saving to suitors in all cases the right of a common law remedy where the common law is competent to give it," was not broad enough to include the remedy which the compensation statute intends to give. He says that that remedy "is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction." I therefore suggest that the sections might be amended by adding, "including remedies in any state given by the Workmen's Compensation statutes" so that it would read "Saving to suitors in all cases the right of a common law remedy where the common law is competent to give it including remedies in any state given by the Workmen's Compensation statutes." I would also suggest with reference to the Federal Liability Law that that might be amended by providing that in any States where Workmen's Compensation Laws are in force, the commissions, designated to enforce such laws, should have concurrent jurisdiction as to injuries received in interstate commerce.

Very truly yours,

MERTON E. LEWIS,

Attorney-General.

By E. C. AIKEN,

Deputy Attorney-General.

P. S.—In reference to the first question I do not claim, of course, that it is undisputed that a stevedore injured upon the dock comes under the State law and not under admiralty, but that is my opinion. I refer to two or three cases that I have examined since dictating the foregoing letter. The *Plymouth*, 3 Wall. 20; The *H. S. Pickands*, 42 Fed. 239; *Swayne and Hoyt, Inc., v. Barsch*, 226 Fed. 581. I am enclosing to you the briefs which you left with Senator Lewis.

. Very truly yours,

MERTON E. LEWIS,

Attorney-General.

By E. C. AIKEN,

Deputy Attorney-General.

5. *Rescindment of awards.*—In consequence of the United States Supreme Court's reversal of the Jensen and Walker awards certain insurance carriers ceased making periodic payments in certain cases having maritime aspects, though they had originally acquiesced in the awards without appeal and had paid installments. In some instances they applied to the Commission to reopen and rescind the awards. The Commission acceded to their requests at first (Cf. *Lewis v. McNamara & Petersen*, Bul., vol. 2, p. 231, July 24, 1917), but upon further consideration decided

that their conduct had estopped them and that they were obligated to continue payment. The question was put to the Attorney-General in the above correspondence. The Commission's views are set forth as follows in a single ruling covering four cases that differ from each other in important particulars:

LANTIGAN V. STANDARD SHIPBUILDING CORP., MORAN V. INTERNATIONAL ELEVATING CO., CHAMPION V. N. Y. AND N. J. STEAMBOAT CO., and SHANLEY V. AMERICAN SUGAR REFINING CO., S. D. R., vol. 14, p. 623, Bul., vol. 3, p. 14, Sept. 11, 1917, *in part*.

There is also another ground for not changing the award already made, which is presented to us with a good deal of force, namely, that of estoppel. It is urged that the employer and insurance carrier have acquiesced in the jurisdiction of this Commission, have recognized their liability under the Compensation Law, have taken no steps to reverse the Commission's award, have repeatedly recognized their liability by making payments, that the last payment was made after the decision of the United States Supreme Court, and that by this acquiescence, they have lulled the claimants into security until some of their rights have probably been eliminated by lapse of time and their opportunity to secure the proper evidence for a suit either at common-law or in admiralty is gone.

It is also argued that the insurance carrier has been compensated for carrying this risk to maturity by the premiums which it exacted, and that it is taking an unfair advantage, after having exacted premiums which it keeps and which are presumably adequate to carry the risk and furnish a fair profit, to now repudiate the liability for which it has been paid. This argument appeals with considerable force, so far as the business ethics of the situation are concerned. If the case is held to fall under admiralty jurisdiction and the argument that want of jurisdiction renders the Commission's decision null and void *ab initio* can be escaped and if it is possible for an estoppel to be invoked in such a case, I should be disposed to hold that the insurance carrier is estopped by its repeated acts of affirmation of the Commission's ruling. Of course it is possible for the insurance carrier to apparently justify its action in retaining the premiums paid while repudiating its liability, on the ground that they are now subject to actions either at common-law or in admiralty which might result in very large damages against them and that it is not fair to ask them to respond in compensation cases where no negligence is found and not have the benefit of compensation awards, in cases where negligence is proven, but I think this argument has something specious about it, because the question of the Commission's jurisdiction over admiralty cases was raised long ago, and the insurance companies had the right, and undoubtedly exercised it, of fixing the amount of their premiums at a figure which would cover this risk as well as all others.

The time at my disposal has not permitted me to go very carefully into the question of estoppel here presented, but I am disposed to give to the claimants the benefit of the doubt, since to do so works out what seems to me to be justice and only gives another reason for the award, in addition

to a finding that the employment of the deceased was covered by the Compensation Law, all the more so, because it is in line with the opinion of the Attorney-General, and makes it possible to have the concededly close questions of law properly reviewed by the court.

A longshoreman, suffering from mental derangement due to a blow on the head while he was working on the docks, had received \$374.79 in periodic payments up to the time of the United States Supreme Court decision; thereafter, upon application of his attorney, the Commission reopened his case and dismissed his claim in order that he might bring an action for negligence: *Regan v. Cunard S. S. Co.*, Claim No. 71473, Mar. 1, 1918.

6. *Awards in pending cases.*—At the time of the United States Supreme Court's reversal of the Jensen and Walker awards accident cases in admiralty were pending which the Commission had not ruled upon. A month after the above ruling in *Lanigan v. Standard Shipbuilding Corp., etc.*, a case of the kind was determined by the Commission. This claim had been before the Commission for two years and eight months with occasional hearings but no decision. The insurance carrier had been advancing compensation. The Commission held that an award should be made under the contract of insurance, notwithstanding the Jensen and Walker decisions. Commissioner Lyon's views, which it adopted, are as follows:

McCRACKEN V. EASTERN GRAVEL CORP., S. D. R., vol. 14, p. 659, Bul., vol. 3, p. 55, Oct. 11, 1917, *in part*.*

There arises, however, another question, turning on the contract of insurance, which the Commission has not up to this time given very serious consideration, although the general doctrine herein expressed underlay the decision in the Moran, Champion and Shanley cases, recently decided by the Commission, it was not stressed and the Commission's jurisdiction was there sustained on the general theory, in the two former cases, of estoppel, and in the latter case, of agreement to pay compensation. Neither of these two theories is strictly applicable to the present case, because there has been no award made by the Commission so as to bring the doctrine of estoppel into play with the same force as in the Moran and Champion cases; nor is there any agreement made under the Compensation Law as in the Shanley case. I am disposed to think, however, that an award in this case should be made under the contract of insurance, following the intent of the statute, even though the case is an admiralty one. It will be noticed that there was no insurance question involved in either the Jensen, the Walker or the Winfield cases, decided by the United States Supreme Court, the

*Argued in Appellate Division, May 8, 1918.

employer in each of those cases being a self-insurer. Our courts have held that the State Fund is the primary source of compensation insurance and that other insurance is merely a permitted substitute. Section 90 of the Compensation Law brings the State Fund into existence and is in part as follows:

"There is hereby created a fund to be known as 'the State insurance fund' for the purpose of insuring employers against liability under this chapter and of assuring to the persons entitled thereto the compensation provided by this chapter."

It thus appears that the State Fund was brought into existence both to indemnify the employer and to secure compensation to the employee. We may, I think, assume that all other permitted insurance carriers with it the same underlying idea, since the permitted substitute can hardly be more favorable to the insurance carrier than the original which it displaces.

Turning now to the policy of insurance issued by the insurance carrier in this case, we find that, in pursuance of subdivision 1 of section 54 of the Compensation Law, the policy contains the following provision:

"EMPLOYEE'S RECOURSE TO COMPANY."

"Condition B.—The Industrial Commission of the State of New York shall have the right to enforce in the name of the people of the State, for the benefit of the persons entitled to the compensation herein insured, either by a filing a separate application or by making the Company a party to the original application, the liability of the company in a whole or in part for the payment of compensation; provided, however, that payment in whole or in part of such compensation either by the Employer or the Company shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid."

This provision apparently carries out the underlying purpose of the Compensation Law to assure payment of compensation by the insurance carrier to the injured employee, as well as to insure the employer against loss for industrial accidents. The policy of insurance in the present case was written, and the accident which lies at the base of this application occurred more than two years before the decision of the United States Supreme Court in the Jensen case, during all of which time the New York Workmen's Compensation Law was held by the highest courts in the State of New York to cover employees engaged on vessels in the navigable waters of the United States.

In the case of the New Amsterdam Casualty Company vs. Olcott Receiver, 165 Appellate Division 603, suit was brought by a Casualty Company to recover the balance of premium upon a policy of compensation insurance issued under the prior statute in New York which was declared unconstitutional in the case of *Ives v. South Buffalo Railroad Company*, 201 New York 271. A portion of the premium had been paid and suit for the balance was brought after the decision of the Ives case. The Appellate Division ordered judgment for the plaintiff on the ground that, notwithstanding the unconstitutionality of the law, there had been coverage during the time when the Compensation Law had been declared by the courts to be the law of the State. The Court there said:

"I think the defendant has misapprehended the meaning of the term 'risk' upon which the question at issue depends. If property insured against fire turns out to have been destroyed before or to have had no existence at the time the policy was written, clearly no risk ever attached, and the insurer could not claim to have given any consideration for the premium reserved. But here the *risk* insured against attached at the time the policy was issued and continued until the policy expired, because during all of that period the defendant rested under the possibility of being cast in damages in the event that accidents such as those insured against had happened. The fact that thereafter the act was held to be void did not destroy the risk *qua* risk which existed while the act was in force."

I think this may be held to be the law in this case for our purposes. It may be said that this quotation from the New Amsterdam case is *obiter dictum* because the Court went on to say:

"It would seem, however, as if all doubt was removed by the agreement of the parties themselves, for the rider provided 'the actual wages and earned premium shall be determined in the manner set forth in the policy to which this endorsement is attached, and it is agreed that such earned premium shall be retained by the Company regardless of the construction which may be given by the courts to the law referred to herein,' being the act in question."

But there is in the standard form policy here used, something which is very like the agreement to which the learned Judge there refers. It is as follows:

"UNCONSTITUTIONALTY OR INVALIDITY OF LAW REQUIRES READJUSTMENT OF PREMIUM RATES."

"*Condition F.*—If the New York Workmen's Compensation Law shall be declared invalid or unconstitutional, in whole or in part, by the judgment of the court of last resort, the premium rates provided by this policy or any endorsement hereon, shall apply until the date of such judgment, and the Company shall immediately readjust the premium rates provided by this policy subject to the approval of the Superintendent of Insurance so as to equitably reflect the changed conditions."

This, it seems to me, is tantamount to an agreement between parties that premiums shall be paid on the one hand and compensation losses paid on the other, up to the time when the Workmen's Compensation Law shall have been held unconstitutional in whole or in part, notwithstanding the invalidity of the law, just as in the case referred to in 165 Appellate Division. I think the parties to this contract of insurance definitely agree that it should be treated as valid for all purposes and covering all employees of the assured up to the time, if ever, when it should be declared invalid in whole or in part, and that, from and after that date, such adjustment should be made as would exclude employees not covered by the act as construed by the courts. There can be little doubt that the insurance carrier here agreed to hold the insured harmless from all claims up to the time when the law was finally adjudicated, on the theory already referred to and under the provisions of subdivision 1 of section 54 of the Compensation

Law embodied in the policy, I think the Commission may, and should, give the injured workman a protection under the policy similar to that given the employer. The matter thus turns upon the construction of the insurance contract rather than constitutional law. If the policy is held to cover both employer and employee up to the time when the Supreme Court of the United States held that maritime operations were not covered by the New York law, and is then cancelled pro-rata as of that date, it certainly gives to each party exactly what was contemplated when the contract was made, namely, to the insurance company its full premium of insurance for the period covered, and to the insured his complete coverage under the act. It is to be noted also that the claimant when she made her claim for compensation, which has been accepted and acted upon by the insurance carrier, executed the following assignment of every cause of action which she had for the death of her son:

"I hereby agree to accept the compensation awarded by the State Workmen's Compensation Commission in lieu of any other right or cause of action which I may have against any person, firm or corporation, in consequence of such accident; and, in consideration, if any, when awarded, I hereby assign and set over unto the State Workmen's Compensation Commission, for the benefit of the State Insurance Fund, if compensation be payable therefrom and otherwise to the person or association or corporation liable for the payment of such compensation, all my right, title, and interest, if any, in such cause of action for such injury, loss or damage against any person, firm or corporation."

Not only, therefore, have both parties to the insurance contract placed themselves in a position where they have agreed to treat it as giving complete coverage to all employees up to May 21, 1917, but the claimant has transferred, in consideration of receiving compensation, her entire cause of action to the insurance carrier for the purpose of allowing it to recoup itself from any third party who may be liable, and this being accepted by the insurance carrier, is an added reason for holding that the intent of the parties, as well as the purpose of the statute as outlined above, should be carried out, and I advise that an award be made bringing the compensation up-to-date and continuing the case.

Such a decision may necessitate a reconsideration of some cases decided immediately after the Supreme Court decision and before the situation had been carefully analyzed, but that should not deter us from now correcting the error if one has been made.

7. *Return of premiums.*—Following the United States Supreme Court's reversal of the Jensen and Walker awards certain employers engaged in admiralty pursuits applied to the State Industrial Commission for return of premiums paid by them into the State Insurance Fund. The Commission declined to make such refund for reasons similar to those which led it to refuse rescindment or denial of awards in admiralty cases occurring before the reversal. Commissioner Lyon's opinion, upon

which it based its action, reviews the compensation law's provisions and continues as follows:

MATTER OF IRON STEAMBOAT CO. OF NEW JERSEY, S. D. R., vol. 14, p. 634, Bul., vol. 3, p. 45, Sept. 20, 1917, *in part*.

It is, therefore, quite evident that it was entirely optional with the petitioners to insure in the State Fund, in a stock company, in a mutual association, to carry their own insurance, or to stand on their legal rights on the theory that the statute was unconstitutional as to them, if they felt that such a position was preferable, and refuse to insure at all. They chose of their own volition to apply to the State Insurance Fund for policies of insurance. While this was optional with the petitioners, the State Insurance Fund had no option whatever, provided the petitioners were ready and willing to pay the regular rate of premium, to refuse to issue the policies. Had these applications for insurance been properly made to the State Fund with a proper tender of the regular premiums, the Commissioners, as the administrators of the State Fund, could no doubt, on their refusal to issue the policies, have been compelled by mandamus to do so. Having issued the policies, the Commissioners were equally bound on the presentation of proper claims for compensation, accompanied by convincing proof, to make awards, and equally if they had refused to do so, could have been compelled by court action to perform that duty. Having made the awards, I suppose there is no question but that they could equally have been compelled, as administrators of the State Fund to make payments under those awards. These premises are certainly sound, provided the law is constitutional.

For nearly three years it was the declared law of the State of New York that the Workmen's Compensation Law was constitutional as regards the employers of labor on navigable waters of the United States. The State Industrial Commission and the manager of the State Fund during that period of three years, in issuing policies, requested by these petitioners and making and paying awards thereunder, therefore, but performed the duties incumbent upon them by their official positions and in accordance with the law as declared by the highest courts of the State. In so doing they have received many thousands of dollars of premium, which they could not under the circumstances have refused. The State Industrial Commission has made awards of many thousands of dollars and the State Fund has paid many thousands of dollars in awards and has set up adequate reserves in very large sums to carry losses so insured to maturity. Not only would it be impossible as a practical matter to recover these awards which have been paid as a matter of fact, because the funds have been dissipated by the recipients of them, but the statute expressly provides that awards once paid cannot be recovered. While it is true that the actual payments made under the policies issued to these petitioners have not been large, it is equally true that in other cases precisely similar payments have already been made aggregating much more than the total premiums received, this being necessarily so where the carrying of risks is made an insurance problem, the overplus received on one policy being used to make up the under-payment made under another.

It is quite manifest that under these circumstances, to comply with the demand of these petitioners would very seriously impair the financial responsibility of the State Fund, if it did not entirely destroy it. If these petitioners are entitled to the relief which they demand, then, of course, every other insurer in the State Fund in like situation can recover all his premiums not actually expended to pay losses, leaving the losses which have exceeded the premiums received as a dead burden upon other insurers in the State Fund.

The precise question here presented seems to have been passed upon by the Appellate Division of the First Department in the case of *The New Amsterdam Casualty Company v. Olcott*, 185 A. D. 603. In that case the plaintiff had issued a compensation policy to the defendant as receiver, but had received only a portion of the premium. While a portion of the premium was still unpaid, the compensation law under which the policy had been issued was declared unconstitutional by the Court of Appeals in the case of *Ives v. The South Buffalo Railroad Company*, 201 N. Y. 271. Suit was brought after the decision of the Ives case to collect the balance of premium, and the defendant pleaded, as the claimants do here, that the law having been declared unconstitutional, there was no liability to insure against and that the contract of insurance was without consideration. The court in ordering a judgment for the plaintiff said, among other things:

"I think the defendant has misapprehended the meaning of the term 'risk' upon which the question at issue depends. If properly insured against fire turns out to have been destroyed before or to have had no existence at the time the policy was written, clearly no risk ever attached, and the insurer could not claim to have given any consideration for the premium reserved. But here the risk insured against attached at the time the policy was issued and continued until the policy expired, because during all of that period the defendant rested under the possibility of being cast in damages in the event that accidents such as those insured against had happened. The fact that thereafter the act was held to be void did not destroy the risk — *qua* risk — which existed while the act was in force."

This reasoning seems to be unanswerable. In the present case not only has the State Fund carried the risks for nearly three years and paid all outstanding claims, but it now stands ready, having cancelled the policies pro-rata as of May 21, 1917, the day when the law was declared unconstitutional as to the petitioners, to carry all losses arising prior to that date to their maturity. This is manifestly the fair and honorable thing to do, because it gives the petitioners exactly what they purchased and treats every other insurer in the State Fund, who is in like condition with these petitions, in precisely the same way, and this it seems is in exact accord with the reasoning in the *New Amsterdam Casualty Company* case. Moreover, it is not clear that these companies did not have *some* employees for whom they could be compelled, even since the United States Supreme Court ruling, to cover by compensation insurance. If this be so then on the petitioner's own theory there was a consideration for the premiums paid.

None of the cases cited by petitioners are in point. In none of them had the position of the parties so altered, as to make it impossible to place them *in statu quo ante*. Even if petitioners had not received full consideration for their payments, as they unquestionably did, it is manifestly impos-

sible to retrace all the steps taken by the State Fund during the nearly three years when, by the declared law of the State, the coverage of petitioners was complete, and payments under many policies were necessarily made.

There is another reason for denying the application of the petitioners and that is, that the money which they now seek to recover was paid under a mistake of law—a mistake,, it will be noted, made by both the petitioners and the manager of the State Fund. Following a like mistake made by the Appellate Division and the Court of Appeals. I suppose there is no rule of law better settled than the one which rests upon the doctrine that courts will not relieve litigants from mistakes of law, the theory being that every one knows the law, and on this theory it must be held that the petitioners here paid these moneys into the State Fund knowing perfectly well that they were under no legal obligation to do so and that the payments therefore having been made voluntarily could afford no basis for a demand of a refund of the moneys paid. No protest accompanied the payment nor had the Commission instituted any proceeding to either compel the petitioners to insure or to collect the penalty for not insuring. I, therefore, advise that the application of the petitioners be denied. I do this all the more readily because, as already stated, such denial works out absolute and unqualified equity and justice not only to these petitioners, but to all other insurers in the State Fund.

8. *Appellate Division decisions relative to jurisdiction and estoppel.*—In deciding ten cases, the Appellate Division on March 7, 1918, handed down a sweeping opinion contrary to the above views of the Commission. The ten cases involved injury to longshoremen on piers or docks, *Anderson v. Johnson Lighterage Co.*, Case No. 3728, *Tacoletti v. McQuade Stevedoring Co.*, File No. 35593; to a foreman on a dock supervising the unloading of rock from a vessel, *Keator v. Rock Plaster Mfg. Co.*, Death Case No. 55313; to carpenters temporarily engaged at their vocation aboard vessels, their employers being not the vessel owners but independent contractors, *Coakley v. Kirkham Co.*, File No. 9670, *Doey v. Rowland Co.*, Death Case No. 6079; to captains aboard their vessels, *Anderson v. Chadwick Co.*, Death Case No. 401, *Meyers v. Dickson & Eddy*, Death File No. 552; to deckhands on steamers, *Sullivan v. Hudson Navigation Co.*, Death Case No. 30089; *Lentinni v. New England Steamship Co.*, Claim No. 21295, Nov. 1, 1917; and to a chief engineer on a steamboat, *Belknap v. Central Hudson Steamboat Co.*, Death File No. 21326. In all of these cases the Commission had made and sustained awards, except in the Belknap case which appears to have been one of the cases in which it rescinded award at the car-

rier's request shortly after the United States Supreme Court's decisions. The Appellate Division affirmed the Belknap ruling and reversed every one of the other nine rulings. In so doing, it held that accidents on docks or piers, accidents on navigable streams, and accidents to employees of independent contractors casually engaged in vessel construction or repair work, as well as accidents to seagoing men proper aboard vessels and upon harbor waters or high seas came within admiralty jurisdiction, to the exclusion of the Workmen's Compensation Law, and that the acquiescence of employers and insurance carriers in awards made prior to the United States Supreme Court's decisions declaring admiralty law exclusive did not constitute estoppel or waiver in view of such decisions. Two justices dissented from the majority's opinion as to six of the cases on the ground that the insurance carriers had not adduced evidence at the Commission's hearings to show that the accidents happened upon navigable waters, the accidents occurring upon docks and piers being clearly compensatable. The Court of Appeals affirmed the reversal orders in *Louis Anderson v. J. L. Co.* (No. 48) and the Doey and Keator cases, June 4, 1918. It is well to repeat that legislation has rendered this decision purely academic as concerns all admiralty accidents subsequent to October 6, 1917, the date of the act of Congress, or at least subsequent to April 17, 1918, the date of the New York re-enactment. The texts of the majority and minority opinions are as follows:

SULLIVAN V. HUDSON NAVIGATION CO., and other cases,—App. Div.—, Mar. 7, 1918.

WOODWARD, J.: All of the above cases involve the question of the jurisdiction of the State Industrial Commission to make the awards in question, and some of them involve the problem of estoppel or waiver on the part of the insurance carriers. It is conceded that the jurisdictional question involved is close, and it has been thought proper to dispose of them all together, that all of the matters may be presented upon a single determination.

In *Matter of Belknap* (No 34), the State Industrial Commission has refused an award in a case which comes within the letter of the statute, on the ground that the accident occurred on board a steamboat plying the waters of the Hudson river, a navigable stream, and that the case, therefore, fell within the exclusive jurisdiction of admiralty. No serious question is raised that the appellant is entitled to a reversal, unless the conclusion is reached that the Commission is correct as to the question of jurisdiction, so that this case may be passed for the present, as it must follow the disposition of the underlying question in all the other cases.

In *Matter of Sullivan v. Hudson Navigation Company* (No. 26), and *Matter of Anderson v. C. W. Chadwick & Company* (No. 39), there was an accident upon a steamboat upon navigable waters, as in *Matter of Belknap* (*supra*), and in the *Sullivan* case the Commission, after suspending action, subsequently reinstated an award to the claimant upon the theory that as the matter was before the Commission with the consent of the insurance carriers the original award might be sustained on the ground that the question of jurisdiction was not raised in the proceeding, and, therefore, was to be deemed waived. Substantially the same situation prevails in the *Anderson* case (No 39).

Assuming for the present that the accidents, which occurred on ship-board on navigable waters, were within the exclusive jurisdiction of admiralty courts, did the fact that the proceedings before the State Industrial Commission were consummated before the decisions of the United States Supreme Court were known, have the effect of waiving the rights of the insurance carriers and employers, or of estopping them from raising the question of jurisdiction? It is not suggested that any objection to the jurisdiction of the State Industrial Commission was raised when the cases were before that body for determination, and it was only after the decisions of the Supreme Court in the cases of *Southern Pacific Co. v. Jensen* (244 U. S. 205) and *Olyde Steamship Co. v. Walker* (Id. 255) that the Commission itself began to question its power, and this was followed by the insurance carriers and employers challenging the action. The question is thus fairly presented in these two cases whether acquiescence in the action of the State Industrial Commission, at the time the matters were under consideration in that body resulting in awards to the claimants, renders such action conclusive, either upon the theory of waiver or estoppel.

It is true, of course, that persons and corporations may waive in some matters, and upon some occasions, a constitutional or statutory provision in their favor (*Mayor of New York v. M. R. Co.*, 143 N. Y. 1, 27, and authorities there cited), but this power is subject to the limitation that it must not be against good morals or sound public policy. (*Matter of Petition of N. Y. L. & W. R. R. Co.*, 98 N. Y. 447, 453.) The public policy of the State is evidenced in legislative and constitutional enactments, and is defined and applied in judicial decisions. (*Matter of Lampson*, 161 N. Y. 511.) When that public policy has been declared parties cannot make a binding contract, by waiver, estoppel, or by mutual agreement, which is in violation of such declared law or public policy. (*Sternaman v. Metropolitan Life Ins. Co.*, 170 N. Y. 13, 19.) Whatever is forbidden by law, either directly or by necessary implication, cannot be legally done; in law it has no standing whatever and is void. And a "void act is no act." (*People v. Witherbee*, 178 App. Div. 368, 370, and authorities there cited; *Davidson v. Ream*, Id. 362.)

This rule is specially emphasized as it relates to the powers of courts or bodies charged with the discharge of particular duties. The powers or jurisdiction cannot be extended by consent. The rule is well established that "when a party interposes the judgment of a court as the foundation of his title or claim, the want of jurisdiction in the court to render the judgment may always be set up against it when sought to be enforced, or when any benefit is claimed under it by the party in whose favor it was rendered,

or by any one claiming under him. It is always open to the party against whom the judgment is offered to prove the want of jurisdiction in the court, even though such proof contradicts recitals in the record. * * * Whenever, therefore, a judgment is interposed as a claim or the foundation of a title, the party against whom it is offered may show that it is void, and, therefore, that the supposed record is not in truth a record at all. No court or judicial officer can acquire jurisdiction by the mere assertion of it, or by erroneously alleging the existence of facts upon which jurisdiction depends. If the court had no jurisdiction, it had no power to make a record, and the supposed record is not in truth entitled to the character of a judgment." (*O'Donoghue v. Boies*, 159 N. Y. 87, 98.) In harmony with this holding, and relying upon it for authority, this court in *Davidson v. Ream* (178 App. Div. 362) held squarely that the plaintiff, who had invoked the jurisdiction of the court, was not estopped to question its jurisdiction, and to have a judgment, nominally in her favor, set aside. In that case we pointed out that the court was without jurisdiction of the subject matter, and say: "The lack of jurisdiction makes the original judgment and the record of its action utterly void and unavailable for any purpose, and while the plaintiff might rely upon this situation, she is at liberty by a more direct and summary proceeding to have the judgment set aside and vacated, and this right is not affected by the fact that this application is made before a different justice from the one who presided at the time the judgment was granted. (*Kamp v. Kamp*, 59 N. Y. 212, 216-218, and authorities there cited.) The application in the case now before us is not to reverse the judgment of the court, or to consider the merits of the controversy, but to prevent the enforcement or recognition of a void judgment (*Kamp v. Kamp*, *supra*), and the fact that the plaintiff was, in form at least, the moving party in the original action does not estop her from invoking the aid of this court. Wherever there is want of authority to hear and determine the subject matter of the controversy an adjudication upon the merits is a nullity and does not estop even an assenting party. (*Matter of Walker*, 136 N. Y. 20, 29, and authority there cited; *Risley v. Phoenix Bank of City of New York*, 83 id. 318, 337; *O'Donoghue v. Boies*, 159 id. 87, 98, 99 and authorities there cited.)" And the rule is that the judgment may, under such circumstances, be attacked directly or collaterally whenever it comes in question. (*O'Donoghue v. Boies*, *supra*, 99.) Clearly, if a party who has invoked the aid of a court of general jurisdiction, and has had a judgment in her favor, may be heard to question the jurisdiction of such court over the subject matter, and may have the judgment set aside as void, it cannot be held that the insurance carrier and employer are estopped to question the jurisdiction of a statutory tribunal when it has been judicially determined that such tribunal has no jurisdiction of the controversy. The insurance carrier and employer did not invoke the jurisdiction; it was assumed by the State Industrial Commission, under the letter of the Workmen's Compensation Law, and it now having been fully determined by the United States Supreme Court that under the circumstances of this case the exclusive jurisdiction vests in the United States District Courts, exercising admiralty jurisdiction, we are of the opinion that these two cases here specially considered should be reversed, and that *Matter of Belknap* (No. 34) should be affirmed.

So far, therefore, as the jurisdictional question is involved in any of the above cases, we are of the opinion that it cannot be waived, and that the conduct of the parties cannot work an estoppel which will give validity to an award of the State Industrial Commission where it was without jurisdiction of the subject matter. A party may, by appearing, waive an objection to the jurisdiction of his person, but he cannot confer authority upon a court or other body, which is denied by law, by a failure to offer the objection seasonably. Where the body acts contrary to law and without power or jurisdiction, the party aggrieved may raise the question at any time when his rights are invaded; he may challenge the jurisdiction. Where there are facts before the court for determination on which the question of jurisdiction depends, of course the adjudication may be reviewed only on appeal. (*O'Donoghue v. Boies, supra*). In such a case it is necessary to raise the question at a proper time and in a proper manner, but the question of whether the body acted within the jurisdiction or power granted, and which impliedly forbade the exercise of any other power than that granted, may always be asserted and raised, directly or collaterally, either from an inspection of the record itself when offered in behalf of the party claiming under it, or upon extraneous proof which is always admissible for that purpose. (*O'Donoghue v. Boies, supra*, 99.) The fact that appellate courts, confined to the review of law questions, will not consider a constitutional question which was not presented in the court below, as in *Valley S. S. Company v. Wattawa* (244 U. S. 202), does not change this rule. It is the duty of such court to review only the actual determinations of the court below, not to take original cognizance, and the fact that the party may subsequently raise the question of jurisdiction fully protects his rights. It matters not how complete the adjudication may be, if the court was without power or jurisdiction its judgment or decree is without avail. This distinction runs through all the cases, reaching to the powers of municipal or other corporations. Mere irregularities, not going to the jurisdiction of the body acting, may be disregarded, or their effect limited; but where they reach to the dignity of jurisdictional defects they are fatal. (*Moore v. Mayor*, 73 N. Y. 238, 248, 249, and authorities cited.)

In *Matter of Doe*y (No. 38) and *Matter of Coakley* (No. 35) we have cases in which the employers were corporations engaged in making alterations or repairs upon ocean-going ships to fit them for carrying particular cargoes, and the employee was found dead in the hold of the vessel in one instance, and was injured in the other. Awards have been made in both cases, and the only separate question necessary to be considered is whether these men were within the exclusive jurisdiction of admiralty in the performance of their work; whether their contracts of employment were maritime in their nature. It is true that these men were what might be called carpenters by trade, and they were engaged in carpenter work at the time of the accidents, but they were doing work looking to the fitting of vessels to carry the cargoes offered; they were doing work preliminary to the actual loading of the vessels, and no good reason suggests itself to our minds why we should attempt to distinguish between this class of labor, performed on shipboard in connection with the taking on of cargoes, and the work of longshoremen in actually placing cargo. The work of a stevedore has been conclusively determined to be maritime in its nature, and

his contract of employment a maritime contract, and that injuries received in connection with the performance of such contract on shipboard were likewise maritime; and that the rights and liabilities of the parties in connection therewith are matters clearly within the admiralty jurisdiction. (*Southern Pacific Co. v. Jensen*, 244 U. S. 205, 217, and authority there cited.) It is not the particular kind of work which the person is qualified to perform, or the fact that he is performing a particular kind of work, which determines the exclusive jurisdiction of a court of admiralty; it is the character of the contract—whether it has reference to maritime service or maritime transactions. (*Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 62.) In the case of torts, the mere fact that the tort occurs on board of a ship located in navigable waters, is sufficient (*Atlantic Transport Co. v. Imbrovek*, *supra*) and matters of contract in connection with such employment are likewise within the rule, as we have already seen. Both of these cases sound in tort; they are cases in which courts of common law and of admiralty had concurrent jurisdiction prior to the enactment of the Workmen's Compensation Law, and we are clearly of the opinion that the State Industrial Commission, which has no common-law jurisdiction, has no power to deal with these cases. In *Atlantic Transport Co. v. Imbrovek* (*supra*), the employer was, as in this case, a corporation employing persons to aid in the loading and unloading of ships at their docks, and the court held that admiralty had jurisdiction of the cause of action against such employers, although the work was being done for the steamship company, and the accident grew out of such work. If the court in that case had jurisdiction of the employer, it would have jurisdiction in the cases now under consideration, and, having such jurisdiction, the State Industrial Commission cannot have it, and the awards should be reversed.

In *Matter of Anderson* (No. 48), *Matter of Keator* (No. 52) and *Matter of Taconetti* (No. 50) the injured employees were at work upon the wharf, and, if the jurisdiction depended upon the rule in cases of torts, it might be that there would be some question as to whether the admiralty court would have jurisdiction. The authorities seem to hold that in matters of tort the location is controlling; that to give jurisdiction the tort must have been committed upon the high seas or navigable waters, and it has been held that docks and piers were not a part of the navigable waters, but were rather extensions of the land. The difficulty is, however, that section 9 of the Judiciary Act of 1789 (1 Stat. 76, 77) gives the District Courts of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it," and this is still the law. (*Southern Pacific Co. v. Jensen*, *supra*.) "The work of a stevedore in which the deceased was engaged is maritime in its nature; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were clearly matters within the admiralty jurisdiction." (*Southern Pacific Co. v. Jensen*, *supra*, 217.) In other words the admiralty court has exclusive jurisdiction of maritime contracts, except in so far as the parties have common law remedies which they may assert, and if an employee under a maritime contract receives an injury he must look either to the common law or to

the admiralty jurisdiction for his remedy. Whether the Workmen's Compensation Law has operated to take away the common law remedy of persons employed in loading and unloading ships under maritime contracts it is not now necessary to consider it; it is enough that the remedy which the Workmen's Compensation Law attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction. (*Southern Pacific Co. v. Jensen*, *supra*, 218.) In such a situation the remedy must be found elsewhere than in the Workmen's Compensation Law, and that is the question presented here. Maritime contracts must be enforced, and the rights of parties determined under them, either in admiralty or in courts of common law; they cannot be disposed of by a tribunal unknown to either of these jurisdictions.

While there are some expressions in *Southern Pacific Co. v. Jensen* (*supra*), which seem to intimate that the case is intended to be limited to vessels engaged in interstate or foreign commerce, we think a careful reading of the opinion does not warrant such a limitation, especially in the light of the previous adjudications of that court. In *The Hine v. Trever* (4 Wall. 555, 563), the court, in speaking of *The Genesee Chief* (12 How. 457), say that that case overrules all the previous decisions limiting the jurisdiction to tide-water, and "asserts the broad doctrine that the principles of that jurisdiction, as conferred on the Federal courts by the Constitution, extend wherever ships float and navigation successfully aids commerce, whether internal or external," and in *Matter of Garnett* (141 U. S. 1, 15), the court, after citing many cases, say: "In some of the cases it was held distinctly that this jurisdiction does not depend on the question of foreign or interstate commerce, but also exists where the voyage or contract, if maritime in character, is made and to be performed wholly within a single state," and quotes Mr. Justice Clifford as saying that "difficulties attend every attempt to define the exact limits of admiralty jurisdiction, but it cannot be made to depend upon the power of Congress to regulate commerce, as conferred in the Constitution. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants."

If the Workmen's Compensation Law had given the right which the statute now gives, and had provided a common law remedy, the difficulty here presented would not exist. (*Dougan v. Champlain Transportation Co.*, 56 N. Y. 1, 5.) By giving a right unknown to the common law, and by providing a remedy equally strange to our underlying law, the subject matter of contracts of a maritime nature is left to the exclusive jurisdiction granted by law to courts of admiralty, and the awards made by the State Industrial Commission are without jurisdiction, and void.

All of the awards made must be reversed, and all of the orders which have been made denying relief to the appellants, must follow this disposition; and in *Matter of Belknap* (No. 34) the determination of the Commission should be affirmed.

All concurred, except JOHN M. KELLOGG, P. J., who dissented (with an opinion in which COCHRANE, J., concurred) in each of the cases except the *Sullivan* case, the *Belknap* case and the *Emily Anderson* case, in which latter cases he concurred in the result.

John M. Kellogg, P. J. (dissenting in part): Concededly the Workmen's Compensation Law is valid, and its terms, in effect, enter into every contract of employment embraced within its various groups. (*Matter of Post v. Burger*, 216 N. Y. 544.)

The State Industrial Commission has general jurisdiction over all questions of compensation, and when a claim apparently within the law is presented to it, and the employer and insurance carrier are duly notified of it and of the hearing thereof, the Commission has general jurisdiction of the subject matter and of the parties. If in exercising its jurisdiction it makes mistakes, overlooks certain facts or rules of law, the remedy is by appeal.

The determination of the Commission is more easily sustained by the general presumption created by the statute that in a proceeding to enforce a claim for compensation, in the absence of substantial evidence to the contrary, the claim comes within the provisions of that Act. (Section 21.)

The determination of the Commission is also aided by section 20 of the law, which provides: "The Commission shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. * * * The decision of the Commission shall be final as to all questions of fact and, except as provided in section 23, as to all questions of law." Section 23 provides: "An award or decision of the Commission shall be final and conclusive upon all questions within its jurisdiction as against the State Fund, or between the parties, unless reversed or modified on appeal therefrom as hereinafter provided."

It is unprofitable to attempt to apply to proceedings under this law the rules relating to actions and other proceedings in court, for one of the objects of the law was to take claims of injured employees from the courts where determination depends somewhat upon technicality and fixed rules of law and practice, and to provide a summary remedy where matters of substance only should be considered and speedy substantial justice administered in an informal way. Section 68 of the law provides that the Commission "in making an investigation or inquiry or conducting a hearing, shall not be bound by the common law or statutory rules of evidence, or by technical or formal rules of procedure except as provided by this chapter, but may make such investigation or inquiry, or conduct such hearing in such manner as to ascertain the substantial rights of the parties." The provisions above referred to not only relate to and govern the action of the Commission, but continue at all times, and govern the actions of any court which is called upon to review or consider in any way the proceedings of the Commission.

An employment may fall within one of the groups named as hazardous employments; nevertheless there may be employments embraced within that group which are practically exempted from the law and for which compensation cannot be made. For example, the operation of a stationary engine is within group 22 as a hazardous employment; but if the engine is operated by the farmer who owns it, and his farm hands, in doing his ordinary farm work, such as threshing and sawing wood, etc., the operator is not within the benefits of the law because farm laborers and domestic servants are excepted therefrom by subdivision 4 of section 3. Longshore

work, including the loading or unloading of cargoes "or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage," is a hazardous employment within group 10; but if a stevedore, or a longshoreman who is performing the work of a stevedore, is actually engaged in stowing away the cargo upon a vessel navigating public waters, he is not within the protection of the law. (*Southern Pacific Co. v. Jensen*, 244 U. S. 205; *Clyde S. S. Co. v. Walker*, id. 255; *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52.) Such work, being performed upon navigable waters in contra-distinction to work upon the dock or upon land, is within exclusive admiralty jurisdiction.

A careful perusal of the cases cited shows that there is more or less uncertainty as to just what constitutes an admiralty or maritime claim. The cases, however, establish that the exact location of the performance of the work, that is upon navigable waters or upon a ship in use in navigating such waters, is the controlling feature in case of an injury to a workman. The effect of these cases, when attempted to be used to destroy or limit this beneficial statute, must be strictly construed and confined to the actual point decided by them or necessarily included in the spirit of the decision. The mere fact that an injury takes place upon a boat, at a public dock, does not show conclusively that it was a matter within the admiralty jurisdiction. It must arise from a matter pertaining to the navigation of the boat; if we assume that the boat upon which the accident occurred had never entered upon navigation, but was being fitted for its initial trip, the work upon it would not be within admiralty jurisdiction.

A claim is presented to the Commission showing that an employee was injured while operating a stationary engine. The employer and insurance carrier are summoned before it and the evidence taken. The facts alleged in the claim are not disputed, but it does not appear just what kind of work the engine was doing at the time of the accident; neither party apparently was interested in that question at the time. An award made upon that record is not void by proof thereafter that the engine at the time was engaged by the owner in performing his ordinary farm work, or that the engine was in operation upon a steamboat navigating public waters. Those matters should have been proved before the Commission. The evidence before the Commission, and the presumptions applying to the case, fully justified the award when made and, as we have seen, the determination is final unless reversed or modified on appeal. The insurance carrier and employer had their day in court, and if they were within an exception to the law they should have proved it.

Upon the other hand, if we assume that it appeared before the Commission that the engine was in fact engaged by the owner in doing his ordinary farm work, and was used solely for that purpose by the farm hand who was injured, or that it was on board a ship navigating public waters, the Commission would have no power to go further with the inquiry, as the claim clearly would not be within its jurisdiction. In the first supposed case the petition upon which the hearing was had, and the evidence aided by the presumptions in favor of the claim, show that it was a matter properly before the Commission. In the other supposed case, it appeared that the Commission had no power to make inquiry as to such matter. A court, or body acting judicially, after it has acquired jurisdiction

admiralty jurisdiction that the insurance carrier and the employer would bring that fact to its attention. The question, under the then state of the decisions, was not deemed material, and it is probable that for that reason no inquiry was made. The fact, however, that the insurance carrier did not prove its defense did not deprive the Commission of the jurisdiction which the claim filed gave it to hear and decide the claim.

The insurance carrier, after having paid the awards for a longer or shorter time without objection, asks to have them vacated upon proof to the Commission that the accident happened upon navigable waters and that therefore the employees were not within the protection of the Workmen's Compensation Law. The application was directed to the conscience of the Commission. It might grant it if in its opinion, under the circumstances, it was just to do so; otherwise it was its duty to deny the application. In the *Keator* case, as we have seen, his employer was engaged in an employment concededly hazardous under the act. In all of the other cases the insurance carrier, in making the application, claims that the employers were not within the provision of the law and that they required no insurance, and that any instance obtained by them was unnecessary and unenforceable. The employer engaged in a hazardous business must insure or qualify as a self-insurer, and by insuring he relieves himself from all claims of negligence on account of the injury and at the same time obtains compensation for his workmen to whom he owes an obligation of protection in a greater or less degree. The insurance company was under no obligation to issue a policy; it sought the risks and assumed them voluntarily upon the theory that by insuring these employers whose business it claims was upon boats navigating the public waters it would do a profitable business. The premium is in its pocket; the loss insured against has occurred and a just award has been made. The award does not charge it with any liability except such as it voluntarily assumed and for which it has been fully compensated. In obtaining the premium the company overreached the employer and the employee by apparently giving them nothing for the premium, or, if acting honestly, was proceeding under a mistake of law; if it has made a mistake of law, it should not be relieved from the effect of it as long as it has been paid fully for taking the risk. If it intentionally overreached the employer and the employee, by selling them insurance which it knew to be worthless, the courts will not be solicitous to aid it in such a scheme. The position of the company is technical and unjust in the extreme, and while it may be said that some of the reasoning here is technical, it is reasonably fair to offset technicality against technicality in the interest of justice. As a matter of justice, and perhaps of technical reasoning, the same rules should apply to all the cases, aside from the *Keator* case, because the result sought to be reached by the insurance company leads to a gross injustice. But we have seen that in the *Sullivan* case and in the *Bernard Anderson* case the awards are void upon their face, and the Commission having made void awards should vacate them. In the other cases we agree with the Commission that justice did not require the vacating of the award. We have seen that the insurance carrier voluntarily entered into the insurance as a good stroke of business for itself. Its policy provides that if the law shall be held unconstitutional or invalid in whole or in part by the judgment of the court of last resort, the premium rates provided by the policy shall apply

until the date of such judgment and that the rates thereafter shall be adjusted so as to reflect the changed condition. That language applied to these cases means that notwithstanding the declared invalidity of some parts of the law, the premium for carrying that risk shall belong to the Company, not probably as a gift, but as something which it has earned, which calls forth the fair inference that the policy contemplates payments for accidents which have happened up to the time when the invalidity is declared.

If the payment of the award should fall upon the employer at any time, the determination of this appeal is without prejudice to his right to bring the matter again before the Commission. (*McNally v. Diamond Mills Paper Co.*, 9 Departmental Rpts. 352.)

I, therefore, favor a reversal in the *Sullivan*, the *Belknap* and the *Bernard Anderson* cases and an affirmance in each of the other cases. COCHRANE, J., concurred.

Determination in each case reversed and the awards annulled, except in the *Belknap* case, where the determination is affirmed.

In deciding with opinion the three cases appealed from the Appellate Division, the Court of Appeals has held (1) that admiralty or maritime law covers longshoremen and others injured on piers or docks while engaged at lading or unlading work and carpenters injured on vessels while temporarily plying their vocations, their employers being not the vessel owners but independent contractors; and (2) that the employer and insurance carrier can at any time question the jurisdiction of the Commission in any accident case occurring under admiralty or maritime jurisdiction prior to the reversal of the *Jensen* and *Walker* awards by the United States Supreme Court. In writing for the court, Judge McLaughlin has based brief opinions in the *Anderson* and *Keator* cases upon a lengthy opinion in the *Doey* case. The opinions are as follows:

DOEY v. HOWLAND Co., — N. Y. —, June 4, 1918.

MCLAUGHLIN, J.: On the 31st of July, 1916, Patrick Doey, an employee of Clarence P. Howland Co., Inc., while engaged in making repairs on the steamship *Normandie*, lost his life by falling down a hatchway. His widow, on behalf of herself and infant children, filed a claim with the state industrial commission, under chapter 41 of the Laws of 1914, for compensation for his death. The commission recognized the validity of the claim and in March, 1917, made an award directing that the same be satisfied by weekly payments. The employer and insurance carrier acquiesced in the award until May 21, 1917, when the Supreme Court of the United States handed down its decisions in *Southern Pacific Co. v. Jensen* (244 U. S. 205) and *Clyde Steamship Co. v. Walker* (Id. 255) holding that the New York State Workmen's Compensation Law (Laws of 1914, chap. 41), in so far as it applied to contracts maritime in nature, was void, inasmuch as the same was in contravention of article III,

section 2, of the Federal Constitution extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction; also in contravention of section 9 of the Judiciary Act of 1789, continued in Judicial Code of 1911, paragraphs 24 and 256 (36 Statutes at Large, 1091, 1160; chap. 231, Comp. Statutes, 1916, pars. 991, 1213), by which the District Courts of the United States are given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

After these decisions had been rendered the employer and insurance carrier moved to vacate the award, on the ground that the state industrial commission did not have jurisdiction to make the same. The application was denied and an appeal then taken to the Appellate Division, where the determination of the commission was, by divided court, reversed and the award vacated. From this order the industrial commission appeals to this court.

Two questions are presented: (a) Was Doey, at the time of his death, engaged in the performance of a maritime contract? (b) If so, were the respondents, after having recognized the validity of the award by making payments thereon and not appealing therefrom, in a position to question the jurisdiction of the commission?

If the first question be answered in the affirmative, then it necessarily follows from the decisions of the Supreme Court of the United States above referred to, that the commission had no authority to make the award in question. In determining whether a contract be of maritime nature, locality is not controlling, since the true test is the subject-matter of the contract — the nature and character of the work to be done. (*Erie R. R. Co. v. Welsh*, 242 U. S. 303.) In torts the rule is different. There, jurisdiction depends solely upon the place where the tort was committed, which must have been upon the high seas or other navigable waters. (*Atlantic Transport Co. of W. Va. v. Imbrovek*, 234 U. S. 52.) An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. (*Matter of Post v. Burger & Gohlke*, 216 N. Y. 544.) The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for the injuries sustained, or if death results, a certain sum to dependents. These payments are made irrespective of whether or not the employer was guilty of wrongdoing. It is a part of the compensation agreed to be paid for services rendered in the course of the employment.

In the present case, upon the conceded facts, I am of the opinion that Doey was, at the time he met his death, engaged in the performance of a maritime contract. His employer had taken a contract to repair an ocean-going vessel, preparatory to its taking on a cargo of grain. Doey was one of several carpenters employed to make the necessary changes. He was, at the time he was killed, engaged in such work on a steamship then in navigable waters. The contract to make the changes was certainly maritime in its nature. Preparing a steamship to receive a cargo is as much maritime in nature as putting the cargo on or taking it from the ship. Nor was the nature of the contract changed in any way because the contractor did not actually do the work himself, but employed others to do it for him. Doey's contract of employment

was just as much of a maritime nature as was that of his employer. Any doubt that might have existed that an employee of a contractor to load a ship is, while thus engaged, in the performance of a maritime contract, was settled by the decision in *Atlantic Transport Co. of W. Va. v. Imbrovek* (*supra*). There, Mr. Justice HUGHES, who delivered the opinion of the court, referring to the work of a longshoreman, said: "The libelant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew, but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.'" (p. 61.)

In *Southern Pacific Co. v. Jensen* (*supra*) the decedent was an employee of the Southern Pacific Company, a corporation organized under the laws of the state of Kentucky, where it had its principal office. It also had an office at pier 49, North river, New York city. It had a contract to unload a cargo from a steamship lying alongside that pier. Jensen, in the discharge of his duties to his employer, drove on to the steamship an electric truck, where it was loaded with lumber. He then started to drive the truck from the ship and while it was on the bridge connecting the ship with the pier, his head came in contact with a piece of timber and he was killed. The court held, reversing this court, that the New York state industrial commission had no jurisdiction to make the award under the Workmen's Compensation Law of that state, since the contract which Jensen was performing was maritime in its nature.

In *Clyde Steamship Co. v. Walker* (*supra*) the steamship company had taken a contract to unload a vessel. It employed Walker, a longshoreman, to assist in doing the work. While thus engaged he was killed. It was held, on authority of the *Jensen* case, that at the time he received his injuries he was engaged in a maritime contract over which the admiralty courts had exclusive jurisdiction; that the New York state industrial commission had no authority to make the award and that the decision of this court in so holding was erroneous.

In view of these decisions, I am unable to reach a conclusion other than that Doey, at the time he lost his life, was engaged in a maritime contract and if this view be correct, then the industrial commission had no authority to make the award in question. This conclusion necessarily leads to the consideration of the second question.

I am of the opinion that the employer and insurance carrier were in a position to question the jurisdiction of the commission to make the award. The only authority it had to make the award was that derived from the statute. The power thus given was unknown to the common law, as well as the method of procedure. The rule is well settled that a court authorized by statute to entertain jurisdiction in a particular case only, if it undertakes to exercise jurisdiction in a case to which the statute has no application, does not acquire jurisdiction and its judgment or determination when made is a nullity and will be so treated whenever called in question by either a direct or col-

lateral attack. (*Risley v. Phenix Bank of the City of New York*, 83 N. Y. 318; *State of Rhode Island v. Comm. Massachusetts*, 12 Peters, 657.)

The general rule is that lack of jurisdiction to render a judgment or determination may be asserted at any time, and the only exception of which I am aware is where jurisdiction depends upon a question of fact. If that be litigated and determined, then the question is settled by the judgment, which becomes final and conclusive unless set aside by a direct attack or reversed on appeal therefrom. (*O'Donoghue v. Boies*, 159 N. Y. 87; *Ferguson v. Crawford*, 70 N. Y. 253.) In all other cases where there is a lack of authority to hear and determine the subject-matter of the controversy, an adjudication is a nullity and will be so declared at the instance of a party affected thereby. (*Matter of Will of Walker*, 136 N. Y. 20.)

The employer and insurance carrier, therefore, were not, in my opinion, estopped from questioning the jurisdiction of the commission. It had assumed to pass upon a subject over which the Federal courts had exclusive jurisdiction. The fact that the determination of the commission had been acquiesced in to the extent that certain payments had been made thereunder and an appeal had not been taken therefrom, could not prevent either of such parties raising the question at any time they saw fit. This follows from the fact that the determination was a nullity. It bound no one. It was a void determination.

My conclusion is that Doey, at the time of his death, was engaged in the performance of a maritime contract; that the compensation commission had no power to make the award; and that the Appellate Division was right in reversing the determination and dismissing the claim.

The order appealed from should be affirmed, with costs against the state industrial commission. HISCOCK, Ch. J., CHASE, COLLIN and CUDDERBACK, JJ., concur; HOGAN and CARDOZO, JJ., concur in result. Order affirmed.

ANDERSON v. JOHNSON LIGHTERAGE Co., — N. Y. —, June 4, 1918.

McLAUGHLIN, J.: The claimant, at the time he was injured, was a long-shoreman in the employ of the Johnson Lighterage Company, which had a contract to load a vessel in navigable waters. While thus engaged he sustained an injury by slipping on a pier from which the cargo was being taken. He made a claim under the Workmen's Compensation Law and the industrial commission allowed the same. Its reward was reversed by the Appellate Division, the claim dismissed, and the commission appeals to this court.

In my opinion, for the reasons stated by me in *Matter of Doey v. Howland Co., Inc.*, decided herewith, Anderson, at the time he was injured, was engaged in performing a maritime contract. The industrial commission, therefore, had no jurisdiction to make the award; it was properly vacated by the Appellate Division, and the claim dismissed.

The order of the Appellate Division, therefore, should be affirmed with costs against the state industrial commission. HISCOCK, Ch. J., CHASE and COLLIN, JJ., concur; CUDDERBACK, HOGAN and CARDOZO, JJ., dissent. Order affirmed.

KEATOR v. ROCK PLASTER MFG. Co., — N. Y. —, June 4, 1918.

McLAUGHLIN, J.: On the 12th of June, 1917, Alexander Keator was in the employ of the Rock Plaster Manufacturing Company, which had a place of business at One Hundred and Fiftieth street and East river, New York city.

As a necessary incident to the carrying on of such business, rock was unloaded from vessels lying alongside a pier in the East river, and dumped on the dock near the plant. Keator had charge of the unloading of such rock. On the day mentioned, while actually engaged in the performance of his duties in unloading a vessel, then in navigable waters, he was struck by a load of rock being hoisted from the vessel to the dock and killed.

I am of the opinion, for the reasons stated by me in *Matter of Doey v. Howland Co., Inc.*, decided herewith, that Keator, at the time he was killed, was engaged in the performance of a maritime contract.

The order appealed from, therefore, should be affirmed, with costs against the state industrial commission. HISCOCK, Ch. J., CHASE and COLLIN, JJ., concur; CUDDEBACK, HOGAN and CARDOZO, JJ., dissent. Order affirmed.

9. *Vessel used by foreign corporation.*— In *Charlton v. Hilton-Dodge Transportation Co.*, the chief engineer of a tug enroute from Portland, Maine, to New York City injured his hand on board the vessel while it was traversing Long Island sound. He was a resident of New York. The corporation that owned the tug had an office in New York City. His contract of employment was made, and his wages were paid in New York. The tug was enrolled or registered in the custom house of the port of New York and purported by the name painted on its stern to hail from New York City. Notwithstanding these facts the Appellate Division held that the State Industrial Commission did not have jurisdiction of the case because the employer was a corporation of the State of Georgia and hence exempted from the New York Workmen's Compensation Law's operation by its clause, "other than vessels of other states or countries used in interstate or foreign commerce," in group 8 of § 2. This decision was handed down about three weeks before the United States Supreme Court decisions in the Jensen and Walker cases. Congress has since vested the States of the Union with concurrent admiralty jurisdiction in compensation cases. The texts of the majority and minority opinions in the case appear above, page 304.

LIST OF CASES

(Note.—S. D. R. is an abbreviation for State Department Reports; Bul., for Monthly Bulletin of the Department of Labor. The texts of cases are indicated by stars preceding their page numbers.)

	PAGE
Abbonato v. Greenfield's Sons, S. D. R., vol. 9, p. 292, May 31, 1916; 175 App. Div. 958, Nov. 15, 1916.....	247
Adler v. Thomashefsky Theatre Co., S. D. R., vol. 9, p. 348, July 11, 1916.	168
Alpert v. Powers, 181 App. Div. 902, Nov. 14, 1917; 223 N. Y. 97, Mar. 12, 1918	241, *242, *245
Ames v. N. Y. Central R. R. Co., S. D. R., vol. 9, p. 393, Aug. 15, 1916; 178 App. Div. 324, May 2, 1917.....	*122, 253
Amesbury v. Vacuum Oil Co., S. D. R., vol. 9, p. 399, Aug. 15, 1916; 178 App. Div. 945, May, 1917.....	216
Anderson v. Chadwick & Co., Death Case, No. 401, Sept. 20, 1917; — App. Div. —, Mar. 7, 1918	363, *364
Anderson v. Johnson Lighterage Co., Case No. 3728, Oct. 8, 1917; — App. Div. —, Mar. 7, 1918; — N. Y. —, June 4, 1918.....	363, *364, *378
Antonio v. Rodgers & Hagerty, Case No. 44342, Mar. 8, 1917; 179 App. Div. 950, July 3, 1917.....	98
Argento v. International Stevedoring Co., S. D. R., vol. 12, p. 586, Bul., vol. 2, p. 105, Feb. 21, 1917.....	285
Aylesworth v. Phoenix Cheese Co., S. D. R., vol. 3, p. 383, Mar. 9, 1915; 170 App. Div. 34, Nov. 10, 1915.....	90, 110, 111
Backman v. Dwight, Devine & Sons, S. D. R., vol. 9, p. 322, June 14, 1916	230
Bacon v. Townsend & McCarthy, S. D. R., vol. 11, p. 638, Bul., vol. 2, p. 66, Dec. 27, 1916; 179 App. Div. 965, Sept. 25, 1917.....	175
Balcom v. Ellintuch & Yarfitz, S. D. R., vol. 12, p. 553, Jan. 22, 1917; 179 App. Div. 548, Sept. 13, 1917.....	*59
Banchiere v. American Brass Co., Bulletin of General Contractors' Association, vol. 3, p. 223, Oct., 1916.....	257
Banks v. Adams Express Co., S. D. R., vol. 7, p. 471, Mar. 7, 1916; 176 App. Div. 916, Dec. 29, 1916; 221 N. Y. Rep. 606, July 11, 1917. 221, *231	221, *231
Bargey v. Massaro Macaroni Co., S. D. R., vol. 4, p. 373, Apr. 30, 1915; 170 App. Div. 103, Nov. 10, 1915; 218 N. Y. 410, June 16, 1916... 53, 100, 102, 167, 168, 171, 174, 175, 177, 181	53, 100, 102, 167, 168, 171, 174, 175, 177, 181
Barnhardt v. American Concrete Steel Co., Bul. of Gen'l Contractors' Ass'n, vol. 7, p. 224, Oct. 1916.....	*254
Barone v. Brambach Piano Co., 101 Misc. 669, Dec. 6, 1917.....	262, *263
Beaudet v. Metz Sons, Case No. 4047, July 17, 1917; 181 App. Div. —, Dec. 28, 1917; — N. Y. Rep. —, May 28, 1918.....	289
Bechmann v. Oelerich & Son, Claim No. 15907, Oct. 6, 1917; 174 App. Div. 353, Sept. 13, 1916.....	*73, 187

	PAGE
Beckwith v. Bastian Bros. Co., S. D. R., vol. 13, p. 538, Mar. 14, 1917; 181 App. Div. 909, Nov. 14, 1917.....	201, 214
Belknap v. Central Hudson Steamboat Co., Death File, No. 21326, July 21, 1917; — App. Div. —, Mar. 7, 1918.....	363, *364
Bellafore v. Roman Bronze Works, Bul., vol. 2, p. 213, June 19, 1917; 181 App. Div. 910, Nov. 14, 1917.....	240
Benjamin v. Rosenberg Bros., S. D. R., vol. 13, p. 525, Bul., vol. 2, pp. 126, 147, March 13, 1917; 180 App. Div. 234, Nov. 28, 1917; 223 N. Y. Rep. —, Mar. 19, 1918.....	178, 286
Bennett v. Van Motor Co., Bul., vol. 2, p. 231, July 5, 1917.....	212
Benton v. Frazier, S. D. R., vol. 5, p. 392, Aug. 11, 1915; 172 App. Div. 913, Jan. 5, 1916; 219 N. Y. 210, Oct. 31, 1916.....	89
Berg v. Hetzler Bros., Bul., vol. 2, p. 50; 179 App. Div. 551, Sept. 13, 1917; 222 N. Y. Rep. 645, Jan. 22, 1918.....	76, *77
Blaes v. Bliss Co., S. D. R., vol. 9, p. 288, May 26, 1916; 177 App. Div. 370, Mar. 7, 1917.....	*214
Blatt v. Schoneberger & Noble, S. D. R., vol. 7, p. 388, Jan. 21, 1916; 176 App. Div. 924, Dec. 29, 1916.....	213
Bogart v. Lehman, Case No. 3182, Feb. 28, 1917; 179 App. Div. 949, July 3, 1917; — N. Y. —, Dec. 21, 1917.....	175, 179
Borgsted v. Schults Bread Co., Claim No. 43522, Apr. 30, 1917; 180 App. Div. 229, Nov. 28, 1917.....	210, 215, 220, *221, 224, 231
Boslee v. Bache & Co., S. D. R., vol. 14, p. 607; Bul., vol. 3, p. 12, Sept. 5, 1917.....	51, 219, 220
Bowne v. Bowne Co., S. D. R., vol. 9, p. 388, Aug. 15, 1916; 176 App. Div. 131, Dec. 28, 1916; 221 N. Y. 28, May 8, 1917.....	186, *187, *189, 192
Bredow v. Naughtin & Co., S. D. R., vol. 8, p. 437, Apr. 6, 1916; 175 App. Div. 958, Nov. 15, 1916.....	117, 168
Burns v. Products Mfg. Co., Case No. 3278, June 15, 1917; 181 App. Div. 910, Nov. 14, 1917; 223 N. Y. Rep. —, May 14, 1918.....	201, 285
Bylow v. St. Regis Paper Co., S. D. R., vol. 12, p. 526, Jan. 3, 1917; 179 App. Div. 555, Sept. 13, 1917.....	117, *197
Cain v. United Breeders Co., Death File, No. 21072, July 18, 1917; 181 App. Div. —, Dec. 28, 1917; affirmed by C. of A., June 14, 1918.....	89
Caine v. Greenhut & Co., S. D. R., vol. 13, p. 515, Bul., vol. 2, p. 125, March 7, 1917; 181 App. Div. 907, Nov. 14, 1917.....	171, 177, 213
Callow v. Otis Elevator Co., Death Case, No. 7376, Oct. 4, 1917; — App. Div. —, Mar. 6, 1918.....	230
Campanella v. Stola Construction and Building Co., S. D. R., vol. 9, p. 385, Aug. 15, 1916.....	136
Cappadona v. Boulton & Co., Bul., vol. 2, p. 211, June 19, 1917.....	349
Carbone v. Loft, 174 App. Div. 901, June 30, 1916; 219 N. Y. 579, Oct. 24, 1916.....	141
Carey v. Frambro Realty Co., Bul., vol. 3, p. 44, Sept. 20, 1917; — App. Div. —, Mar. 6, 1918.....	113
Carlson v. Ogden Co., S. D. R., vol. 14, p. 655, Bul., vol. 3, p. 49, Sept. 28, 1917; 181 App. Div. —, Dec. 28, 1917.....	*253, 294

	PAGE
Casey v. Borden's Condensed Milk Co., Bul., vol. 3, p. 6, Aug. 13, 1917; 182 App. Div. —, Jan. 18, 1918; argued in Appellate Division, May 8, 1918	212, 230, 237
Casterline v. Gillen, S. D. R., vol. 14, p. 610, Bul., vol. 3, p. 13, Sept. 5, 1917; — App. Div. —, Mar. 6, 1918.....	*114
Casualty Co. of America v. Swett Electric Light & Power Co., 174 App. Div. 825, Nov. 15, 1916.....	*204
Champion v. N. Y. & N. J. Steamboat Co., S. D. R., vol. 14, p. 623, Bul., vol. 3, p. 14, Sept. 11, 1917.....	*356
Champine v. DeGrasse Paper Co., Death File, No. 2581, Nov. 18, 1916; 181 App. Div. 909, Nov. 14, 1917.....	230
Charlton v. Hilton-Dodge Transportation Co., 178 App. Div. 385, May 2, 1917	57, 285, *304, 379
Chludzinski v. Standard Oil Co. of N. Y., S. D. R., vol. 9, p. 397, Aug. 15, 1916; 176 App. Div. 87, Dec. 28, 1916.....	*163, 200
Claremont v. De Coss, S. D. R., vol. 7, p. 463, Mar. 2, 1916; 175 App. Div. 952, Nov. 16, 1916; 220 N. Y. Rep. 671, Mar. 20, 1917.....	*54
Clemens v. Clemens & Grell, Case No. 42660, Mar. 22, 1915; 181 App. Div. 911, Nov. 14, 1917.....	192
Clyde Steamship Co. v. Walker, 167 App. Div. 945, Mar. 1915; 215 N. Y. 529, July 13, 1915; 244 U. S. 255, May 21, 1917.....	320, *348
Coakley v. Kirkham Co., File No. 9670, Sept. 28 1917; — App. Div. —, Mar. 7, 1918	363, *364
Coleman v. Bartholomew, 175 App. Div. 122, Nov. 15, 1916....	83, 168, *193
Collins v. Brooklyn Union Gas Co., S. D. R., vol. 4, p. 440, July 13, 1915; 171 App. Div. 381, Jan. 18, 1916.....	208
Conley v. Hickey, Case No. 6547, Apr. 26, 1917; 181 App. Div. 911, Nov. 14, 1917	161, 197
Conlon v. Selden Motor Vehicle Co., Claim No. 18757, Sept. 11, 1917; 182 App. Div. —, Jan. 18, 1918.....	202, 207
Connolly v. Tucker Electrical Construction Co., Case No. 9217, Apr. 16, 1917; — App. Div. —; S. D. R., vol. 14, p. 716, Bul., vol. 3, p. 119, Jan. 2, 1918; — App. Div. —, May 21 1918.....	290
Cook v. N. Y. C. & H. R. R. Co., S. D. R., vol. 8, p. 469, Apr. 27, 1916; 179 App. Div. 967, Sept. 27, 1917.....	217
Coons v. Endicott, Johnson & Co., S. D. R., vol. 14, p. 565, Bul., vol. 2, p. 203, June 6, 1917; 181 App. Div. —, Dec. 28, 1917.....	220, 240
Corico v. Smith, 97 Misc. 447, Nov., 1916; 178 App. Div. 33, Apr. 4, 1917	*316, *318
Cronk v. Turner, S. D. R., vol. 13, p. 547, Bul., vol. 2, p. 167, Apr. 11, 1917	62, 248
Cummings v. Johnson Construction Co., S. D. R., vol. 9, p. 369, July 19, 1916; 178 App. Div. 942, May 2, 1917.....	79, 137
Cunningham v. Rodgers & Hagerty, File No. 6236, Dec. 5, 1916.....	50
Cutter v. Snavlin, S. D. R., vol. 14, p. 547, Bul., vol. 2, p. 152, Apr. 11, 1917	172, 213
Daly v. Bates & Roberts, S. D. R., vol. 14, p. 618, Bul., vol. 3, p. 9, Sept. 5, 1917; — App. Div. —, Mar. 15, 1918, argued in C. of A., May 29, 1918	153, 154

	PAGE
David v. Town Taxi Co., S. D. R., vol. 7, p. 464, Mar. 2, 1916; 175 App. Div. 958, Nov. 15, 1916.....	89
Days v. Trimmer & Sons, S. D. R., vol. 9, p. 285, May 25, 1916; 176 App. Div. 124, Dec. 28, 1916.....	*48
De Feo v. Butterick & Co., Bul., vol. 2, p. 224, July 5, 1917....	219, 230, 240
De Padova v. Acme Engineering & Constructing Co., Bul., vol. 3, p. 169, Apr. 2, 1918.....	350
Dietz v. Solomonwitz, S. D. R., vol. 12, p. 555, Bul., vol. 2, p. 102, Jan. 24, 1917; 179 App. Div. 560, Sept. 13, 1917.....	140, *278
Dodd v. Lancashire Corp., S. D. R., vol. 9, p. 281, May 23, 1916; 176 App. Div. 924, Dec. 29, 1916.....	113
Doey v. Howland Co., Death Case No. 6079, Sept. 14, 1917; — App. Div. —, Mar. 7, 1918; — N. Y. —, June 4, 1918.....	363, *364, *375
Dorb v. Stearns & Co., 180 App. Div. 138, Nov 14, 1917.....	247
Dose v. Moehle Lithographic Co., 179 App. Div. 519, July 3, 1917; 221 N. Y. 401, Oct. 23, 1917.....	53, 103, 104, *105, *107, 110, 176, 178
Dowling v. N. Y. Central & H. R. R. Co., S. D. R., vol. 9, p. 320, June 14, 1916	118, 123, 201, 202
Dubin v. Heffernan, Claim No. 3801, May 2, 1917; 181 App. Div. 909, Nov. 14, 1917.....	136, 160
Dunbar v. Schaupp, Bul., vol. 2, p. 232, July 25, 1917.....	247
Eckhard v. Flint & Horner Co., Death Case, No. 50101, July 26, 1917; — App. Div. —, Mar. 6, 1918.....	180
Edsall, State Industrial Commission v., Death File, No. 2064, Nov. 29, 1916; 179 App. Div. 481, July 3, 1917; 222 N. Y. Rep. 651, Jan. 29, 1918	*38
Eldridge v. Endicott, Johnson & Co., S. D. R., vol. 8, p. 445, Apr. 12, 1916	51, 210
Elms v. Buffalo Meter Co., S. D. R., vol. 14, p. 576, Bul., vol. 2, p. 210, June 19, 1917.....	209
Elsis v. Gregory, Bul., vol. 2, p. 227, July 5, 1917.....	202
Farrell v. Terry & Williamson Steamship Works, File 11666, June 8, 1917; 181 App. Div. 909, Nov. 14, 1917.....	160
Fegan v. Republic Elevator & Machine Co., S. D. R., vol. 12, p. 571, Feb. 7, 1917.....	230
Fitzpatrick v. Blackall & Baldwin Co., S. D. R., vol. 8, p. 456, Apr. 19, 1916; — App. Div. —, Dec. 1, 1916; 220 N. Y. Rep. 671, Mar. 20, 1917	283
Fleming v. Gair Co., S. D. R., vol. 10, p. 564, Aug. 30, 1916; 176 App. Div. 23, Dec. 29, 1916.....	*241
Fogarty v. National Biscuit Co., Bul., vol. 2, p. 78, S. D. R., vol. 7, p. 415, Feb. 3, 1916; 175 App. Div. 729, Nov. 22, 1916; 221 N. Y. 20, May 8, 1917.....	*90, *96
Fowler v. Risedorph Bottling Co., S. D. R., vol. 8, p. 404, Mar. 14, 1916; 175 App. Div. 224, Nov. 15, 1916.....	*232
Friday v. Galusha Stove Co., Death File, No. 18739, Feb. 28, 1917; 181 App. Div. —, Dec. 28, 1917.....	230
Friedman v. R. & F. Realty Corp., S. D. R., vol. 14, p. 551, Bul., vol. 2, p. 165, May 14, 1917.....	212

	PAGE
Galelli v. Magnesite Products Co., S. D. R., vol. 7, p. 416, Feb. 3, 1916..	186
Gallagher v. N. Y. Central R. R. Co., 180 App. Div. 88, Nov. 14, 1917; 222 N. Y. Rep. 649, Jan. 22, 1918.....	*310
Gardner v. Horseheads Construction Co., S. D. R., vol. 4, p. 437, June 30, 1916; 171 App. Div. 66, Jan. 5, 1916; Claim No. 60009, Apr. 27, 1917; 181 App. Div. 915, Nov. 28, 1917.....	284
Gartner v. N. Y. Dairy Produce Co., S. D. R., vol. 9, p. 279, May 23, 1916; vol. 13, p. 507, Mar. 3, 1917; 179 App. Div. 950, July 3, 1917..	240
Geller v. Republic Novelty Works, S. D. R., vol. 12, p. 592, Feb. 21, 1917; Bul., vol. 3, pp. 5, 6, Aug. 13, 1917; 180 App. Div. 762, Dec. 28, 1917	83, 171, *180
Geoppner v. Henning, Death File, No. 17691, Nov. 20, 1916; 178 App. Div. 943, May 2, 1917.....	220
Getman v. Baker Co., Claim No. 26780, Jan. 2, 1918.....	51
Gibbons v. Marx & Rawolle, 191 App. Div. 142, Dec. 28, 1917.....	*239
Gifford v. Patterson, Bul., vol. 2, p. 129, Mar. 15, 1917; 179 App. Div. 420, July 2, 1917; 222 N. Y. 4, Nov. 20, 1917.....	99, *154, *155, 202
Gilbert v. DesLauriers Column Mould Co., 180 App. Div. 59, Nov. 14, 1917	290
Giudici. See Judice.	
Gizzone v. N. Y. & Philadelphia Stevedoring Co., Bul., vol. 2, p. 223, July 5, 1917.....	349
Glatzl v. Stump, S. D. R., vol. 6, p. 397, Dec. 29, 1915; 174 App. Div. 901, June 30, 1916; 220 N. Y. 71, Jan. 30, 1917.....	75, 113, *169, 223
Gleisner v. Gross & Herbener, 170 App. Div. 37, Nov. 10, 1915....	167, 168
Gobrecht v. Wells Fargo & Co., Claim No. 28898, Feb. 10, 1916; 179 App. Div. 952, July 3, 1917.....	285, 304
Gorman v. Philippi, Bul., vol. 2, p. 255, Aug. 14, 1917.....	202
Gorton v. Eastman Kodak Co., Bul., vol. 2, p. 150, Apr. 11, 1917; 181 App. Div. 909, Nov. 14, 1917.....	219
Graham v. Brooklyn Union Gas Co., Death Case, No. 10594, Jan. 2, 1918; — App. Div. —, Mar. 15, 1918.....	220
Granofsky v. Bing & Bing Construction Co., Claim No. 28900, Apr. 5, 1916; 181 App. Div. 909, Nov. 14, 1917.....	98
Grasell v. Brodhead, 175 App. Div. 874, Dec. 29, 1916.....	61, *84
Greenberg v. Canadian Knitting Mills, S. D. R., vol. 10, p. 572, Bul., vol. 2, p. 9, Sept. 15, 1916; 178 App. Div. 942, May 2, 1917.....	248
Grieb v. Hammerle, Death File, No. 6676, Jan. 5, 1917; 181 App. Div. 911, Nov. 14, 1917; 222 N. Y. 362, Jan. 29, 1918.....	*149
Griffin v. Roberson & Son, S. D. R., vol. 9, p. 303, June 14, 1916; 176 App. Div. 6, Dec. 29, 1916.....	*142
Gurnett v. Ross Co., S. D. R., vol. 13, p. 535, Bul., vol. 2, pp. 41, 126, March 14, 1917; 181 App. Div. 910, Nov. 14, 1917.....	79, 112, 177
Hackford v. Veeder & Brown, S. D. R., vol. 8, p. 472, Apr. 27, 1916; 176 App. Div. 924, Dec. 29, 1916.....	50, 219
Hanke v. N. Y. Consolidated R. R. Co., 181 App. Div. 53, Dec. 21, 1917..	*274
Harvey v. Brown-Kent-Jackson Lumber Co., Bul., vol. 2, p. 122.....	207
Hawkins v. Bleakly, 243 U. S. 210, Mar. 6, 1917.....	*33

	PAGE
Hawthorne v. N. Y. Central R. R. Co., Claim No. 15873, Mar. 29, 1916; 181 App. Div. 908, Nov. 14, 1917.....	158, 314
Hellman v. Manning Sandpaper Co., S. D. R., vol. 10, p. 561, Aug. 27, 1916; 176 App. Div. 127, Dec. 28, 1916; 221 N. Y. 492, May 8, 1917.....	*95, 140
Henderson v. Donovan Co., Case No. 16407, Feb. 3, 1917; 178 App. Div. 946, May 17, 1917.....	46, 219, 237
Hennessey v. Markendorf, File No. 8422, Mar. 14, 1917; — App. Div. —, Sept., 1917; 222 N. Y. Rep. 647, Jan. 22, 1918.....	80
Henry v. Fuller Co., S. D. R., vol. 12, p. 529, Jan. 5, 1917; 179 App. Div. 952, July 3, 1917.....	248
Henry v. Levor & Co., S. D. R., vol. 6, p. 388, Dec. 20, 1915.....	210
Hernon v. Holihan, S. D. R., vol. 14, p. 597, Bul., vol. 3, p. 4, Aug. 13, 1917; — App. Div. —, Mar. 6, 1918.....	*46
Hiers v. Hull Co. S. D. R., vol. 8, p. 486, May 4, 1916; 178 App. Div. 350, May 2, 1917.....	51, *52, 210
Holmes v. United States Printing Co., S. D. R., vol. 12, p. 557, Jan. 24, 1917.....	152, 202
Holtz v. Greenhut & Co., 175 App. Div. 878, Dec. 28, 1916.....	*75
Hoover v. Vulco Engineering Co., S. D. R., vol. 13, p. 513, March 6, 1917.	189
Howard v. Howard, S. D. R., vol. 9, p. 355, July 11, 1916; 176 App. Div. 940, Jan. 12, 1917; 221 N. Y. Rep. 605, July 11, 1917.....	189, 192
Hubinak v. Endicott, Johnson & Co., S. D. R., vol. 8, p. 507, May 18, 1916; 175 App. Div. 958, Nov. 15, 1916.....	163
Hungerford v. Bonn, S. D. R., vol. 14, p. 720, Bul., vol. 3, p. 121, Jan. 2, 1918; argued in Appellate Division, May 14, 1918.....	56
Hurley v. Consolidated Dental Mfg. Co., Bul., vol. 2, p. 149, Apr. 24, 1917.....	247
Ide v. Faul & Timmins, 179 App. Div. 567, Sept. 13, 1917.....	207
Ives v. South Buffalo Ry. Co., 68 Misc. 643; 140 App. Div. 921, Oct., 1910; 201 N. Y. 271, Mar. 24, 1911.....	11
Iron Steamboat Company of New Jersey, Matter of, S. D. R., vol. 14, p. 634, Bul., vol. 3, p. 45, Sept. 20, 1917.....	*361
Jenkins v. Hogan & Sons, S. D. R., vol. 9, p. 380, July 31, 1916; 177 App. Div. 36, Mar. 7, 1917.....	*296
Jensen. See Southern Pacific Co. v. Jensen.	
Judice (Giudici) v. Degnon Contracting Co., Bul., vol. 2, p. 149, Apr. 24, 1917; 181 App. Div. 909, Nov. 14, 1917.....	212, 219
Kaempfer v. Automobile Club of America, S. D. R., vol. 10, p. 591, Bul., vol. 2, p. 10, Sept. 15, 1916.....	*181
Kammar v. Hawk, 177 App. Div. 938, Mar. 7, 1917; 221 N. Y. 378, Oct. 16, 1917.....	*86
Kasper v. Clark & Williams Co., S. D. R., vol. 7, p. 454, Feb. 24, 1916; 175 App. Div. 958, Nov. 15, 1916.....	113
Keating v. Thompson & Starrett Co., Bul., vol. 2, p. 229, July 5, 1917. 79,	*137
Keator v. Rock Plaster Mfg. Co., Death Case, No. 55313, Sept. 19, 1917; — App. Div. —, May 7, 1918; — N. Y. —, June 4, 1918....	363, *364, *376

	PAGE
Kehoe v. Consolidated Telegraph & Electrical Subway Co., S. D. R., vol. 9, p. 384, Aug. 10, 1916; 176 App. Div. 84, Dec. 28, 1916.....	92, *93
Kennedy v. Kennedy Mfg. & Engineering Co., S. D. R., vol. 7, p. 383, Jan. 18, 1916; Bul., vol. 1, No. 8, p. 8, Apr. 27, 1916; 177 App. Div. 56, Mar. 7, 1917; 182 App. Div. —, Jan. 18, 1918.....	188, *189, 192, 286
Kenny v. Union Railway Co., 166 App. Div. 497, Mar. 3, 1915.....	207
Kiernan v. Friestedt Underpinning Co., S. D. R., vol. 5, p. 390, Aug. 5, 1915; 171 App. Div. 539, Mar. 8, 1916.....	124
King v. Gross & Co., File No. 7766, Jan. 31, 1917; 179 App. Div. 966, Sept. 25, 1917	62, 114
Klein v. Stoller & Cook Co., S. D. R., vol. 8, p. 440, Apr. 10, 1916; 175 App. Div. 958, Nov. 15, 1916; 220 N. Y. Rep. 670, Mar. 20, 1917..	283
Kneff v. Michel Brewing Co., S. D. R., vol. 11, p. 623, Nov. 27, 1916....	46
Kobyra v. Adams, S. D. R., vol. 8, p. 491, May 8, 1916; 176 App. Div. 43, Dec. 28, 1916	*94
Kohlhaus v. Regal Shoe Co., Claim No. 56218, Nov. 16, 1917; — App. Div. —, Mar. 6, 1918	180
Kronberger v. Harlem Bottle Co., Case No. 17637, Mar. 13 1917; 181 App. Div. 900, Nov. 14, 1917.....	*68, 87
LaFleur v. Wood, S. D. R., vol. 8, p. 405, Mar. 14, 1916; 179 App. Div. 397, May 2, 1917	*238
Landes v. Lupton's Sons, S. D. R., vol. 9, p. 340, June 28, 1916; 176 App. Div. —, Dec. 1, 1916; 221 N. Y. 574, June 12, 1917.....	284
Lanigan v. Standard Shipbuilding Corp., S. D. R., vol. 14, p. 623, Bul., vol. 3, p. 14, Sept. 11, 1917.....	*356
Lanigan v. Town of Saugerties, Bul., vol. 2, p. 148, Apr. 24, 1917; 180 App. Div. 227, Nov. 28, 1917; 223 N. Y. Rep. —, May 14, 1918.161, *162,	192
Larsen v. Paine Drug Co., 169 App. Div. 838, Nov. 10, 1915; 218 N. Y. 252, May 12, 1916.....	94, 102, 167, 168, 177
Lee v. Smith & Sons Co., S. D. R., vol. 10, p. 584, Bul., vol. 2, p. 14, Sept. 15, 1916	139, 203
Lehmann v. Ramo Films. 92 Misc. 418, Nov., 1915.....	257
Leland v. Seneca Falls Mfg. Co., Bul., vol. 2, p. 18; Files of Commission, Claim No. 15433, Feb. 15, 1917, and May 14, 1917.....	110, 147
Lentinni v. N. E. Steamship Co., Claim No. 21295, Nov. 1, 1917; — App. Div. —, Mar. 7, 1918.....	363
Leslie v. O'Connor & Richman, S. D. R., vol. 5, p. 383, July 28, 1915; 173 App. Div. 988, May 3, 1916; 220 N. Y. Rep. 672, Mar. 20, 1917.....	89
Levine v. Gold's Sons, S. D. R., vol. 14, p. 691, Bul., vol. 3, p. 78, Nov. 15, 1917	56, 117
Lewis v. McNamara & Petersen, Bul., vol. 2, p. 231, July 24, 1917.....	355
Liberatore v. Kelly Construction Co., S. D. R., vol. 10, p. 574, Bul., vol. 2, p. 12, Sept. 15, 1916.....	*126
Liberti v. Staten Island R. R. Co., S. D. R., vol. 6, p. 406, Jan. 12, 1916; 180 App. Div. 90, Nov. 14, 1917; 223 N. Y. Rep. —, May 14, 1918....	*312
Lindquest v. Holler & Shepard, S. D. R., vol. 10, p. 607, Oct. 19, 1916; 178 App. Div. 317, May 2, 1917.....	*211
Lindsay v. Gallagher, S. D. R., vol. 9, p. 275, Bul., vol. 2, p. 50, May 18, 1916; — App. Div. —, May, 1917.....	202

	PAGE
Littler v. Fuller Co., Case No. 23951, Sept. 14, 1917; — App. Div. —, Jan. 18, 1918; 223 N. Y. 369, May 7, 1918.....	138
Litts v. Risley Lumber Co., S. D. R., vol. 14, p. 714, Bul., vol. 3, p. 119, Jan. 2, 1918; — App. Div. —, May 8, 1918.....	56
Lloyd v. Power Specialty Co., S. D. R., vol. 7, p. 409, Feb. 3, 1916.....	284
London v. Casino Waist Co., Case No. 60642, Aug. 2, 1917; 181 App. Div. —, Dec. 28, 1917	213
Ludwig v. Groh's Sons, S. D. R., vol. 8, p. 426, Apr. 1, 1916; 181 App. Div. 907, Nov. 14, 1917.....	145
Lupke v. Simon, S. D. R., vol. 11, p. 617, Bul., vol. 2, p. 45, Nov. 22, 1916	169
Lutz v. Zimmerman & Co., Bul., vol. 2, p. 228, July 5, 1917.....	204
Lynch v. Anderson, Case No. 60299, July 2, 1917; 181 App. Div. 911, Nov. 14, 1917	200
Lyon v. Windsor & Davis, S. D. R., vol. 5, p. 389, Aug. 5, 1915; 173 App. Div. 377, May 18, 1916; 179 App. Div. 949, July 3, 1917.....	111
McCabe v. Brooklyn Heights R. R. Co., S. D. R., vol. 8, p. 407, Mar. 15, 1916; 177 App. Div. 107, Jan. 9, 1917.....	253
McCarthy v. McAllister Steamboat Co., 94 Misc. 692, Apr. 24, 1916.....	257
McComsey v. Simmons, S. D. R., vol. 7, p. 433, Feb. 10, 1916.....	194
McCracken v. Eastern Gravel Corp., S. D. R., vol. 14, p. 659, Bul., vol. 3, p. 55, Oct. 11, 1917; argued in Appellate Division, May 8, 1918.....	357
McDermott v. Ingersoll & Bro., S. D. R., vol. 11, p. 606, Bul., vol. 2, p. 45, Nov. 22, 1916; 178 App. Div. 943, May 2, 1917.....	207
McDermott v. Lupfer & Remick, Death Claim No. 11547, Sept. 11, 1917; —App Div. —, Mar. 6, 1918.....	152
McDowell v. New Film Corp. or Dispatch Film Corp., Bul., vol. 3, p. 10, Sept. 5, 1917; — App. Div.—, Mar. 6, 1918.....	75
McGuire v. Brooklyn Heights R. R. Co., S. D. R., vol. 10, p. 631, Bul., vol. 2, p. 30, Oct. 25, 1916.....	202
McKibben v. Pakowski, File No. 61, June 21, 1917; — App. Div. —, May 8, 1918	56
McNally v. Diamond Mills Paper Co., S. D. R., vol. 8, p. 431, Apr. 5, 1916; vol. 9, p. 352, July 11, 1916; 178 App. Div. 342, May 2, 1917; 223 N. Y. 83, Mar. 12, 1918.....	181
McNeil v. N. Y. Central R. R. Co., Death Claim, No. 14239, July 11, 1916; 181 App. Div. 912, Nov. 14, 1917.....	314
Macechko v. Bowen Mfg. Co., S. D. R., vol. 13, p. 505, Feb. 21, 1917; 179 App. Div. 573, Sept. 13, 1917	205
Mack v. N. Y. Dock Co., Death Case, No. 24142, July 16, 1917; 181 App. Div. —, Dec. 28, 1917; 223 N. Y. Rep. —, May 14, 1918.....	350
Maher v. Phoenix Underwear Co., S. D. R., vol. 12, p. 549, Bul., vol. 2, p. 92, Jan. 17, 1917.....	209
Malanzona v. Utica Steam & Mohawk V. C. Mills, S. D. R., vol. 10, p. 604, Oct. 16, 1916; Bul., vol. 2, p. 92, Jan. 17, 1917.....	240
Maley v. O'Boyle, S. D. R., vol. 10, p. 612 Oct. 25, 1916.....	282
Maloney v. Levy & Gilliland Co., 176 App. Div. 470, Feb. 23, 1917.....	82

	PAGE
Manor v. Pennington, 180 App. Div. 130, Nov. 14, 1917.....	134, *135
Markell v. Green Felt Shoe Co., S. D. R., vol. 8, p. 487, May 4, 1916; 175 App. Div. 958, Nov. 15, 1916; 221 N. Y. Rep. 493, May 8, 1917..	*147
Markham v. United Breeders' Co., S. D. R., vol. 4, p. 390, May 28, 1915; 175 App. Div. 957, Nov. 15, 1916.....	63, 286
Mathews v. General Electric Co., Claim No. 63415, May 24, 1917; 181 App. Div. 911, 912, Nov. 14, 1917.....	215
Matta v. Dennings Point Brick Works, Death File, No. 14895, Oct. 25, 1917; 182 App. Div. —, Jan. 18, 1918; argued in C. of A., Apr. 25, 1918.	283
Mattura v. Price & Co., S. D. R., vol. 11, p. 635, Dec. 26, 1916; 179 App. Div. 952, July 3, 1917.....	75, 89, 98
Meyers v. Dickson & Eddy, Death File, No. 552, Sept. 26, 1917; — App. Div. —, Mar. 7, 1918.....	363
Moran v. International Elevator Co., S. D. R., vol. 14, p. 623, Bul., vol. 3, p. 14, Sept. 11, 1917, argued in App. Div., Mar. 12, 1918.....	*356
Mosier v. Del., Lackawanna & Western R. R. Co., S. D. R., vol. 4, p. 341, Mar. 30, 1915; 172 App. Div. 913, Jan., 1916.....	303
Mountain Timber Co. v. Washington, 75 Wash. 581; 243 U. S. 219, Mar. 6, 1917	*22
Mulford v. Pettit & Sons, 175 App. Div. 958, Nov. 15, 1916; 220 N. Y. 540, May 1, 1917.....	75, *172, 174, 177
Muller v. Ludlum Steel Co., Bul., vol. 2, pp. 15, 21, Sept. 15, 1916.....	248
Murphy v. Ludlum Steel Corp., — Misc. —, Oct. 24, 1917; — App. Div.—, Mar. 15, 1918	126, *127, 253
Nappa v. Flushing Bay Improvement Co., Bul., vol. 2, p. 166, May 22, 1917; 181 App. Div. 910, Nov. 14, 1917.....	204
Naud v. King Sewing Machine Co., 95 Misc. 676, June 20, 1916; 178 App. Div. 31, Apr. 4, 1917; 223 N. Y. Rep. —, Mar. 12, 1918.....	51
Nelson v. Campagnie Generale Transatlantique, S. D. R., vol. 11, p. 619, Bul., vol. 2, p. 44, Nov. 22, 1916.....	230
Nelson v. Scheier & Kohn, Bul., vol. 3, p. 51, Oct. 18, 1917.....	156
New York Central R. R. Co. v. White, S. D. R., vol. 2, p. 477, Nov. 21, 1914; 169 App. Div. 903, May, 1915; 216 N. Y. 653, Oct. 19, 1915; 243 U. S. 188, Mar. 6, 1917.....	*11, 90, 310
New York Central R. R. Co. v. Winfield, 168 App. Div. 351, May 7, 1915; 216 N. Y. 284, Nov. 23, 1915; 244 U. S. 147, May 21, 1917.....	*291
Newman, State Industrial Commission v., S. D. R., vol. 11, p. 645, Jan. 11, 1917; 179 App. Div. 481, July 3, 1917; 222 N. Y. 363, Jan. 29, 1918	*38, *39, 111
Nilsen v. American Bridge Co., 176 App. Div. 915, Jan. 19, 1917; 221 N. Y. 12, May 8, 1917.....	*250
Oberg v. McRoberts & Co., S. D. R., vol. 6, p. 386, Dec. 20, 1915; 175 App. Div. 1, Nov. 1, 1916.....	*57, 90
O'Dell v. Adirondack Electric Power Corp., Death File, No. 12192, Apr. 27, 1917; 181 App. Div. 910, Nov. 14, 1917; 223 N. Y. Rep. —, May 14, 1918	50, 230

	PAGE
O'Hare v. Abenroth & Root Mfg. Co., File No. 14225, Aug. 16, 1917; — App. Div. —, Mar. 6, 1918.....	215
Owens v. New York Mills Corp., S. D. R., vol. 9, p. 367, July 19, 1916; 179 App. Div. 942, May 2, 1917.....	206, 207, 232
Pardy v. Boomhower Grocery Co., S. D. R., vol. 11, p. 609, Bul., vol. 2, p. 43, Nov. 22, 1916; 178 App. Div. 347, May 2, 1917.....	*71
Pavia v. Petroleum Iron Works Co., S. D. R., vol. 9, p. 378, July 27, 1916; 178 App. Div. 345, May 2, 1917.....	*261
Peers v. DeCarion & Co., S. D. R., vol. 5, p. 425, Oct. 27, 1915.....	160
Pelton v. Johnson, S. D. R., vol. 12, p. 551, Jan. 22, 1917; 179 App. Div. 949, July 3, 1917.....	175
Pierson v. Interborough Rapid Transit Co., 102 Misc. 130, Dec., 1917.....	119, *120, 253
Pietha v. Murdter, S. D. R., vol. 7, p. 482, Mar. 9, 1916; 174 App. Div. 764, Nov. 15, 1916.....	*70
Plass v. Central New England R. Co., S. D. R., vol. 4, p. 331, Feb. 20, 1915; 169 App. Div. 826, Nov. 10, 1915; 221 N. Y. 472, Nov. 13, 1917..	*309
Pope v. Merritt & Chapman Derrick & Wrecking Co., S. D. R., vol. 10, p. 587, Bul., vol. 2, p. 15, Sept. 15, 1916; 177 App. Div. 63, Mar. 7, 1917.....	123, *124, 202
Post v. Burger & Gohlke, 168 App. Div. 403, May 7, 1915; 216 N. Y. 544, Jan. 11, 1916.....	283
Prokopiak v. Buffalo Gas Co., S. D. R., vol. 7, p. 390, Jan. 21, 1916; 176 App. Div. 128, Dec. 28, 1916.....	213
Pulidori v. Acme Engineering & Constructing Co., Bul., vol. 3, p. 169, Apr. 2, 1918.....	350
Putnam v. Murray, S. D. R., vol. 6, p. 355, Dec. 6, 1915; vol. 7, p. 407, Feb. 3, 1916; 174 App. Div. 720, Sept. 13, 1916.....	*115, 223
Reddy v. National Excavating Co., S. D. R., vol. 10, p. 621, Oct. 25, 1916; 178 App. Div. 943, May 2, 1917; S. D. R., vol. 14, p. 602, Bul., vol. 2, p. 256, Aug. 14, 1917.....	189, 192
Redner v. Faber & Son, Bul., vol. 2, p. 162, May 14, 1917; 180 App. Div. 127, Nov. 14, 1917; 223 N. Y. 379, May 14, 1918.....	*157
Rega v. Cunard S. S. Co., Claim No. 71473, Mar. 1, 1918.....	357
Rehmklaus v. Bowman Automobile Co., Bul., vol. 2, p. 224, July 12, 1917..	209
Remington v. Briggs Bros. & Co., S. D. R., vol. 14, p. 558, Bul., vol. 2, p. 164, May 14, 1917; 179 App. Div. 966, Sept. 27, 1917.....	79, 112, 178
Restivo v. Rapid Transit Subway Const. Co., S. D. R., vol. 12, p. 538, Bul., vol. 2, p. 90, Jan. 10, 1917.....	215
Rheinwald v. Builders Brick & Supply Co., S. D. R., vol. 1, p. 417, Sept., Oct., 1914; 168 App. Div. 425, May 14, 1915; S. D. R., vol. 7, p. 440, Feb. 16, 1916; 174 App. Div. 935, Sept. 13, 1916; 223 N. Y. Rep. —, Mar. 19, 1918.....	53, 99, 100, 167
Richardson v. Builders' Exchange Ass'n, S. D. R., vol. 9, p. 317, June 14, 1916; 179 App. Div. 949, July 3, 1917.....	213
Ridout v. Rodgers & Haggerty, S. D. R., vol. 14, p. 710, Bul., vol. 3, p. 101, Dec. 11, 1917; argued in Appellate Division, May 14, 1918.....	283
Riedel v. Mallory Steamship Co., S. D. R., vol. 10, p. 601, Bul., vol. 2, pp. 20 (cover), 27, Sept. 29, 1916; 176 App. Div. 923, Dec. 28, 1916....	94, 201

	PAGE
Roberto v. Schmadeke, Death File, No. 28918, June 2, 1917; 180 App. Div. 143, Nov. 14, 1917.....	*63
Rodgers v. Borden's Condensed Milk Co., Death File, No. 27351, July 13, 1917; 181 App. Div. —, Jan. 18, 1918.....	73, 220
Ross v. Genesee Reduction Co., 180 App. Div. 846, Dec. 28, 1917.....	*196
Rover v. Rigney & Co., Bul., vol. 2, p. 205, June 6, 1917.....	209
Royal Indemnity Co. v. P. & W. Refining Co., 98 Misc. 631, Feb., 1917....	*273
Ruane v. City of New York, Death File, No. 27891, May 24, 1917; 181 App. Div. 912, Nov. 14, 1917.....	117
Rudgers v. Winter, Andrus & Burrows, File No. 12752, Feb. 26, 1917; — App. Div. —, Sept., 1917.....	80
Rzeczynski v. Manhattan Brass Co., Bul., vol. 2, p. 91, S. D. R., vol. 12, p. 540, Jan. 10, 1917; 179 App. Div. 952, July 2, 1917.....	110, 153, 213
Sabatino v. Crimmins Construction Co., 102 Misc. 172, Jan. 9, 1918....	*268
Sacalli v. Marrone, S. D. R., vol. 12, p. 543, Bul., vol. 2, p. 91, Jan. 10, 1917	110
Saenger v. Locke, S. D. R., vol. 9, p. 330, June 15, 1916; 175 App. Div. 963, Nov. 29, 1916; 220 N. Y. 556, May 1, 1917.....	*147
Sanders v. Lehigh Valley R. R. Co., 172 App. Div. 913, Jan., 1916	303
Santacroce v. Sag Harbor Brick Works, Case No. 70213, Oct. 10, 1917; — App. Div.—, Mar. 6, 1918.....	*49, 165, 209
Savinsky v. Hicks & Sons, Case No. 32173, Apr. 6, 1917; 181 App. Div. 910, Nov. 14, 1917	79, 137, 177
Saxon v. Erie R. R. Co., 172 App. Div. 913, Jan. 5, 1916; 221 N. Y. 179, July 11, 1917	*307
Schattner v. American Tobacco Co., 100 Misc. 261, June, 1917.....	*249
Schmidt v. Berger, S. D. R., vol. 7, p. 432, Feb. 10, 1916; 175 App. Div. 957, Nov. 15, 1916; 221 N. Y. 26, May 8, 1917.....	83, 168, *174, 178
Schultz v. Metz Bros., Case No. 18262, June 18, 1917; 181 App. Div. —, Dec. 28, 1917	138
Scott v. Grant, S. D. R., vol. 14, p. 651, Bul., vol. 3, p. 47, Sept. 29, 1917	219
Sexton v. Public Service Comm. of New York City, 180 App. Div. 111, Nov. 14, 1917.....	158, *159
Shanahan v. Monarch Engineering Co., 92 Misc. 466, Dec., 1915; 172 App. Div. 221, Apr. 19, 1916; 219 N. Y. 469, Dec. 29, 1916.....	248, 254
Shanley v. American Sugar Refining Co., S. D. R., vol. 14, p. 623, Bul., vol. 3, p. 14, Sept. 11, 1917.....	*356
Sharlow v. Sharlow Bros. Co., Case No. 34730, Sept. 14, 1917; 181 App. Div. —, Dec. 28, 1917.....	88, 192
Shinnick v. Clover Farms Co., 90 Misc. 1, Apr., 1915; 169 App. Div. 236, July 9, 1915	250
Sickles v. Ballston Refrigerating Storage Co., S. D. R., vol. 5, p. 382, July 28, 1915; 171 App. Div. 108, Jan. 5, 1916.....	110
Siegfried v. Goldberg, S. D. R., vol. 7, p. 452, Feb. 24, 1916; 175 App. Div. 952, Nov. 29, 1916; 220 N. Y. Rep. 673, Mar. 20, 1917.....	*62, 112
Siersted v. Leinhos, Engelke & Bock, S. D. R., vol. 14, p. 704, Bul., vol. 3, p. 121, Nov. 27, 1917.....	163, 165

	PAGE
Slane v. Cording & Salzmann S. D. R., vol. 11, p. 631, Bul., vol. 2, pp. 9, 64, Dec. 20, 1916; 179 App. Div. 952, July 3, 1917.....	145, 146
Smith v. Gold, S. D. R., vol. 9, p. 376, July 20, 1916; — App. Div. —, Nov., 1916	75, 139
Smith v. Heine Safety Boiler Co., Death Case, No. 18197, Oct. 18, 1917; — App. Div. —, Mar. 7, 1918; — N. Y. —, May 28, 1918.....	285
Smith v. Washburn & Co., Case No. 18733, Sept. 6, 1917; — App. Div. —, Mar. 6, 1918	112, 237
Smyth v. Packard Motor Car Co., File No. 8486, Feb. 1, 1917; 181 App. Div. 907, Nov. 14, 1917	248
Solmonsohn v. Nassau Electric R. R. Co., Bul., vol. 2, p. 207, June 19, 1917	48
Solomon v. Bonis, 181 App. Div. 672, Nov. 28, 1917; 223 N. Y. Rep. —, May 14, 1918	*178
Sorge v. Aldebaran Co., S. D. R., vol. 3, p. 390, Mar. 30, 1915; 171 App. Div. 959, Nov. 22, 1915; 218 N. Y. Rep. 636, May 2, 1916.....	90, 202
Southern Pacific Co. v. Jensen, 167 App. Div. 945, Mar. 1915; 215 N. Y. 514, July 13, 1916; 244 U. S. 205, May 21, 1917....	11, 303, 320, 321, *322
Spang v. Broadway Brewing & Malting Co., Death Case, No. B-30, Oct. 19, 1917; — App. Div. —, Mar. 6, 1918.....	62, *111, 113, 140
Spinks v. Village of Marcellus, 180 App. Div. 732, Dec. 28, 1917..	112, 160, *161
State Industrial Commission v. Edsall, Death File, No. 2064, Nov. 29, 1916; 179 App. Div. 481, July 3, 1917; 222 N. Y. Rep. 651, Jan. 29, 1918	*38
State Industrial Commission v. Newman, S. D. R., vol. 11, p. 645, Jan. 11, 1917; 179 App. Div. 481, July 3, 1917; 222 N. Y. 363, Jan. 29, 1918. *38, *39	
Staufenberg v. Muller & Son, S. D. R., vol. 10, p. 563, Aug. 28, 1916; 178 App. Div. 942, May 2, 1917.....	212
Stavorako v. Cassidy's, Ltd., S. D. R., vol. 11, p. 602, Nov. 16, 1916; 177 App. Div. 941, Mar. 22, 1917.....	171, 172
Stillwagon v. Callan Bros., Bul., vol. 3, p. 99, Dec. 11, 1917; — App. Div. —, May 8, 1918	141
Stivins v. Buffalo Cereal Co., Case No. 19653, Aug. 14, 1917; — App. Div. —, Mar. 6, 1918.....	139
Stokes v. Reardon, S. D. R., vol. 11, p. 615, Bul., vol. 2, p. 42, Nov. 22, 1916	140
Stolte v. N. Y. State Sewer Pipe Co., Death File, No. 18389, Dec. 18, 1916; 179 App. Div. 949, July 3, 1917.....	211
Strader v. Stern Bros., S. D. R., vol. 15, p. —, Bul., vol. 3, p. 117, Jan. 17, 1918	61
Sturcke v. Lullman, Case No. 32240, June 26, 1917; 181 App. Div. —, Dec. 28, 1917	212
Sturges v. King Sewing Machine Co., Death File, No. 18933, May 29, 1917; 181 App. Div. 911, Nov. 14, 1917.....	51, 212, 220
Sugg v. Erie Railroad Co., S. D. R., vol. 10, p. 609, Oct. 19, 1916; 180 App. Div. 133, Nov. 14, 1917.....	314

	PAGE
Sullivan v. Beach Gasper Co., Bul., vol. 3, p. 82, Nov. 19, 1917.....	165, 203
Sullivan v. Hudson Navigation Co., Death Case, No. 30080, July 27, 1917; — App. Div. —, Mar. 7, 1918.....	363, *364
Supple v. Erie Railroad Co., S. D. R., vol. 10, p. 611, Oct. 19, 1916; 180 App. Div. 135, Nov. 14, 1917.....	314
Swanick v. Saratoga Milling & Grain Co., File No. 19563, June 13, 1917; 181 App. Div. 911, Nov. 14, 1917.....	149
Tacoletti v. McQuade Stevedoring Co., File No. 35593, Sept. 28, 1917; — App. Div. —, Mar. 7, 1918.....	363, *364
Ten Broeck v. Town of Saugerties, Bul., vol. 2, p. 148, Apr. 24, 1917; 181 App. Div. 910, Nov. 14, 1917.....	192
Tillburg v. McCarthy & Townsend, S. D. R., vol. 12, p. 531, Jan. 8, 1917; 179 App. Div. 593, Sept. 25, 1917.....	*175
Tomassi v. Christensen, 171 App. Div. 284, Jan. 5, 1916.....	110
Tracy v. Mertens, S. D. R., vol. 12, p. 562, Bul., vol. 2, p. 102, Jan. 24, 1917.....	113
Tucillo v. Ward Baking Co., S. D. R., vol. 14, p. 568, Bul., vol. 2, p. 202, June 6, 1917; 180 App. Div. 302, Nov. 28, 1917.....	*217, 247
Turatt v. Ocean Steam Navigation Co., S. D. R., vol. 11, p. 629, Dec. 5, 1916.....	139, 141
Uhl v. Guarantees Construction Co., S. D. R., vol. 8, p. 479, May 3, 1916; 174 App. Div. 571, Nov. 15, 1916.....	*216
Uhl v. Hartwood Club, S. D. R., vol. 9, p. 360, July 11, 1916; Bul., vol. 2, p. 27, Sept. 29, 1916; 177 App. Div. 41, Mar. 7, 1917; 221 N. Y. Rep. 588, July 11, 1917.....	61, 181, *182, *186, 195, 207
Unger v. Supreme Realty Co., S. D. R., vol. 9, p. 343, June 28, 1916.....	86
United States F. & G. Co. v. N. Y. Rys. Co., 93 Misc 118, Jan., 1916....	264
Urban v. Frank & Co., S. D. R., vol. 11, p. 612, Bul., vol. 2, p. 46, Nov. 22, 1916.....	201
Van Blaricum v. Dominick & Hoff, File No. 37327, Mar. 22, 1917; — App. Div. —.....	240
Van Keuren v. Dwight, Divine & Sona, S. D. R., vol. 12, p. 565, Feb. 6, 1917; 179 App. Div. 509, July 3, 1917; 222 N. Y. Rep. 648, Jan. 22, 1918.....	221, *224, 231
Van Wie v. Wright & Cobb Lighterage Co., Death File, No. 306, Dec. 29, 1915; 175 App. Div. 957, Nov. 15, 1916.....	208, 209
Verdicchio v. McNab & Harlin Mfg. Co., 178 App. Div. 48, Apr. 5, 1917..	*258
Vezzio v. Del., Lackawanna & Western R. R. Co., S. D. R., vol. 4, p. 414, June 11, 1915; 172 App. Div. 913, Jan., 1916.....	303
Vincent v. Taylor Bros., 180 App. Div. 818, Dec. 28, 1917; reargued in Appellate Division May 14, 1918.....	63, *80, 113, 194
Vollmers v. N. Y. Central R. R. Co., S. D. R., vol. 6, p. 370, Dec. 5, 1917; 180 App. Div. 60, Nov. 14, 1917; 223 N. Y. Rep —, Mar. 19, 1918.....	*311
Walker. See Clyde Steamship Co. v. Walker.	
Walsh v. Woolworth Co., 180 App. Div. 120, Nov. 14, 1917.....	*65, 111
Whalen v. N. Y. & Cuban Mail S. S. Co., Bul., of General Contractors' Ass'n, vol. 8, p. 64.....	213
White v. Loades, 178 App. Div. 236, May 2, 1917.....	*80, 194

	PAGE
White v. New York Central R. R. Co. See New York Central R. R. Co. v. White.	
Wincheski v. Morris, 179 App. Div. 600, Sept. 27, 1917.....	*195
Winfield. See New York Central R. R. Co. v. Winfield.	
Winter v. Doelger Brewing Co., 95 Misc. 150, May, 1916; 175 App. Div. 796, Dec. 29, 1916	*251, 282
Woolley v. Geneva Cutlery Co., File No. 18487, Apr. 6, 1917; 181 App. Div. 909, Nov. 14, 1917; S. D. R., vol. 15, p. —, Bul., vol. 3, p. 156, Mar. 14, 1918.....	79, 149
Worf v. Phoenix Sand and Gravel Co., S. D. R., vol. 14, p. 570, Bul., vol. 2, p. 205, June 6, 1917	201
Zimmerman v. N. Y. Central R. R. Co., 180 App. Div. 98, Nov. 14, 1917	314, *315
Zubradt v. Shepherd Estate, S. D. R., vol. 13, p. 509, Mar. 5, 1917; 180 App. Div. 20, Nov. 14, 1917.....	*177

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117
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SPECIAL BULLETIN

Issued Under the Direction of
THE INDUSTRIAL COMMISSION

JOHN MITCHELL, Chairman
EDWARD P. LYON JAMES M. LYNCH
LOUIS WIARD HENRY D. SAYER
WILLIAM S. COFFEY, Secretary

No. 38

JUNE, 1918

NEW YORK LABOR LAWS
ENACTED IN 1918

Prepared by

THE BUREAU OF STATISTICS AND INFORMATION

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Previous Publications Concerning New York Labor Laws

Compilations and reviews of the laws enacted in individual years similar to those in this Bulletin have been published as follows:

1886 and 1887—In annual report of Bureau of Labor Statistics for 1887.

1888, 1889, 1890—In annual report of Bureau of Labor Statistics for 1889.

1898, 1899, 1900—In annual reports of Bureau of Labor Statistics for each of those years.

1899 to 1913—In June Bulletins of each year except 1911 when they appeared in the September Bulletin. Similar compilations and reviews were published also in the report of the Commissioner of Labor for 1903 and 1904.

1914—In Bulletin No. 62.

1915—In Bulletin No. 72.

1916—In Bulletin No. 78.

1917—In Bulletin No. 84.

Bills relating to labor introduced in the Legislature were reprinted for 1903 and 1904, and indexed as in this Bulletin for 1905 to 1913, in the reports of the Commissioner of Labor for those years except 1913 when the index was published in the June Bulletin. The index for 1914 was published in Bulletin No. 62; for 1915 in Bulletin No. 72; for 1916 in Bulletin No. 78, and for 1917 in Bulletin No. 84.

Compilations of all New York labor laws in force have been published as follows:

1884, 1895, 1907—In annual reports of Bureau of Labor Statistics for those years.

1902—In annual report of the Bureau of Labor Statistics for 1901.

1905 to 1914—In annual reports of the Commissioner of Labor. These compilations were partly annotated.

A historical review of Labor Legislation in New York, by A. P. Walter, was published as a separate monograph (30 pp.) in 1904.

Of the above publications, files of which may be found in many public libraries, the Department can now supply only the following:

Annual reports of Commissioner of Labor: 1903-05, 1907, 1910, 1913 and 1915.

Bulletins: June, 1908; September, 1911; June, 1912; and No. 78.



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DEPARTMENT OF LABOR
SPECIAL BULLETIN

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JOHN MITCHELL, Chairman
EDWARD P. LYON **JAMES M. LYNCH**
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LABOR LAWS OF 1918

CHAPTER	SUBJECT	PAGE
	Messages of the Governor concerning labor.....	14
32.	Time allowed employees to vote.....	17
89.	Retirement pensions for State prison and reformatory employees.....	17
142.	Retirement pensions for Civil War veterans in State department of public buildings.....	19
190.	Age requirements for masters, pilots and engineers on steam vessels.....	19
249.	Re-enacting groups 8 and 10 of section 2 of Workmen's Compensation Law.....	20
265.	Industry badges for employees.....	20
355.	Expenses of industrial council.....	21
356.	Establishment of additional public employment office.....	21
369.	Manufacture and sale of mattresses and bed springs.....	22
380.	Right to public employment.....	24
414.	Commission on pension system for State and municipal employees.....	25
415.	Compulsory instruction for non-English-speaking and illiterate minors.....	25
434.	Women as messengers.....	27
456.	Organisation of Bureau of Statistics and Information.....	27
459.	Physical examination blanks for employment certificates.....	29
499.	Retirement pensions for State hospital officers and employees.....	34
556.	Increased salaries for civilian employees of New York State.....	39
557.	Retirement pensions for employees in office of Adjutant-General.....	40
566.	Increased salaries for guards and other employees in State prisons.....	41
577.	Increased salaries for guards in State prisons.....	42
595.	Increased salaries for third deputy commissioner and counsel.....	43
625.	Compulsory labor for males between 18 and 50 years of age.....	44
627.	Factory floor areas, exits, stairways, fire-alarm systems.....	45
628.	Summer vacation permits.....	50
633.	Conservation Commission employees embraced under Workmen's Compensation Law.....	52
634.	Workmen's Compensation Law; general amendments.....	52
635.	Cutting of fire wood exempted from Workmen's Compensation Law.....	54
649.	Vestibuled cabs for locomotive engines.....	55

LABOR LEGISLATION IN 1918

GENERAL REVIEW

This Bulletin contains the text of amendments to the Labor Law and Workmen's Compensation Law made in 1918, and also other legislation relating to labor. Additions made to existing statutes are indicated by italic type; omissions by enclosure in brackets. Statutes which contain new matter only are printed in Roman type throughout. Preceding the text of the laws are the statements made by the Governor, in his annual message to the Legislature, relative to labor, and also the text of two special messages in relation to additional public employment offices and to suspension of labor laws during the war.

Of the twenty-eight laws contained in this Bulletin, seven amend the Labor Law proper and four amend the Workmen's Compensation Law. The remaining seventeen are of interest in one way or another to labor.

Administration of Labor Law

Three measures were enacted relating to the administrative features of the Labor Law, one relating to the Bureau of Statistics and Information, one to the Industrial Council and a third to the Third Deputy Commissioner and to the Counsel.

Bureau of Statistics and Information. Chapter 456 rewrites the sections of the Labor Law relative to the organization and powers of the Bureau of Statistics and Information. No essential change is made but the organization of the Bureau is made more flexible, and the statement of its duties is couched in more general terms which broaden rather than narrow its field.

Expenses of Industrial Council. Chapter 355 provides for compensation and expenses for the members of the Industrial Council while actually engaged in counselling with and advising the Industrial Commission. Formerly, such compensation and expenses were specifically denied to them by section 40-a of the Labor Law.

Salary Increases. Chapter 595 increases the salary of the Third Deputy Commissioner in charge of the Bureau of Mediation and Arbitration from five thousand to six thousand dollars and the salary of the Counsel to the Commission from six thousand to seven thousand dollars.

Workmen's Compensation

Four legislative bills amending the Workmen's Compensation Law were enacted this year. One amended the law generally; another brought within the scope of the law certain employees of the State Conservation Commission; a third re-enacted certain provisions of the law which had been overturned by court decisions; and a fourth exempted from the scope of the law certain employees engaged in woodcutting.

General Amendments. Of the above mentioned statutes, chapter 634 is much the most important. This statute makes the following changes:

(1) Creates a new group 45 in which are included all employments, except farming and domestic service, not included in other groups, in which "are engaged or employed four or more workmen or operatives regularly." The term "workmen or operatives" is new in the Compensation Law, the term "employee" having been employed exclusively heretofore. In an opinion, requested by the Governor prior to his signature to the bill, the Attorney-General states as follows concerning this new term and the application of the amendment:

It is my opinion, therefore, that the term "workmen or operatives" would not be held to include clerical or professional work but would be limited to those who do manual labor or were mechanics or artisans. I can only speak in general terms. It would be difficult, if not impossible, to be more specific with reference to the many employments carried on throughout the State.

The particular employments and the class of employees which are brought within the scope of the Compensation Law by this amendment remains, therefore, a matter for determination by the courts.

(2) The time within which an injured employee is required to give notice of his injury to the Industrial Commission and to his employer is changed from ten days "after disability" to thirty days "after the accident causing such injury." Similarly, the right to claim compensation is changed to one year after the accident instead of one year after the injury.

(3) The power of the Commission to excuse failure to give notice of injury is much broadened. This offsets the tendency of recent court decisions which has been increasingly strict in regard to the requirement of notice.

(4) Medical care may be required, when deemed necessary by the Commission, for a period in excess of sixty days, instead of being limited to that period. The injured employee may himself procure medical treatment at the expense of the employer but only unless the employer shall have, after request by the employee, failed to furnish it. An important exception to the necessity for such request by the injured employee for medical treatment is made by the amendment in that if "the employer or his superintendent or foreman having knowledge of such injury" fails to provide it, then the injured employee may procure medical services without such notice and at the expense of the employer.

(5) Employers and insurance carriers are deemed to have waived notice of injury or death, or the filing of a claim for compensation, within the statutory requirements of thirty days and of one year, respectively, unless objection to such failure is raised before the Commission on the hearing of a claim. In other words, such objection may not be brought forward in an appeal to the courts, from a ruling by the Commission, unless it has been previously urged before the Commission.

(6) Stage carpenters, electricians, moving picture machine operators and other similar theatrical employees are brought within the scope of the law by including them in group 42 of the second section.

Conservation Commission Employees. Chapter 633 brings within the scope of the Compensation Law certain field employees of the State Conservation Commission. These are placed in a group numbered 45 which happens to be the same number as that of the new group created by chapter 634 referred to above.

Interstate Commerce and Longshore Work. Chapter 249 reenacts groups 8 and 10 of the Compensation Law which refers to vessels engaged in interstate or foreign commerce and to longshore work. These groups, which were included in the act originally, were held to be unconstitutional by the United States Supreme Court on May 21, 1917, in the case of *Southern Pacific Company v. Jensen*, 244 U. S. 205, as conflicting with the admiralty jurisdic-

tion of the United States. On October 6, 1917, there became effective, through an act of Congress and the signature of the President, an amendment to the Federal Judicial Code giving to claimants the right to accept compensation under State law. Chapter 249, by re-enactment of the groups above referred to, has thus restored jurisdiction over such accidents to the Industrial Commission.

Cutting of Fire Wood. Chapter 635 is notable in that it is the first statute which withdraws the protection of the Compensation Law from certain employees to whom it had once been extended. On account of the fuel situation last winter, and the necessity of enlarging to the utmost the supply of fuel, the cutting of fire wood, where not more than four persons are employed, has been removed from the list of enumerated hazardous employments. In such work, the cost of carrying compensation insurance has been found to be a deterrent.

Safety

The structural provisions of the Labor Law as related to fire prevention in factories are substantially amended by one statute, while another amends the Railroad Law relative to locomotive cabs.

Fire Prevention in Factories. Chapter 627 amends the provisions of the Labor Law relative to factory construction with a view to lessening the fire hazard to those employed therein. As to factory buildings erected after July 1, the power now possessed by the Industrial Commission under section 52-a of the Labor Law to permit increased occupancy in factory buildings is taken away, and the requirement of exits based on floor area has been eliminated. Such buildings must conform to the requirements of section 79-e of the Labor Law as to occupancy and to sections 79-e and 79-a as to exits.

A number of changes are made with reference to stairways and stairway enclosures, among which are the following: 1. In factories hereafter constructed all stairways, serving as means of exit required by the Labor Law, need extend to the roof only when "safe egress may be had from the roof to an adjoining or nearby structure." Formerly, all such stairways were required to extend to the roof and must do so even under the amendment if the building exceeds five stories in height. 2. In existing factories, where

formerly all stairways which extended to the top story were required to extend to the roof also, the amendment requires only that stairways "serving as required means of exit" need extend to the roof and even then only unless safe egress may be had from the roof. 3. In exterior enclosed fire proof stairways, not exceeding one hundred feet in height, the stairways and landings may be of other than incombustible material. Such other material must, however, be approved by the Commission.

The Commission is empowered to permit, under stipulated conditions, an automatic sprinkler system with only one, instead of two, as formerly, adequate source of water supply as a substitute for a fire alarm signal system or for a fire drill, in factory buildings more than two stories high.

The Fire Commissioner in New York City is given power to issue permits, in accordance with rules established by the Commission, for smoking in factory buildings in New York City; elsewhere, the Commission retains this power.

The words "and in proper repair" are added to requirements of cleanliness and sanitary conditions in factory buildings.

A requirement is laid upon all local building officials, except in New York City, to report to the Commission as to all permits issued for construction or alteration of any factory, mercantile or storage building.

Vestibuled Cabs on Locomotives. Chapter 649 requires that locomotive engines be equipped with vestibuled cabs constructed so as to "enclose all openings between the engine cab and the water tank or coal tender attached to such engine." The act is effective January 1, 1919, except that engines at that time in service may be continued in service until they are sent to the shop for "general heavy repairs," at which time they must be equipped with vestibules unless the Federal authorities in charge of railroads direct otherwise.

Woman and Child Labor

Three legislative enactments relative to the employment of women and children received the signature of the Governor. One relates to the employment of female minors and to the hours of other females in messenger service; another legalizes permits for

summer vacation work for children; and the third makes a change as to the furnishing of the blanks on which physical examination records in connection with applications for children's employment certificates are kept.

Women as Messengers. By chapter 434, the employment of females under twenty-one years of age as messengers for the delivery of goods or messages is absolutely forbidden in cities of the first and second class. Women over that age may be so employed between 7 o'clock in the morning and 10 o'clock in the evening on not more than six days or to exceed fifty-four hours in any one week.

Summer Vacation Permits. Chapter 628 adds a new section to the Labor Law permitting the employment of children between fourteen and sixteen years of age without having fully complied with the present requirements for issuance of employment certificates. The amendment limits such employment to the months of July and August and only "in or in connection with any mercantile establishment or business office in cities or villages." A special certificate is required for such employment. To secure this certificate all of the existing requirements for an employment certificate must be complied with except that no definite educational attainment is required. At present, a child between fourteen and fifteen must have completed the elementary school course, or, if between fifteen and sixteen, must have completed the sixth grade of the elementary school, in order to secure an employment certificate.

Records of Physical Examination. Chapter 459 amends sections 71 and 163 of the Labor Law by providing that in cities of the first and second class the blanks for recording the results of physical examinations of children applying for employment certificates shall be furnished by those cities on a form prescribed by the Commission. Formerly, the Commission was required to furnish these blanks.

Education of Immigrants and Illiterates

Three statutes enacted in 1918 amend the Education Law with reference to providing instruction for illiterates and those unable to attend the regular day schools. One only of these is reproduced in this Bulletin.

Non-English-Speaking Minors. By chapter 415, the attendance of every minor between sixteen and twenty-one years of age, who does not possess such knowledge of the English language as is required for the completion of the fifth grade of an elementary school, is required at some day or evening school unless exempted by the health authorities as being physically or mentally unfitted for attendance. Penalties are imposed upon minors, and upon those having minors under their control, for failure to comply with the act. Employers of minors may meet the requirements of the act by conducting classes in their establishments for teaching English and civics to foreign-born employees. Any minor subject to the act may satisfy its requirements by attendance upon such classes. The employment, except as provided by law, or harboring of a minor subject to the act is punishable by fine.

Night Schools. Chapter 409, not reprinted, renders compulsory, instead of discretionary, upon district and city boards of education the establishment of free night schools in which shall be taught the "common branches and such additional subjects as may be adapted to students applying for instruction."

Training of Teachers for Illiterates. Provision is made by chapter 412, not reprinted, for the training of teachers in the best methods of giving instruction to illiterates over sixteen years of age.

Increased Pay for Public Employees

Three statutes of 1918 increased the compensation of certain State employees. Two increased salaries of employees in State prisons and a third increased the salaries of those civilian employees of the State generally whose annual compensation is less than \$1,500 per year.

Guards in State Prisons. Chapter 566 provides increased pay for guards in Auburn, Clinton, Great Meadow and Sing Sing prisons, and for certain other employees in the industrial departments of those prisons. The act is effective July 1, 1918.

Guards in Prison Hospitals. Chapter 577 provides for an increase, effective July 1, 1918, of two hundred dollars for each year's service as guard or attendant in State prison hospitals up through the fifth year. Thereafter, the salary is to be fourteen hundred, instead of twelve hundred dollars as at present.

Civilian Employees of the State. By chapter 556, an increase in annual salary of 10 per cent is made, during the war, to all civilian employees of the State now receiving compensation of less than \$1,500 per year. If the present salary received by any employee plus any maintenance received from the State equals or exceeds \$1,500 per year such employee is not entitled to the benefits of the act.

Retirement Pensions for State Employees

Five measures enacted in 1918 relate to the general subject of retirement systems upon pension for employees in State service. One deals with a general system for all State and municipal employees and the others with a system for particular departments in State service.

Commission on General Pension System. Chapter 414 creates a State Commission of five members to inquire into the subject of retirement pensions for all State and municipal officers and employees with special reference to the financial problem involved. The Commission is to consist of the State Superintendent of Insurance, two members appointed by the Governor, and two members appointed by the President of the Senate and Speaker of the Assembly, respectively. An appropriation of \$5,000 is made and a report is to be made to the Legislature on February 1, 1919.

Retirement of State Hospital Employees. Chapter 499 amends the retirement system for employees of State hospitals so as to include officers as well as employees; extends the system so as to include all State hospitals and the bureau of deportation and the psychiatric institute; limits the maximum annuity to \$1,500 per year; provides that maintenance shall not be considered in computing contributions or annuities of officers; and provides for representation of officers and of employees on the retirement board.

Retirement of Prison Department Employees. The retirement system already in existence for guards in State prisons is extended by chapter 89 to include all employees of the Prison Department. Such retirement is discretionary with the prison authorities and is subject to revocation by the Governor.

Retirement of Veterans in Adjutant-General's Office. By chapter 557, the Adjutant-General is authorized to retire upon a pension any Civil War veteran in his office, who has been employed

continuously for ten years and has reached the age of seventy years and who requests such retirement. In case of incapacity for performance of duty, retirement is compulsory. In either case, an annual pension of one-half the salary received by such employee in his last year of service, but not to exceed \$1,000, must be paid.

Retirement of Veterans in State Department of Public Buildings. The retirement of Civil War veterans in the employ of the State Department of Public Buildings, who have reached the age of seventy years and have served continuously for five years, is made discretionary with the department by chapter 142. An annual pension of one-half the salary paid such employee in his last year of service, but not to exceed \$1,000 per year, is provided.

Miscellaneous

Below will be found noted eight other statutes of 1918 which are of sufficient interest to be included in this Bulletin. The text of one of the statutes, here noted, relating to convict labor in construction of a State highway is not, however, reproduced.

Right to Public Employment. The exclusion of any citizen of this State from "any public employment" by reason of race, color, creed or previous condition of servitude is made a misdemeanor by chapter 380 amendatory of the Penal Law.

Time for Employees to Vote. By chapter 32, the statutory period of two hours, which employers must allow to employees for the purpose of voting at a general election must be allowed to such employees at any election, the word "an" being substituted for the word "general" in the statute.

Convict Labor on State Highway. The employment of convicts is provided for, by chapter 391, not reproduced in this Bulletin, in the construction by the State Prison Commission of a substitute highway for a State highway in Dutchess county.

Age Requirements for Pilots on Vessels. Chapter 190 permits the employment as master, pilot or engineer, on steam vessels of less than one hundred tons burden, of persons between eighteen and twenty-one years of age. Formerly, all persons serving as such were required to be twenty-one years of age.

Compulsory Labor for Males. By the provisions of chapter 625, the Governor is authorized to issue a proclamation declaring

that all able-bodied males in New York State, between the ages of eighteen and fifty years, are required during the war to "be habitually and regularly engaged in some lawful, useful and recognized business, profession, occupation, trade or employment." Students and workers on strike are exempted. Sheriffs, and other officers, are to seek out persons subject to the act. Registration with a Public Employment Bureau is a defense against prosecution under the act, but registrants must accept such employment as may be assigned by the Bureau at the current of wages for such work in the locality. The Governor has issued the proclamation under date of June 1. Failure to comply with its provisions entails three months' imprisonment, or fine of one hundred dollars, or both.

Manufacture and Sale of Mattresses. To the General Business Law a new article is added by chapter 369, effective November 1, dealing with the manufacture and sale of mattresses and bed springs. The former provisions of the same code relative to bedding material are repealed. The new article is more comprehensive and detailed in scope. The Industrial Commission is to enforce the article and the State Department of Health is to prescribe or approve the sterilization process through which secondhand material used in manufacturing of bedding must pass.

Identification Badges for Employees. Chapter 265 authorizes the adoption by any employer of a badge or other identifying insignia to be worn by his employees while upon the work premises. Such badge is to be certified by the Industrial Commission and its unlawful wearing is made a misdemeanor.

Employment Office for Negroes. Chapter 356 appropriates \$5,000, effective July 1, 1918, for the establishment by the Industrial Commission of an additional public employment office in such locality as will "best serve the interest of the negro population."

STATEMENT AS TO ATTITUDE OF ORGANIZED LABOR TOWARD THE WAR IN ANNUAL MESSAGE OF GOVERNOR WHITMAN, 1918

As showing what organized labor in this State is doing to aid the country in the war, I call your attention to the fact that while there were reported to the Bureau of Mediation and Arbitration in the State Industrial Commission between April 1, 1916, and November 30, 1916, 385 strikes, which involved 216,043 persons; during the same period in 1917 there were reported to the Bureau but 228 strikes, involving less than 65,000 persons.

SPECIAL MESSAGE OF GOVERNOR WHITMAN RELATIVE TO ADDITIONAL PUBLIC EMPLOYMENT OFFICES

STATE OF NEW YORK — EXECUTIVE CHAMBER

ALBANY, February 18, 1918.

To the Legislature:

The war has emphasized the great importance at the present time of all industrial questions, and we are daily impressed with the intimate relation between industrial efficiency and military efficiency. During the past few months increasing attention has been given by the authorities at the National Capitol to matters affecting production of shipping and war supplies, and speeding up output, as well as to those questions closely and vitally affecting the well being of the workers themselves.

No question has received greater consideration or more thoughtful care than the question of employment, as concerned with war industries. The national authorities have realized that fact and are now taking steps to deal adequately with this great problem. To this end, there has recently been established in the United States Department of Labor, under an executive order of the President, a War Emergency Employment Service, and an appropriation has been made to establish an Employment Service in States where no such service has heretofore been established; and also to extend and encourage the Employment Systems of those States where such a service now exists.

New York State was among the first to attempt to deal in a large way with the question of employment. Under the State Industrial Commission there has been built up an efficient organization in the State Public Employment Bureau, which maintains offices in some of the largest of our industrial centers. Starting with a small and modest beginning, the bureau has had a steady growth, slow it is true, but establishing itself upon a firm basis in those communities. A force of efficient workers has been trained in this field of activity and a vast fund of information has been accumulated with regard to working conditions in the localities the bureau serves.

The Industrial Commission has recommended in its departmental request the establishment of three additional offices this year. This request, I approved, and I recommended in the Tentative Budget Appropriations the opening of such offices in the beginning of the next fiscal year. The present offices of the Employment Bureau are located at Albany, New York city, Syracuse, Rochester and Buffalo.

The Industrial Commission's recommendation was that new offices be opened at Utica, Binghamton and Watertown.

The Secretary of Labor of the United States has now recommended the establishment of offices in the three cities mentioned, and in addition that offices be opened at Elmira, Jamestown and Newburgh. The Secretary also suggests the desirability of opening all of these offices at once. The emergency is urgent.

The Industrial Commission has submitted to me an estimate of the cost of establishing such offices. From such estimate it appears that the cost of maintaining these offices until July 1st, will be \$20,000. This amount should be appropriated at once and be made immediately available, to be expended under the direction of the Industrial Commission.

The State of New York has responded loyally to every demand of the Federal Government. We must not fall behind in this matter. For these reasons, therefore, and because I believe the extension of our present employment system will be of real and substantial benefit to the industries of the State and to our wage earners, I earnestly recommend the immediate appropriation* of the sum of \$20,000 for the purpose named.

If this be done, then it is necessary that provision be made in the annual appropriation bill for the expenses of maintaining these offices during the coming year.

(Signed) CHARLES S. WHITMAN.

SPECIAL MESSAGE OF GOVERNOR WHITMAN RELATIVE TO SUSPENSION OF LABOR LAWS DURING THE WAR

STATE OF NEW YORK — EXECUTIVE CHAMBER

ALBANY, February 4, 1918.

To the Legislature:

For your information I transmit herewith a quotation from a letter addressed to me by Samuel Gompers, President of the American Federation of Labor, setting forth the action of the Council of National Defense and the Advisory Commission in regard to the suspension of the labor laws.

"Information reaches me from several states that an effort is being made to suspend labor legislation under a plea of war emergency. As several of these efforts have misinterpreted an action of the Council of National Defense, I wish to put in your possession exact information as to that action of the Council.

"In order to safeguard the man power and the labor power of the nation, on December 3, 1917, the Council of National Defense, in joint meeting with the Advisory Commission, adopted a series of rules regulating the maintenance of labor standards and labor safety laws, and set forth the restrictions under which their suspension may be effected in cases of extraordinary emergency. That program, which prescribes definite time limits and requires proof that suspension is necessary, is as follows:

"1. Upon notice from the Council of National Defense stating that a war emergency or that public welfare require such suspension.

"2. That such suspension should be made only after public hearings had been held, reasonable notice (of not less than five days) of such hearings having been sent to the State Labor Department or State Labor Commission, to the plant, organization and employees in the industry affected, and to the public by appropriate notice in the press.

"3. That the particular provisions of the labor laws that are suspended and the length of time of suspension should be stated in a permit to be issued by the Governor.

"4. That permits should be issued for limited periods not to exceed six months and to be renewed only upon rehearings.

"5. That all permits should expire two months after the close of the war.

"6. That the permits should be issued to individual plants and not to an

* This bill Senator Hill, S. 568 (636) and Mr. Machold, A. 688 (762) failed of passage.

entire industry and only to those plants that comply with all the state factory, building and fire regulations, and that no suspension of outstanding regulations or order, herein provided for, should be construed to apply to state laws requiring the installation of protective devices.

"7. That copies of all permits issued should be posted in conspicuous places in each factory or plant affected over the proper official signature."

(Signed) CHARLES S. WHITMAN.

TEXT OF LABOR LAWS OF 1917

[Arranged in chronological order of enactment as indicated by chapter numbers. In the case of acts which make changes in existing law, new matter introduced is printed in italic type and old matter omitted is enclosed in brackets. Acts containing new matter only are in Roman type throughout.]

Chapter 32.

An Act to amend the election law, in relation to time allowed employees to vote at an election.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section three hundred and sixty-five of chapter twenty-two of the laws of nineteen hundred and nine, entitled "An act in relation to the elections, constituting chapter seventeen of the consolidated laws," is hereby amended to read as follows:

§ 365. Time allowed employees to vote. Any person entitled to vote at [a general] *an* election held within this state, shall on the day of such election be entitled to absent himself from any service or employment in which he is then engaged or employed, for a period of two hours, while the polls of such election are open. If such voter shall notify his employer before the day of such election of such intended absence, and if thereupon two successive hours for such absence shall be designated by the employer, and such absence shall be during such designated hours, or if the employer upon the day of such notice makes no designation, and such absence shall be during any two consecutive hours while such polls are open, no deduction shall be made from the usual salary or wages of such voter, and no other penalty shall be imposed upon him by his employer by reason of such absence. This section shall be deemed to include all employees of municipalities.

§ 2. This act shall take effect immediately.

Approved March 4.

Chapter 89.

An Act to amend the prison law, in relation to retirement of employees in the prison department.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article sixteen of chapter forty-seven of the laws of nineteen hundred and nine, entitled "An act relating to prisons, constituting chapter forty-three of the consolidated laws," as amended by chapter seven hundred and twelve of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

ARTICLE 16.

RETIREMENT OF GUARDS AND [OTHER] OF EMPLOYEES OF STATE PRISONS AND REFORMATORIES AND OF THE PRISON DEPARTMENT.

Section 410. When guards and other employees may be retired.

411. Retirement subject to revocation of governor.

§ 410. When guards and other employees may be retired. A guard or other employee in a state prison or reformatory, or an employee in the prison department, who shall have served a term of employment of thirty years, which employment, in the case of a guard or employee in a state prison or reformatory, was either wholly in such prison or reformatory or partly therein and partly in another prison or reformatory or in a state hospital or penitentiary, or which employment, in the case of an employee of the prison department, was either wholly in such department, or partly therein and partly as a guard or other employee in a prison, reformatory, hospital or penitentiary, or in one or more of them, and which, in the case of any such guard or employee in a state prison or reformatory or employee in the prison department, was either in one consecutive term or in two or more terms which shall together amount to a total period of employment of thirty years, may, if unable to perform his regular duties in a manner satisfactory to the superintendent of prisons or superintendent of reformatories, as the case may be, be retired as hereinafter provided at one-half the salary paid to him for the year immediately preceding such retirement. Such payment shall in no case exceed one thousand dollars per annum and shall be payable out of moneys appropriated by the state for the salary of such guard or employee, and shall not be revoked, diminished or subject to the claims of creditors. Such guard or employee may be retired when such action shall be in the interest of the state in the following manner: A guard or employee in a state prison or an employee in the prison department, by the superintendent of prisons, a guard or employee in a state reformatory, by the board of managers of such reformatory, on the recommendation of the superintendent of reformatories.

Within the meaning of this section, an employee of the prison department means any person employed under the superintendent of state prisons.

§ 411. Retirement subject to revocation of governor. The retirement of a guard or employee, pursuant to this article, shall be subject at any time to revocation by the governor, who shall serve a notice of such revocation on the superintendent of state prisons, or the board of managers of the state reformatory making such retirement, and thereupon such retirement and all payments on account thereof shall cease. Upon such revocation such guard or employee shall be entitled to reassume his duties in the state prison or reformatory, or department, from which he was retired at the salary or compensation received by him at the time of retirement.

§ 2. This act shall take effect immediately.

Approved March 26.

Chapter 142.

An Act to amend the public buildings law, in relation to the powers of the trustees of public buildings to retire certain employees in such department.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section three of chapter forty-eight of the laws of nineteen hundred and nine, entitled "An act relating to public buildings, constituting chapter forty-four of the consolidated laws," as amended by chapter four hundred and three of the laws of nineteen hundred and fifteen, is hereby amended by adding thereto a new subdivision, to be subdivision eight, to read as follows:

8. Have power, in their discretion, to retire any employee in the department of public buildings who is an honorably discharged soldier, sailor or marine of the army or navy of the United States in the late civil war, and who shall have been employed for a continuous period of five years or more in such department and who shall have reached the age of seventy years. Such retirement may be upon the application of such veteran, or the trustees may take such action on their own motion. Upon being retired pursuant to this act such person shall be paid in the same manner that the salary or wages of his former position were customarily paid to him an annual sum equal in amount to one-half the salary or wage paid to him in the last year of his employment, provided, however, that the amount so paid to such retired veteran shall not exceed the sum of one thousand dollars per annum.

§ 2. This act shall take effect immediately.

Approved April 3.

Chapter 190.

An Act to amend chapter forty-two of the laws of nineteen hundred and nine, entitled "An act relating to navigation, constituting chapter thirty-seven of the consolidated laws," relative to the age of applicants for licenses as masters, pilots or engineers.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section seventeen of chapter forty-two of the laws of nineteen hundred and nine, as amended by chapter seven hundred and sixty-five of the laws of nineteen hundred and thirteen, is hereby amended so as to read as follows:

§ 17. Licenses. Every person employed as master, pilot, or engineer on board of a steam vessel or a vessel propelled by machinery, carrying passengers or freight for hire, or towing for hire, shall be examined by the inspectors as to his qualifications, and if satisfied therewith they shall grant him a license for the term of one year for such boat, boats or class of boats as said inspectors may specify in such license. In a proper case, the license may permit and specify that the master may act as pilot, and in case of small vessels also as engineer and pilot. The license shall be framed under glass, and posted in some conspicuous place on the vessel on which he may act. Whoever acts as master, pilot or engineer, without having first received such license, or upon a boat or class of boats not specified in his license, shall be liable to a penalty of fifty dollars for each day that he so acts, except as in this article otherwise

specified, and such license may be revoked by the inspectors for intemperance, incompetency or willful violation of duty. An applicant for license as master, pilot or engineer, *must be a citizen of the United States; and to act as such on steam vessels of more than one hundred tons burden, [must be a citizen of the United States, and] at least twenty-one years of age, and to act as such on steam vessels of one hundred tons burden or under, and on motor boats he shall be not less than eighteen years old.*

§ 2. This act shall take effect immediately.

Approved April 12.

Chapter 249.

An Act to re-enact certain provisions of the workmen's compensation law relating to the application thereof.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The portions constituting groups eight and ten of section two of chapter eight hundred and sixteen of the laws of nineteen hundred and thirteen, entitled "An act in relation to assuring compensation for injuries or death of certain employees in the course of their employment, and repealing certain sections of the labor law relating thereto, constituting chapter sixty-seven of the consolidated laws," as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen, and such section amended by chapter six hundred and twenty-two of the laws of nineteen hundred and sixteen and chapter seven hundred and five of the laws of nineteen hundred and seventeen, such group having been declared unconstitutional by the United States supreme court as conflicting with the admiralty jurisdiction of the United States, but subsequently authorized by act of congress, are hereby re-enacted to read as follows:

Group 8. The operation, within or without the state, including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the company; marine wrecking.

Group. 10. Longshore work, including the loading or unloading of cargoes or parts of cargoes of grain, coal, ore, freight, general merchandise, lumber or other products or materials, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage.

§ 2. This act shall take effect immediately.

Approved April 17.

Chapter 265.

An Act to amend the penal law, in relation to wearing industry badges by unauthorized persons.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The penal law is hereby amended by inserting therein, at the end of article one hundred and thirty-four, a new section, to be section fourteen hundred and thirty-five, to read as follows:

§ 1435. Wearing industry badges, or other insignia of identification, by unauthorized persons. An employer of labor may adopt a badge, or other insignia of identification, to be worn or displayed by the employees for the

purpose of identification while upon the premises of the employer and post a notice of the adoption of such badge, or insignia, near the main entrance of such premises. Such employer shall deposit with the industrial commission a replica of such badge or insignia, and such commission shall, if such badge or insignia be distinctive, issue to such employer a certificate authorizing the use thereof for the purposes of this section. Any person who, after the approval and adoption of such badge, or insignia, and posting of such notice, without authority or permission of the employer adopting the same, wilfully wears such badge, or displays such insignia, or any facsimile or any imitation thereof, or uses the same to obtain admittance to or remain upon the premises of the employer, is guilty of a misdemeanor.

§ 2. This act shall take effect immediately.

Approved April 17.

Chapter 355.

An Act to amend the labor law, in relation to the expenses of the members of the industrial council, and making an appropriation therefor.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision three of section forty-a of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as added by chapter six hundred and seventy-four of the laws of nineteen hundred and fifteen, is hereby amended to read as follows:

(3) [No compensation or expenses shall be paid from the treasury to the members of the council] *The members of the council shall be entitled to compensation at the rate of not exceeding ten dollars per diem for each meeting attended by them, or each day actually spent in the work of the council. They shall also be paid their reasonable and necessary traveling and other expenses while engaged in the performance of their duties.*

§ 2. *The sum of fifteen hundred dollars (\$1,500), or so much thereof as may be necessary, is hereby appropriated for the purposes of this act.*

§ 3. This act shall take effect July first, nineteen hundred and eighteen.

Approved April 30.

Chapter 356.

An Act making an appropriation for the establishment by the industrial commission of an additional public employment office, and providing for its maintenance.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The sum of five thousand dollars (\$5,000), or so much thereof as may be needed, is hereby appropriated to the industrial commission for the establishment, as provided by article five-a of the labor law, of an additional public employment office in that locality which in the opinion of the industrial commission would best serve the interest of the negro population. The sum hereby appropriated shall be payable by the treasurer on the order of the commission.

§ 2. This act shall take effect July first, nineteen hundred and eighteen.

Approved April 30.

Chapter 369.

An Act to amend the general business law, in relation to mattresses, upholstered box-springs and metal bed-springs.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter twenty-five of the laws of nineteen hundred and nine, entitled "An act relating to general business, constituting chapter twenty of the consolidated laws," is hereby amended by inserting therein a new article, to be article twenty-five-b, to read as follows:

ARTICLE 25-B.

MATTRESSES, UPHOLSTERED BOX-SPRINGS AND METAL BED-SPRINGS.

Section 389-m. Definitions.

389-n. Prohibition as to manufacture.

389-o. Prohibition as to sale.

389-p. Tagging when new; idem "second-hand."

389-q. Tagging "remade or renovated."

389-r. Tag, how made and attached.

389-s. Removing, defacing or altering tag prohibited.

389-t. Industrial commission to enforce article.

389-u. Approval or disapproval of process of sterilization.

389-v. Complaints.

389-w. Violation a misdemeanor.

§ 389-m. Definitions. Whenever used in this article:

The term "mattress" means any mattress, pillow, cushion, muff bed, down quilt, quilted bed mattress, mattress pad, comforter, bunk, quilt or pad, or bed quilt;

The term "upholstered box-spring" means any metal spring placed or built upon a metal or wooden frame, covered with felt or other material, and encased in a covering or ticking;

The term "metal bed-spring" means any metal bed-spring, metal couch, metal folding bed, metal cot, metal cradle or metal bassinet; and

The term "second-hand material" means any material which has been used on, for or about the person, or in any mattress, upholstered box-spring or metal bed-spring.

§ 389-n. Prohibition as to manufacture. No person shall, in the making, remaking or renovating of any mattress, upholstered box-spring or metal bed-spring for sale, use any second-hand material which has not been thoroughly sterilized by a process prescribed or approved by the state department of health.

§ 389-o. Prohibition as to sale. No person shall sell, or offer, deliver or consign for sale, any mattress, upholstered box-spring or metal bed-spring, in the making, remaking or renovating of which there has been used any second-hand material which has not been thoroughly sterilized by a process prescribed or approved by the state department of health.

§ 389-p. Tagging when new; idem "second-hand." No person shall directly or indirectly sell, or offer, deliver or consign for sale or have in his possession with intent to so sell, offer, deliver or consign:

(a) Any mattress, upholstered box-spring or metal bed-spring which contains only new material, unless there is attached thereto a white tag specifying

(1) The name and address either of the manufacturer or of the vendor or of the successive vendors, and

(2) In the case of a mattress the kind of material used, and that all the material used is new, in case of an upholstered box-spring, the kind of filling used, and that all the material used is new, and in the case of a metal bed-spring that all the material used is new; or

(b) Any mattress, upholstered box-spring or metal bed-spring which contains any second-hand material, unless there is attached thereto a yellow tag bearing the words "second-hand" and specifying

(1) The name and address either of the manufacturer or of the vendor or of the successive vendors;

(2) The date of sterilization of the material and the name and address of the person sterilizing the same;

(3) In the case of a mattress the kind of material used, and

(4) In the case of an upholstered box-spring, the kind of filling used.

§ 389-q. Tagging "remade or renovated." No person shall directly or indirectly redeliver to the owner thereof, or have in his possession with intent to so redeliver, any mattress, upholstered box-spring or metal bed-spring, which has been remade or renovated unless there is attached thereto a blue tag bearing the words "remade or renovated," and specifying

(1) The name and address of the person remaking or renovating the same, and

(2) The date of sterilization of the material and the name and address of the person sterilizing the same.

§ 389-r. Tag, how made and attached. Whenever a tag is required by this article it shall be made of muslin, linen or other material of like durability, shall be legibly printed, stamped or written in the English language and in letters at least one-eighth of an inch in height, and shall, in the case of a mattress or upholstered box-spring, be prominently and securely sewed thereon, and in the case of a metal bed-spring, be prominently and securely affixed thereto.

§ 389-s. Removing, defacing or altering tag prohibited. No person shall remove, deface or alter, or cause to be removed, defaced or altered, any tag placed upon any mattress, upholstered box-spring or metal bed-spring as required by this article.

§ 389-t. Industrial commission to enforce article. Every place where mattresses, upholstered box-springs or metal bed-springs are made, remade or renovated, or materials therefor prepared or sterilized, or where such articles or materials are sold or offered, delivered or consigned for sale, or held in possession with intent so to sell, offer, deliver or consign, shall be subject to the supervision and inspection of the industrial commission, which shall also have power to supervise and inspect the manufacture and sale of the articles covered by this act, and to prosecute violations thereof.

§ 389-u. Approval or disapproval of process of sterilization. The state department of health shall, within sixty days after any process for the sterilization of second-hand material has been submitted to it as herein

provided, approve such process if it finds it reasonably effective, and otherwise shall disapprove it and state the reasons for such action.

§ 389-v. Complaints. Any person who has reason to believe that this article has been or is being violated may present the facts to the industrial commission and it shall be the duty of the commission to investigate the same and to institute a prosecution if it finds reasonable cause to believe that there has been such violation. Any individual may institute proceedings to enforce this article and punish any violation thereof in the county where such violation occurs.

§ 389-w. Violation a misdemeanor. Any person who violates any provision of this article is guilty of a misdemeanor. The unit for each separate and distinct misdemeanor in violation of this article shall be each mattress, upholstered box-spring or metal bed-spring, made, remade or renovated, sold, or offered, delivered, or consigned for sale, or delivered, or possessed with intent so to sell, offer, deliver or consign, contrary to the provisions of this article.

§ 2. Section three hundred and ninety-two-a of chapter twenty-five of the laws of nineteen hundred and nine, entitled "An act relating to general business, constituting chapter twenty of the consolidated laws," as added by chapter five hundred and three of the laws of nineteen hundred and thirteen, is hereby repealed.

§ 3. This act shall take effect six months from and after the date of its passage.

Approved April 30.

Chapter 380.

An Act to amend the penal law, in relation to protecting civil and public rights.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section five hundred and fourteen of the penal law is hereby amended to read as follows:

§ 514. Protecting civil and public rights. A person who:

1. Excludes a citizen of this state, by reason of race, color, *creed* or previous condition of servitude, *from any public employment* or from the equal enjoyment of any accommodation, facility or privilege furnished by innkeepers or common carriers, or by owners, managers or lessees of theatres or other places of amusement, or by teachers and officers of common schools and public institutions of learning, or by cemetery associations; or,

2. Denies or aids or incites another to deny to any other person because of race, creed or color, *public employment or the* full enjoyment of any of the accommodations, advantages, facilities and privileges of any hotel, inn, tavern, restaurant, public conveyance on land or water, theatre or other place of public resort or amusement,

Is guilty of a misdemeanor, punishable by a fine of not less than fifty dollars nor more than five hundred dollars.

§ 2. This act shall take effect September first, nineteen hundred and eighteen.

Approved April 30.

Chapter 414.

An Act to create a state commission to inquire into the subject of retirement pensions, allowances and annuities for state and municipal officers and employees, and making an appropriation therefor.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Commission created. A state commission is hereby created consisting of seven members, of whom one shall be the superintendent of insurance of the state of New York. Two shall be appointed by the governor, one by the temporary president of the senate and one by the speaker of the assembly, to inquire into the subject of retirement pensions, allowances and annuities for state and municipal officers and employees, especially with reference to the method of establishing and maintaining the fund from which such pensions, allowances and annuities shall be paid. A vacancy occurring in the office of a member of such commission shall be filled by the officer who made the original appointment.

§ 2. Powers and duties of commission. Such commission shall have power to subpoena and compel the attendance of witnesses, including public officers and employees, and to require the production of books, records and papers, to take and hear proofs and testimony and adopt rules for the conduct of its proceedings.

§ 3. Officers and employees. The commission shall select a chairman and vice-chairman from among its own members and may employ a secretary and such other experts and employees as may be needed, in connection with the duties of the commission, and may fix their compensation.

§ 4. Expenses of commissioners. The members of such commission shall receive no compensation for their services, but shall be paid their actual and necessary traveling, hotel and other expenses incurred in the discharge of their duties.

§ 5. Report to governor and legislature. The commission shall on or before February first, nineteen hundred and nineteen, report the result of its inquiry to the governor and legislature, including such proposed legislation as it may deem advisable.

§ 6. Appropriation. The sum of five thousand dollars (\$5,000) or so much thereof as may be needed is hereby appropriated for the purposes of this act, payable by the treasurer on the warrant of the comptroller on the order of the chairman or vice-chairman of such commission.

§ 7. This act shall take effect immediately.

Approved May 1.

Chapter 415.

An Act to amend the education law, to require the attendance at school of non-English-speaking and illiterate minors.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article twenty-three of chapter twenty-one of the laws of nineteen hundred and nine, entitled "An act relating to education, constituting chapter sixteen of the consolidated laws," as amended by chapter one hundred

and forty of the laws of nineteen hundred and ten is hereby amended by adding thereto a new section, to read as follows:

§ 637. Attendance of illiterate minors. 1. Every minor, between sixteen and twenty-one years of age, who does not possess such ability to speak, read and write the English language, as is required, for the completion of the fifth grade of the public or private schools of the city or school district in which he resides, shall attend some day or evening school or some school maintained by an employer as hereinafter provided in subdivision six of this act, in the city or district in which he resides throughout the entire time such school is in session; provided that no such minor be required to attend, if the commissioner of health, or the executive officer of the board or department of health of the city, town, village or district, where such minor resides, or an officer thereof designated by such board, department or commissioner shall deem such minor to be physically or mentally unfit to attend.

2. Any minor subject to the provisions of this section, who willfully violates any provisions of this section, shall be punished by a fine of not exceeding five dollars.

3. Every person having in his control any minor subject to the provisions of this section shall cause such minor to attend a school as hereby required; and if such person fails for six sessions within a period of one month to cause such minor to so attend school, unless the commissioner of health or the executive officer of the board or department of health of the city, town, village or district where such minor resides or an officer thereof designated by such board, department or commissioner shall certify that such minor's physical or mental condition is such as to render his attendance at school harmful or impracticable, such person shall, upon complaint by a truant officer and conviction thereof, be punished by a fine of not more than twenty dollars.

4. Whoever induces or attempts to induce such minor to absent himself unlawfully from school or employs such minor except as is provided by law, or harbors such who, while school is in session, is absent unlawfully therefrom, shall be punished by a fine of not more than fifty dollars.

5. The employer of any minor subject to the provisions of this section shall procure from such minor and display in the place where such minor is employed the weekly record of regular attendance upon a school and it shall be unlawful for any person to employ any minor subject to the provisions of this section until and unless he procures and displays said weekly record as herein provided. It shall be the duty of the teacher or principal of the school upon which he (such minor) attends to provide each week such minor with a true record of attendance.

6. Any employer may meet the requirements of this act by conducting a class or classes for teaching English and civics to foreign-born in shop, store, plant or factory, under the supervision of the local school authorities, and any minor subject to the provisions of this act may satisfy the requirement by attendance upon such classes.

§ 2. This act shall take effect September first, nineteen hundred and eighteen.

Approved May 1.

Chapter 434.

An Act to amend the labor law, in relation to employment of women as messengers and the hours of labor in such occupation.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one hundred and sixty-one-a of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as added by chapter three hundred and forty-one of the laws of nineteen hundred and ten is hereby renumbered section one hundred and sixty-one-c, and such section as thus renumbered is hereby amended to read as follows:

§ 161-[a].c. [Hours of labor of messengers] *Employment in telegraph or messenger company service.* In cities of the first or second class no [person] male under the age of twenty-one years shall be employed or permitted to work as a messenger for a telegraph or messenger company in the distribution, transmission or delivery of goods or messages before five o'clock in the morning or after ten o'clock in the evening of any day. No female under the age of twenty-one years shall be employed or permitted to work at any time in the occupation specified in this subdivision. No woman over twenty-one years of age shall be employed or permitted to work as a messenger for a telegraph or messenger company in the distribution, transmission or delivery of goods or messages more than six days or fifty-four hours in any one week, or before seven o'clock in the morning or after ten o'clock in the evening of any day. The provisions of subdivision four of section one hundred and sixty-one of this chapter, in relation to the time allowed for meals and of section one hundred and sixty-one-a of this chapter, in relation to the posting of a notice as to the number of hours employed, and sections one hundred and sixty-eight-c and one hundred and sixty-eight-e of such chapter, in relation to washing facilities and water closets respectively, shall be deemed also to apply to the employment specified in this section.

§ 2. This act shall take effect immediately.

Approved May 2.

Chapter 456.

An Act to amend the labor law, in relation to the organization of the bureau of statistics and information.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections sixty-two, sixty-three, sixty-four and sixty-five of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as renumbered and amended by chapter one hundred and forty-five of the laws of nineteen hundred and thirteen, are hereby amended to read, respectively, as follows:

§ 62. Bureau of statistics and information. The bureau of statistics and information[,] shall be under the immediate charge of a chief statistician, but subject to the direction and supervision of the commission[er of labor].

§ 63. Divisions[; duties and powers. 1]. The bureau of statistics and information shall have [five] *such* divisions as [follows: general labor statistics; industrial directory; industrial accidents and diseases; special investigations; and printing and publication. There shall be such other divisions in such bureau as the commissioner of labor may deem advisable.] *may be deemed necessary by the commission.* Each [of the said] division[s] shall, subject to the supervision and direction of the commission[er of labor] and of the chief statistician, be in charge of [an officer or employee of the department of labor designated by the commissioner of labor; and each of the said divisions, in addition to the duties prescribed in this chapter, shall perform such other duties as may be assigned to it by the commissioner of labor] *a chief of division, or of such other employee of proper qualifications as the commission may designate therefor.*

[2. The division of general labor statistics shall collect, and prepare statistics and general information in relation to conditions of labor and the industries of the state.

3. The division of industrial directory shall prepare annually an industrial directory for all cities and villages having a population of one thousand or more according to the last preceding federal census or state enumeration. Such directory shall contain information regarding opportunities and advantages for manufacturing in every such city or village, the factories established therein, hours of labor, housing conditions, railroad and water connections, water power, natural resources, wages and such other data regarding social, economic and industrial conditions as in the judgment of the commissioner would be of value to prospective manufacturers, and their employees. If a city is divided into boroughs the directory shall contain such information as to each borough.

4. The division of industrial accidents and diseases shall collect and prepare statistical details and general information regarding industrial accidents and occupational diseases, their causes and effects, and methods of preventing, curing and remedying them, and of providing compensation therefor.

5. The division of special investigations shall have charge of all investigations and research work relating to economic and social conditions of labor conducted by such bureau.

6. The division of printing and publication shall print, publish and disseminate in such manner and to such extent as the commissioner of labor shall direct, such information and statistics as the commissioner of labor may direct for the purpose of promoting the health, safety and well being of persons employed at labor.

7. The commissioner of labor may subpoena witnesses, take and hear testimony, take or cause to be taken depositions and administer oaths.]

§ 64. [Information to be furnished upon request. The owner, operator, manager or lessee of any mine, factory, workshop, warehouse, elevator, foundry, machine shop or other manufacturing establishment, or any agent, superintendent, subordinate, or employee thereof, and any person employing or directing any labor affected by the provisions of this chapter, shall, when requested by the commissioner of labor, furnish any information in his possession or under his control which the commissioner is authorized to require, and shall admit him or his duly authorized representative to any place which is affected by the provisions of this chapter for the purpose of inspection.

A person refusing to admit such commissioner, or person authorized by him, to any such establishment, or to furnish him any information requested, or who refuses to answer or untruthfully answers questions put to him by such commissioner, in a circular or otherwise, shall forfeit to the people of the state the sum of one hundred dollars for each refusal or untruthful answer given, to be sued for and recovered by the commissioner in his name of office. The amount so recovered shall be paid into the state treasury.] *Duties.* The bureau of statistics and information shall collect and prepare such statistics and other information from the records of the department, from reports collected for the purpose, or from other sources, for the use of the commission or for publication, as may be directed by the commission, it being the policy and intent of this section that the commission shall have full and accurate information relating to the operation and effect of the laws which it administers, the means of promoting the end sought by those laws, and any other matters concerning which the commission may deem it desirable that information shall be available.

The bureau shall prepare or edit, and shall issue such publications, and furnish information otherwise, as may be directed by the commission.

§ 65. Industrial poisonings to be reported. 1. Every medical practitioner attending on or called in to visit a patient whom he believes to be suffering from poisoning from lead, [phosphorous] *phosphorus*, arsenic, brass, wood alcohol, mercury or their compounds, or from anthrax, or from compressed air illness, contracted as a result of the nature of the patient's employment, shall send to the commission[er of labor] a notice stating the name and full postal address and place of employment of the patient and the disease from which, in the opinion of the medical practitioner, the patient is suffering, with such other and further information as may be required by the said commission[er].

2. If any medical practitioner, when required by this section to send a notice, fails forthwith to send the same, he shall be liable to a fine not exceeding ten dollars.

3. It shall be the duty of the commission[er of labor] to enforce the provisions of this section, and [he] it may call upon the state and local boards of health for assistance.

§ 2. This act shall take effect immediately.

Approved May 6.

Chapter 459.

An Act to amend the labor law, in relation to employment certificates.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section seventy-one of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as amended by chapter three hundred and thirty-three of the laws of nineteen hundred and twelve and chapter four hundred and sixty-five of the laws of nineteen hundred and sixteen, is hereby amended to read as follows:

§ 71. Employment certificate, how issued. 1. Such certificate shall be issued by the commissioner of health or the executive officer of the board or department of health of the city, town or village where such child resides or is to be employed, or by such other officer thereof as may be designated by such board, department or commissioner for that purpose, upon the application of the parent, guardian or custodian of the child desiring such employment. Such officer shall not issue such certificate until he has received, examined, approved and filed the following papers duly executed, namely: The school record of such child properly filled out and signed as provided in this article; also, evidence of age showing that the child is fourteen years old or upwards, which shall consist of the evidence thereof provided in one of the following *paragraphs of this subdivision*[s of this section] and which shall be required in the order herein designated as follows:

(a) Birth certificate; passport or baptismal certificate. A duly attested transcript of the birth certificate filed according to law with a registrar of vital statistics or other officer charged with the duty of recording births; or a passport; or a duly attested transcript of a certificate of baptism showing the date of birth of such child.

(b) Other documentary evidence. In case it shall appear to the satisfaction of the officer to whom application is made, as herein provided, for an employment certificate, that a child for whom such certificate is requested and who has presented the school record, is in fact over fourteen years of age, and that satisfactory documentary evidence of age can be produced, which does not fall within any of the provisions of the preceding *paragraphs of this subdivision*[s of this section], and that none of the papers mentioned in said [subdivisions] *paragraphs* can be produced, then and not otherwise he shall present to the board of health of which he is an officer or agent, for its action thereon, a statement signed by him showing such facts, together with such papers as may have been produced before him constituting such evidence. The commissioner of health, or when officially authorized, the issuing officer of the board or department of health may then accept such evidence as sufficient as to the age of such child, and a record of such evidence shall be fully entered on the minutes of the board at the next meeting thereof.

(c) Physicians' certificates. In cities of the first class only, in case application for the issuance of an employment certificate shall be made to such officer by a child's parent, guardian or custodian who alleges his inability to produce any of the evidence of age specified in the preceding [subdivisions] *paragraphs of this [section] subdivision*, and if the child is apparently at least fourteen years of age, such officer may receive and file an application signed by the parent, guardian or custodian of such child for physicians' certificates. Such application shall contain the alleged age, place and date of birth, and present residence of such child, together with such further facts as may be of assistance in determining the age of such child. Such application shall be filed for not less than sixty days after date of such application for such physicians' certificates, for an examination to be made of the statements contained therein, and in case no facts appear within such period or by such examination tending to discredit or contradict any material state-

ment of such application, then and not otherwise the officer may direct such child to appear thereafter for physical examination before two physicians officially designated by the board of health, and in case such physicians shall certify in writing that they have separately examined such child and that in their opinion such child is at least fourteen years of age such officer shall accept such certificates as sufficient proof of the age of such child for the purposes of this section. In case the opinions of such physicians do not concur, the child shall be examined by a third physician and the concurring opinions shall be conclusive for the purpose of this section as to the age of such child.

2. Such officer shall require the evidence of age specified in [subdivision] *paragraph* (a) in preference to that specified in any subsequent *paragraph* of subdivision one and shall not accept the evidence of age permitted by any subsequent [subdivision] *paragraph* unless he shall receive and file in addition thereto an affidavit of the parent showing that no evidence of age specified in any preceding [subdivision] *paragraph* or [subdivisions] *paragraphs* of this [section] *subdivision one* can be produced. Such affidavit shall contain the age, place and date of birth, and present residence of such child, which affidavit must be taken before the officer issuing the employment certificate, who is hereby authorized and required to administer such oath and who shall not demand or receive a fee therefor.

3. Such employment certificate shall not be issued until such child further has personally appeared before and been examined by the officer issuing the certificate, and until such officer shall, after making such examination, sign and file in his office a statement that the child can read and write correctly simple sentences in the English language and that in his opinion the child is fourteen years of age or upwards and has reached the normal development of a child of its age, and is in sound health and is physically able to perform the work which it intends to do. Every such employment certificate shall be signed, in the presence of the officer issuing the same, by the child in whose name it is issued. In every case, before an employment certificate is issued, such physical fitness shall be determined by a medical officer of the department or board of health, who shall make a thorough physical examination of the child and record the result thereof on a blank [to be furnished for the purpose] *which shall be prescribed* by the [industrial] commission and *which shall set forth [thereon] such facts concerning the physical condition and history of the child as the [industrial] commission may require.* *Outside of cities of the first and second class such blanks shall be furnished by the commission.*

4. In case the evidence of age, filed as in this section provided, shows such child to be fourteen years old but fails to show such child to be fifteen years old, no employment certificate shall be issued unless such child, in addition to complying with all the requirements of this section and producing the school record described in section seventy-three, shall also present a certificate of graduation properly issued in the name of such child, from a public elementary school, or school equivalent thereto or parochial school, or a pre-academic certificate issued by the regents, or a certificate of the completion of an elementary course issued by the education department.

Chapter 499.

An Act to amend the insanity law, in relation to the retirement of officers and employees of state hospitals for the insane.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The schedule of sections of article five of chapter thirty-two of the laws of nineteen hundred and nine, entitled "An act in relation to the insane, constituting chapter twenty-seven of the consolidated laws," as inserted by chapter fifty-nine of the laws of nineteen hundred and twelve, is hereby amended to read as follows:

ARTICLE V.

RETIREMENT OF OFFICERS AND EMPLOYEES OF THE STATE HOSPITAL SYSTEM [STATE HOSPITAL EMPLOYEES].

Section 109. *Definition.*

110. Retirement fund created; custody and control.
111. Retirement of *officers and employees*.
112. Proceedings for retirement; physical disability.
113. Retirement for disability caused by injury.
114. Term of service; how computed.
115. Contributions to retirement fund.
116. Repayments when retirement *s* without fault of *officer or* employee; payments in case of death.
117. Forfeiture of right to annuity by default in making contributions.
118. Temporary *officers and employees*.
119. Retirement board created.
120. Medical examiners.
121. Application blanks.
122. Expenses of administration.

§ 2. Such chapter, as added by chapter fifty-nine of the laws of nineteen hundred and twelve, and amended by chapter six hundred and seven of the laws of nineteen hundred and sixteen, is hereby amended by inserting therein a new section, to be section one hundred and nine, to read as follows:

§ 109. *Definition.* *Wherever the state hospital system is mentioned in this act it includes the officers and employees of all the state hospitals, including Dannemora and Matteawan state hospitals; the medical member of the state hospital commission and medical inspectors who have had previous experience in the New York state hospitals and employees of the state hospital commission; the bureau of deportation and the psychiatric institute.*

§ 3. Sections one hundred and ten, one hundred and eleven, one hundred and twelve, one hundred and thirteen, one hundred and fourteen, one hundred and fifteen, one hundred and sixteen, one hundred and seventeen and one hundred and eighteen of such chapter, as added by chapter fifty-nine of the laws of nineteen hundred and twelve, and amended by chapter six hundred and seven of the laws of nineteen hundred and sixteen, are hereby amended to read, respectively, as follows:

§ 110. Retirement fund created; custody and control. A permanent fund for the payment of annuities to *officers and employees* of the New York state

hospital[s] *system* for the insane in the employ of the state of New York is hereby established, such fund to consist of moneys that may be paid in by those entitled to the benefits of the provisions of this section as hereinafter provided; moneys received from donations, gifts and bequests; moneys received from deductions for leave of absence without pay, for not less than twenty-four hours nor more than thirty days in any one year; moneys received from deductions for sickness for not less than twenty-four hours nor more than ninety days in any one year, and moneys received from other sources. The treasurer or other officer of any *department of the state hospital system* who collects or receives money[s,] hereby declared to be part of such fund, shall pay to the comptroller of the state of New York, who shall place the same in such fund, which shall be invested by him and the money received from interest thereon shall be credited to said fund. All moneys belonging to the fund herein provided for shall be received by the comptroller of the state of New York who shall have charge of the administration thereof, and who shall pay therefrom the annuities, payable quarterly throughout life, or other benefits that may become due and payable hereunder. The retirement board provided for in this article shall from time to time establish such reasonable rules and regulations for the administration and investment of such fund as will insure the perpetuation thereof. The comptroller of the state of New York shall report annually for the fiscal year to the retirement board the condition of said fund in detail, giving all items of receipts and disbursements and his recommendation in regard thereto. This report shall be published with and as a part of the annual report of the state hospital commission.

§ 111. Retirement of *officers and employees*. Any *officer or employee* of the New York state hospital[s] *system* for the care of the insane, including the Matteawan and Dannemora state hospitals for criminal insane, who shall have signified his or her intention to take advantage of the provisions of this article and who shall faithfully and honestly discharge his or her duty in one or more of such state hospitals, or *state hospital department* or in any former city or county asylum, now a state hospital for the insane, or partly in each for twenty-five years, shall upon his or her application to the retirement board be entitled to retirement; provided, however, in the opinion of such board, there is sufficient money in the fund to warrant such retirement. Every applicant must be in the service of [a] the state hospital *system* for the insane, as hereinbefore provided, at the time application is made for retirement, and shall remain in the said service until notified by the retirement board of his or her retirement. Any person retired pursuant to the provisions of this section must be awarded, granted and paid from said retirement fund an annual amount equal to one-half of the wages or compensation, including maintenance, as fixed by the state hospital commission or by statute received by him or her, for the year immediately preceding the application for retirement, provided, however, that no person shall receive such annuity until he or she shall have paid into the said fund, by deductions from his or her wages, or by contributions in full, an amount equal to fifty per centum of his or her first year's annuity, and provided further that any such person who has been reduced in grade after twenty-five years of service shall be retired at the rate of wages and maintenance received by him or her during the twenty-fifth year of service and provided

further that no annuity shall exceed the sum of fifteen hundred dollars per annum. Such annuity shall become effective from the first of the month immediately subsequent to the date of the meeting of the retirement board taking action on same, and shall be for the natural life of such person and payable in quarterly installments, and shall not be revoked, repealed, diminished or subject to claim of creditors.

§ 112. Proceedings for retirement; physical disability. The retirement board shall have power upon its own motion or upon the application in writing of any person entitled to the benefit of the retirement fund to retire any such person who shall have faithfully and honestly discharged his or her duties in [one or more of such] *any department of the state [hospitals] hospital system* including the Matteawan and Dannemora state hospitals for criminal insane, or former city or county asylum now a state hospital, or partly in each, for twenty-five years, or who shall have performed such duties for fifteen years or more, faithfully and honestly and who shall have become mentally or physically incapacitated by reason of accident or illness, provided, however, that reasonable notice in writing shall be given by the board or one of its members of its proposed action, to the person intended to be retired and an opportunity afforded to such person to be heard before the final action is taken by such board, and said board shall certify in writing the reason for such retirement, and that the best interests of the public service demand the same. To aid in such determination, the board may cause the person intended to be retired, to be physically examined by the medical examiners hereinafter provided for. Any person retired pursuant to the provisions of this section must be awarded, granted and paid from said retirement fund an annual amount equal to as many twenty-fifths of one-half of the wages for compensation, including maintenance received by him or her for the year immediately preceding the application for retirement as he or she has served years, provided, however, in the opinion of the retirement board, there is sufficient money in the fund to warrant such retirement, and provided further that no person shall receive such annuity until he or she shall have paid into said fund by deductions from his or her wages or salary or by contribution in full an amount equal to fifty per centum of his or her first year's annuity, *and further provided that no such annuity shall exceed fifteen hundred dollars per annum.* Such annuity shall become effective from the first of the month immediately subsequent to the date of the meeting of the retirement board taking action on same, shall be payable in [quarterly*] *quarterly* installments and shall not be diminished or subject to the claims of creditors. *Officers or [E]mployees* retired for disability under the provisions of this section shall be subject to examination by a medical examiner or board appointed by the retirement board, or by the retirement board itself; and in the event of an *officer or employee* so retired becoming able to perform active service again, he or she [shall] *may* be reinstated by the superintendent or *other appointing power* on [the] a certificate of the retirement board that such retired *officer or employee* is again able to perform duty, and such annuity shall cease upon the date of such reinstatement.

§ 113. Retirement for disability caused by injury. Any *officer or employee* of the New York state hospital *system* for the insane who shall have signified his or her intention to take advantage of the provisions of this article and

* So in original.

who upon the report of the medical examiner hereinafter provided for to the retirement board, has become totally disabled by reason of an injury received in the line of duty or at the hands of a patient of [any] *the New York state hospital system* for the insane, including the Matteawan and Dannemora state hospitals for criminal insane, and incapacitated for performing the duties of the position, shall be retired with such allowances as under the circumstances may appear fitting to the retirement board, independently of length of service, but such allowance shall not be less than ten twenty-fifths of one-half of the wages, including maintenance, provided, however, in the opinion of the retirement board, there is sufficient money in the fund to warrant such retirement, and provided further that no person shall receive such annuity until he or she shall have paid into the said fund by deductions from his or her wages or by contribution in full an amount equal to fifty per centum of his or her first year's annuity *as hereinbefore provided*. Such annuity shall become effective from the first of the month immediately subsequent to the date of the meeting of the retirement board taking action on same, shall be payable in quarterly installments, and shall not be diminished or subject to the claim of creditors. *Officers and [E]*employees retired for disability under the provisions of this section shall be subject to an examination by a medical examiner or board appointed by the retirement board, or by the retirement board itself; and in the event of *an officer or an employee* so retired becoming able to perform *active* service again, he or she [shall] *may* be reinstated by the superintendent or other appointing power on [the] a certificate of the retirement board that such retired *officer or employee* is again able to perform duty, and such annuity shall cease upon the date of such reinstatement.

§ 114. Term of service; how computed. The term of service of *an officer or an employee* of the New York state [hospitals] *hospital system* for the insane shall be computed according to the time such person was upon the pay-roll of [any] *the state hospital system*, including the Matteawan and Dannemora state hospitals for criminal insane, or any city or county asylum now a New York state hospital for the insane. [Except that the period of time during which any *officer or employee* is not a participant in the fund and not entitled to the benefits of this article shall not be considered in computing his or her time of service.] Any time for which any contribution may have been repaid to an *officer or employee* as provided in section one hundred and sixteen shall not, in case the *officer or employee* re-enters the service, be counted or considered in making retirements unless the amount of such repayment shall be paid into the fund, with interest at the rate of four per centum from the time it was repaid to the *officer or employee*.

§ 115. Contributions to retirement fund. Every *officer or employee* of the New York state [hospitals] *hospital system* for the insane who shall have signified his or her intention to take advantage of the provisions of this article shall contribute to said fund and the treasurer or other officer of [any] *the state hospital system* as hereinbefore provided shall at the end of the first full calendar month after this section as hereby amended takes effect deduct and retain monthly from the wages and maintenance of such persons and pay to the comptroller of the state of New York who shall credit the said fund by amounts as follows: Persons who have performed such duty for less than five years, one per centum. Persons who have performed such duty for more than five years and less than ten years, one and one-half per centum.

Persons who have performed such duty for more than ten years and less than fifteen years, two per centum. Persons who have performed such duty for more than fifteen years and less than twenty years, two and one-half per centum. Persons who have performed such duty for more than twenty years, three per centum. Such payments shall cease when a person has paid for twenty-five years, or who has been retired pursuant to the provisions of this article. Every person to whom this article applies who shall have signified his or her intention to take advantage of this article, who shall continue in the employ of the New York state [hospitals] *hospital system* for the insane after this article takes effect, as well as every person to whom this article applies who may hereafter be appointed to a position or place, shall be deemed to consent and agree to the deductions made and provided for herein, and shall receipt in full for the wages, pay or compensation which shall be paid monthly or at any other time, and such payment shall be a full and complete discharge and acquittance of all claims or demands whatsoever for the services rendered by such person during the period covered by such payment, notwithstanding the provisions of any other law, rule or regulation affecting the wages, pay or compensation of any person or persons employed in the New York state civil service to whom this article applies. Every *officer or employee* entering the service of the New York state [hospitals] *hospital system* on and after the first day of the calendar month after this section as hereby amended takes effect and who is not for any reason exempted from the benefits of this article, shall contribute and continue to contribute thereto to the retirement fund at the rate of two per centum per month of his or her wages including maintenance, *except maintenance shall not be considered in computing contributions or annuities of officers*. All *officers and employees* participating in the retirement fund at the time this section as hereby amended takes effect or employed hereafter or reinstated shall, subject to the provisions of this act, continue to participate while they remain in the state hospital [service] *system*. All *officers and employees* in the state hospital [service] *system* prior to the twenty-second day of March, nineteen hundred and twelve, who are not participants in the retirement fund may become such by signifying their desire to do so to the retirement board within the thirty days next following the time this section as hereby amended takes effect and shall continue to be participants while they remain in the state hospital [service] *system*.

§ 116. Repayments where retirement is without fault of *officer or employee*; payments in case of death. Any person who has not become entitled to a retirement allowance, who loses his or her employment by reason of reduction of force or any change due to the action of the [hospital] authorities, of the state *hospital system* and not owing to his or her own default or misconduct, shall be entitled to receive on retirement the aggregate amount of his or her contribution to the fund or funds from which the retirement allowances are to be paid, and shall not be entitled to any further benefits under this article. In case of death of any annuitant occurring between quarterly payments, the estate of the deceased annuitant shall be paid the amount due the annuitant at the date of death. Such amount shall be accepted as a complete discharge and acquittance of all claims or demands whatsoever against the retirement fund. In case of death of an *officer or an employee* who has made at least two payments, his estate shall either be reimbursed in the amount contributed by him or her, or in such sum as the retirement board may deem proper.

§ 117. Forfeiture of right to annuity by default in making contributions. Any officer or employee who has been granted retirement pursuant to the provisions of this article and who does not make all necessary contributions required herein, within ninety days after notice of such retirement, shall forfeit his or her rights to said annuity, and shall not be entitled to retirement except upon reapplication to the retirement board.

§ 118. Temporary officers and employees. The retirement board hereinafter provided shall exclude from the operation of this act any group of officers or employees who receive their compensation on a temporary pay-roll and whose tenure of office is intermittent or of uncertain duration.

§ 4. Section one hundred and nineteen of such chapter, as added by chapter fifty-nine of the laws of nineteen hundred and twelve, and amended by chapter two hundred and eighty-three of the laws of nineteen hundred and twelve and chapter six hundred and seven of the laws of nineteen hundred and sixteen, is hereby amended to read as follows:

§ 119. Retirement board created. The retirement board hereinbefore mentioned, shall be composed of the comptroller of the state of New York, the medical member and the legal member of the New York state hospital commission, *a representative of the officers to be chosen at a regular quarterly conference of the superintendents with the state hospital commission, and a representative of the employees, to be chosen by a majority vote of the employees contributing to the retirement fund*, which board shall have general jurisdiction over and authority to pass upon all questions that may arise under the provisions of this article. *Members of the retirement board as provided in this section, except the comptroller, medical and legal members of the state hospital commission, shall be chosen or elected, as provided in this section, within ninety days after this act as hereby amended takes effect and thereafter biennially, commencing with November, nineteen hundred and twenty.*

§ 5. Section one hundred and twenty of such chapter, as added by chapter fifty-nine of the laws of nineteen hundred and twelve, is hereby amended to read as follows:

§ 120. Medical examiners. The retirement board may appoint one or more boards of medical examiners hereinbefore mentioned, each of which boards shall be composed of not less than three physicians connected with the New York state hospital [service] system to conduct examinations.

§ 6. This act shall take effect immediately.

Approved May 7.

Chapter 556.

An Act to provide for increased compensation to civilian employees of the state of New York during the existing war for civilization, and making an appropriation therefor.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. During the continuance of the existing war with the German empire and its allies, there shall be paid to all persons employed by the state of New York as civilian employees increased compensation at the rate of ten per centum per annum to such employees who receive salaries or wages from the state of New York at a rate per annum of less than one thousand five hundred dollars.

§ 2. If a person employed by the state receives maintenance, no increase in his compensation shall be allowed under this act if the total of the money compensation and maintenance equals one thousand five hundred dollars. If such total be less than one thousand five hundred dollars, the increase allowed under this act shall be ten per centum of the money compensation and not of the total of such compensation and maintenance.

§ 3. The increased compensation provided by this act shall not apply to persons whose duties require only a portion of their time or whose services are needed for brief periods or intervals, or to any persons who receive a part of their salaries or wages for the same service from other sources, except where compensation is at an annual rate but paid in less than twenty-four instalments.

§ 4. If the salary or compensation of an employee shall have been increased by any appropriation to an amount exceeding the increase herein provided for this act shall not apply to such employee. If the increase by any such appropriation be less than that herein provided for, such employee shall receive, by this act, only the difference between such increase and the increase herein provided for.

§ 5. In any case where the extra compensation allowed under this act would make the total compensation of the employee exceed fifteen hundred dollars per annum, only such proportion of the increase shall be allowed as to make the total compensation equal one thousand five hundred dollars.

§ 6. In determining the right of civilian employees to increased compensation under this act, such employees as are employed on piece-work, by the hour, or per diem rates, shall be entitled to receive increased compensation at the rate specified when the fixed rate of compensation for the regular working hours on the basis of three hundred and twelve days in a year would amount to less than the highest amount of salary or wages hereinbefore specified for each group; provided, that this method of computation shall not apply to any per diem employees regularly paid a per diem compensation for every day in the year.

§ 7. The sum of one million dollars (\$1,000,000), or so much thereof as may be necessary, is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, to carry out the provisions of this act. The moneys appropriated shall be paid out by the state treasurer on the warrant of the comptroller in the manner provided by law for the payment of moneys appropriated for the compensation of employees affected by this act.

§ 8. This act shall take effect July first, nineteen hundred and eighteen.

Approved May 8.

Chapter 557.

An Act to amend the military law, in relation to retiring certain employees in the office of the adjutant-general, and pensioning them, and making an appropriation therefor.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article one of chapter forty-one of the laws of nineteen hundred and nine, entitled "An act in relation to the militia, constituting chapter thirty-six of the consolidated laws," is hereby amended by inserting therein a new section, to follow section nineteen, to be section nineteen-a, to read as follows:

§ 19-a. Retiring veterans of the late civil war and granting them pensions. Every soldier, sailor or marine of the army or navy of the United States in the late civil war honorably discharged from service who shall have been employed for a continuous period of ten years or more in the office of the adjutant-general of the state of New York and who shall have reached the age of seventy years may, upon his own request and the approval of the adjutant-general, or upon being incapacitated for performing the duties of his position, shall be retired from such employment, and thereafter during his life the adjutant-general shall pay to him in the same manner that the salary or wages of his former position were customarily paid to him an annual sum equal in amount to one-half the salary or wages paid to him in the last year of his employment; provided, however, that the amount so to be paid to such retired veteran shall not exceed the sum of one thousand dollars per annum.

§ 2. The sum of three thousand six hundred dollars (\$3,600), or so much thereof as may be necessary, is hereby appropriated out of any moneys in the treasury not otherwise appropriated for the purposes of this act payable by the treasurer on the warrant of the comptroller on vouchers signed by the adjutant-general, being for the fiscal year beginning July first, nineteen hundred and eighteen.

§ 3. This act shall take effect immediately.

Approved May 8.

Chapter 566.

An Act making appropriations for increases in salaries of guards in the state prisons and of certain other officers and employees of the industrial departments of the several prisons.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The treasurer shall pay, on the warrant of the comptroller, from the several sums specified, to the persons and for the purposes indicated in this act, the amounts named or so much thereof as shall be sufficient to accomplish, in full, the purposes designated by the appropriations, which several amounts are hereby appropriated out of any moneys in the treasury not otherwise appropriated. The increase for each guard is to be at the rate of two hundred dollars a year and for each of the other officers and employees in the industrial departments of the several prisons, receiving a salary of not to exceed fifteen hundred dollars a year, the increase is to be at the rate of one hundred dollars a year. The amounts as herein appropriated are for the fiscal year beginning July 1, 1918, and are to be considered as supplementing the amounts for the several positions included under the several subdivisions in any other appropriation.

Auburn prison

Payable from general fund

Guard, 85 at \$200.....	\$17,000 00
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Clinton prison

Payable from general fund

Guard, 91 at \$200.....	\$18,200 00
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Great Meadow prison

Payable from general fund

Guard, 55 at \$200..... \$11,000 00

Sing Sing prison

Payable from general fund

Guard, 92 at \$200..... \$18,400 00

Auburn prison

Payable from prison capital fund

Guard, 11 at \$200..... \$2,200 00

Foreman, assistant engineer and fireman, 18 at \$100..... \$1,800 00

Clinton prison

Payable from prison capital fund

Guard, 8 at \$200..... \$1,600 00

Foreman, mechanic and fireman, 7 at \$100..... \$700 00

Sing Sing prison

Payable from prison capital fund

Guard, 3 at \$200..... \$600 00

Foreman, mechanic, assistant engineer and fireman, 8 at \$100 \$800 00

§ 2. This act shall take effect on the first day of July, nineteen hundred and eighteen.

Approved May 8.

Chapter 577.

An Act to amend the prison law, in relation to the compensation of guards and other officers.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one hundred and fourteen of chapter forty-seven of the laws of nineteen hundred and nine, entitled "An act relating to prisons, constituting chapter forty-three of the consolidated laws," as amended by chapter fifty of the laws of nineteen hundred and twelve and chapter one hundred and eighty-nine of the laws of nineteen hundred and fourteen, is hereby amended to read as follows:

§ 114. Compensation of other officers. The superintendent of state prisons shall, from time to time, prescribe the compensation of the other officers of said prisons, but the compensation so fixed and prescribed [for the following officers] in each of such prisons shall not in any case exceed the rate of [an] *the* annual salary[, as follows: To the principal keeper, two thousand dollars; to the kitchen keeper, storekeeper, hall-keeper, yard-keeper, and sergeant of the guard, each fifteen hundred dollars; to the state detective at Sing Sing prison, eighteen hundred dollars] *appropriated for the position of each of such officers.* The compensation of guards and attendants in prison hospitals shall be as follows: For the first year's service, [eight] *ten* hundred dollars; for the second year's service, [nine] *eleven* hundred dollars; for the third year's service, [ten] *twelve* hundred dollars; for the fourth year's service, [eleven] *thirteen* hundred dollars; for the fifth year's service, and thereafter, [twelve] *fourteen* hundred dollars.

§ 2. This act shall take effect on the first day of July, nineteen hundred and eighteen.

Approved May 9.

Chapter 595.

An Act to amend the labor law, in relation to the salaries of the third deputy commissioner and of the counsel to the commission, and making an appropriation therefor.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section forty-one of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as amended by chapter seven hundred and twenty-nine of the laws of nineteen hundred and eleven, chapter one hundred and forty-five of the laws of nineteen hundred and thirteen and chapter six hundred and seventy-four of the laws of nineteen hundred and fifteen, is hereby amended to read as follows:

§ 41. Deputy commissioners. The commission shall appoint and may remove a first deputy commissioner who shall be in charge of the bureau of inspection; a second deputy commissioner who shall be in charge of the workmen's compensation bureau; a third deputy commissioner who shall be in charge of the bureau of mediation and arbitration.

The annual salaries of the deputies shall be as follows: first deputy, six thousand dollars; second deputy, six thousand dollars; third deputy, [five] *six* thousand dollars.

§ 2. Section forty-eight of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as amended by chapter one hundred and forty-five of the laws of nineteen hundred and thirteen and chapter six hundred and seventy-four of the laws of nineteen hundred and fifteen, is hereby amended to read as follows:

§ 49.* Counsel. The commission may appoint and at pleasure remove as counsel to the commission an attorney and counsellor at law of the state of New York who shall represent the department of labor or the commission and take charge of and assist in the prosecution of actions and proceedings brought by or on behalf of the commission or the department and who shall generally act as legal advisor to the commission. Such counsel shall receive an annual salary of [six] *seven* thousand dollars. The commission may appoint and at pleasure remove not exceeding three attorneys and counsellors at law to assist the counsel in the performance of his duties and may fix their compensation within the limits of the annual appropriation provided therefor.

§ 3. The sum of one thousand dollars (\$1,000), or so much thereof as may be necessary, is hereby appropriated to pay that part of the salary of the third deputy commissioner in charge of the bureau of mediation and arbitration of the department of labor, as prescribed by section forty-one of the labor law, as amended by this act, which represents the amount of the increase in such salary made by this act, for the fiscal year beginning July first, nineteen hundred and eighteen.

The sum of one thousand dollars (\$1,000), or so much thereof as may be necessary, is hereby appropriated to pay that part of the salary of the counsel to the state industrial commission and department of labor, as pre-

* The section number is given inadvertently as "49" instead of "48".

scribed by section forty-nine of the labor law, as amended by this act, which represents the amount of the increase in such salary made by this act, for the fiscal year beginning July first, nineteen hundred and eighteen.

§ 4. This act shall take effect July first, nineteen hundred and eighteen.

Approved May 9.

Chapter 625.

An Act to require that all able-bodied male persons, between the ages of eighteen and fifty years, be regularly employed or engaged in a useful occupation, after proclamation by the governor and until the termination of the present war.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The governor is hereby authorized to issue a proclamation, during the present war with Germany and its allies, to the effect that public exigency requires that every able-bodied male person, between the ages of eighteen and fifty years, inclusive, be habitually and regularly engaged in some lawful, useful and recognized business, profession, occupation, trade or employment until the termination of such war. Any such proclamation shall be filed with the secretary of state and published at least once in each county, in a newspaper of general circulation therein. The governor may, in like manner, revoke any such proclamation before the termination of such war.

§ 2. From and after the issuance of the proclamation by the governor, as provided in section one, and until the termination of the present war with Germany and its allies or until the prior revocation of such proclamation, every able-bodied male resident of this state, between the ages of eighteen and fifty years, inclusive, shall habitually and regularly engage in some lawful, useful and recognized business, profession, occupation, trade or employment. A refusal by any such person to be so employed for at least thirty-six hours per week shall constitute a violation of this section. The possession by any person of money, property or income sufficient to support himself and those regularly dependent upon him shall not be defense to a prosecution for a violation of this section or of any provision of this article.

§ 3. In the prosecution of any person for failure or refusal to be employed as required by section two, if the defendant allege his inability to obtain work or employment the burden of proof shall be upon him to show that he made reasonable efforts in that behalf; and the people shall not be required to prove in the first instance that the defendant failed or refused to make such efforts. It shall, however, be a defense, if the defendant shall prove that he was registered, as an applicant for employment, with the bureau of employment of the department of labor or with a branch office of such bureau and that employment was not furnished.

§ 4. No person shall be excused from accepting any proposed employment on the ground that the compensation is not adequate, if the wage or salary is equal to that paid to others in the same locality for the same kind of work. In addition to its other powers, the state industrial commission may assign any person registered with the bureau of employment to any available job or occupation for which such person is fitted. Such commission shall prepare and publish such rules and regulations governing the assignment of persons to work under this act as will assure that all persons similarly circumstanced

shall, so far as possible, be treated alike. In assigning any one to work, such commission shall take into consideration the age, physical condition and any other appropriate circumstances of the person so assigned. Such rules shall have the force of law, and a violation thereof shall be punishable in the same manner as a violation of any other provision of this act.

§ 5. It shall be the duty of the sheriffs of the respective counties and of any other officer, state or municipal, charged with enforcing the law, to seek and to continue to seek diligently the names and places of residence of able-bodied male persons within their respective jurisdictions, between the ages of eighteen and fifty years, inclusive, not regularly or continuously employed, as provided in this act, while such proclamation is in force.

§ 6. The state industrial commission is hereby authorized to appoint or employ, subject to the civil service law or rules, such additional employees as may be necessary, and to use such agencies as may be available and appropriate, to carry out the provisions of this act.

§ 7. The provisions of this act shall not apply to persons temporarily unemployed by reason of differences with their employers or to bona fide students during the school term nor to persons fitting themselves to engage in trade or industrial pursuits.

§ 8. For the purposes of this act, any male person found within the state shall be deemed a resident and in any prosecution hereunder of a male person between the ages of eighteen and fifty years, inclusive, proof that the accused habitually loiters in idleness in streets, roads, depots, pool rooms, saloons, hotels, stores or other places shall be prima facie evidence of the failure or refusal of such person to comply with the provisions of this act.

§ 9. Any able-bodied male person, between the ages of eighteen and fifty years, inclusive, who, after such proclamation, and during the time required by this act, fails or refuses to be habitually and regularly engaged in some lawful, useful and recognized business, profession, occupation, trade or employment, as required by section two of this act, or who, after unsuccessfully seeking employment, fails to register with the bureau of employment of the department of labor within thirty days after the proclamation by the governor as provided by this act takes effect, or who thereafter continues out of employment for any period of thirty days without having registered with such bureau, or who refuses to accept employment assigned to him by the state industrial commission, shall be guilty of a misdemeanor and punishable by a fine of not exceeding one hundred dollars or imprisonment for not exceeding three months or both.

§ 10. This act shall take effect immediately.

Approved May 11.

Chapter 627.

An Act to amend the labor law, in relation to floor area and required exits, stairways, fire alarm systems and fire drills, smoking and cleanliness in factories.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision two of section seventy-nine-a of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as added by chap-

ter four hundred and sixty-one of the laws of nineteen hundred and thirteen, and amended by chapter seven hundred and twenty-one of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

2. Floor area and required exits. The term "floor area" [as used in this section] means the entire space between fire walls, or between a fire wall and an exterior wall of a building, or between the exterior walls of the building where there is no intervening fire wall. From every floor area there shall be not less than two means of exit remote from each other, one of which on every floor above the ground floor shall be an interior enclosed fireproof stairway or an exterior enclosed fireproof stairway, and the other shall be such a stairway or a horizontal exit. No point in any floor area in an unsprinklered building shall be more than one hundred feet distant from the entrance to one such means of exit, and in a sprinklered building shall be more than one hundred and fifty feet distant from the entrance to one such means of exit. *In buildings erected after July first, nineteen hundred and eighteen, no increase in occupancy shall be permitted under the provisions of section fifty-two-a of this chapter.* [Whenever any floor area exceeds five thousand square feet there shall be provided at least one additional means of exit as hereinbefore described for each five thousand square feet, in excess of five thousand square feet, except where the industrial commission shall otherwise prescribe.] In every building over one hundred feet in height there shall be at least one exterior enclosed fireproof stairway which shall be accessible from any point in the building.

§ 2. Subdivision three of section seventy-nine-a of such chapter, as added by chapter four hundred and sixty-one of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

3. Stairways. All stairways shall be constructed of incombustible material and shall have an unobstructed width of at least forty-four inches throughout their length, except that handrails may project not more than three and one-half inches into such width, *and except that stairways and landings inside an exterior enclosed fireproof stairway not to exceed one hundred feet in height, may be constructed of other than incombustible material, such other material to be approved by the commission.* There shall be not more than twelve feet six inches in height between successive landings. The treads shall be not less than ten inches wide exclusive of nosing, and the rise shall be not more than seven and three-fourths inches. No stairway with "winders" shall be [allowed except as a connection from one floor to another] *permitted as a required means of exit.* The treads shall be constructed and maintained in such manner as to prevent persons from slipping thereon. Every stairway shall be enclosed on all sides by fireproof partitions extending continuously from the lowest story to which such stairway extends to three feet above the roof [and the], *except in buildings with fireproof roof slabs the stairway enclosure may terminate at the underside of such slab.* The roof of the enclosure shall be constructed of fireproof material at least four inches thick [with a skylight at least three-fourths the area of the shaft] *and the enclosure shall be ventilated by: (a) windows in exterior walls, or, (b) by skylights in metal frames with fixed or movable louvres or ventilators in roof of enclosure. Exterior windows within twenty-five feet of a non-fireproof structure shall be fireproofed. Skylights, unless provided with wired glass, shall have thereunder a shield of wire mesh in substantial framework.* [All stairways serving as required means of exit shall extend to the roof and

shall lead continuously to the street or to a fireproof passageway independent of other means of exit from the building, opening on a road or street, or to an open area affording unobstructed passage to a road or street. All stairways that extend to the top story shall be continued to the roof.] *Whenever safe egress may be had from the roof to an adjoining or nearby structure all stairways serving as required means of exit shall extend to the roof. All stairways serving as required means of exit shall lead continuously to the street or to a fireproof passageway independent of other means of exit from the building opening on a road or street or to an open area affording unobstructed passage to a road or street; provided, however, that in buildings more than five stories in height all stairways serving as required means of exit shall extend to the roof.* Provision shall be made for the adequate lighting of all stairways by artificial light.

§ 3. Subdivision one of section seventy-nine-c of such chapter, as added by chapter four hundred and sixty-one of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

1. Stairways. Stairways shall be provided with proper and substantial hand-rails. Where the stairway is enclosed by fireproof partitions the bottom of the enclosure shall be of fireproof material at least four inches thick unless the fireproof partitions extend to the cellar bottom. *Whenever safe egress may be had from the roof to an adjoining or nearby structure[. A]all stairways serving as required means of exit that extend to the top story shall be continued to the roof.*

§ 4. Section seventy-nine-d of such chapter, as added by chapter four hundred and sixty-one of the laws of nineteen hundred and thirteen, is hereby amended by adding thereto a new subdivision, to be subdivision five, to read as follows:

5. *Notice of issuance of permit. The officer of any city, village or town having power to examine and pass upon plans for the construction and alteration of buildings shall, immediately upon the issuance of a permit for the construction or alteration of a factory building, storage building or mercantile building as defined in this chapter, forward to the department of labor, on forms provided, a notice of the issuance of such permit and such other information as is set forth in such forms. Provided, however, that the provisions of this subdivision shall not apply to the city of New York.*

§ 5. Subdivision eight of section seventy-nine-f of such chapter, as added by chapter four hundred and sixty-one of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

8. Exterior enclosed fireproof stairways shall be stairways completely enclosed from top to bottom by walls of fireproof material not less than eight inches thick extending from the sidewalk, court or yard level to the roof, and with walls extending above the roof so as to form a bulkhead. The stairway shall in all other respects conform to the requirements of [this article in regard to enclosed stairways] *subdivision three of section seventy-nine-a of this chapter.* There shall be no opening in any wall separating the exterior enclosed fireproof stairway from the building. Access shall be provided to the stairway from every floor of the building by means of an outside balcony or vestibule of steel, iron or masonry. Every such balcony or vestibule shall have an unobstructed width of at least forty-four inches and shall be provided with a fireproof floor and a railing of incombustible material not less than three feet high. Access to such balconies from the

building and to the stairway from the balconies, shall be by means of fire doors. The level of the balcony floor shall be not more than seven inches below the level of the door sill of the building. The doors shall be not less than forty-four inches wide and shall swing outward onto the balcony and inward from the balcony to the stairway, and shall be provided with locks or latches with visible fastenings requiring no key to open them in leaving the building. The landings in such stairway shall be of such width that the doors in opening into the stairway shall not reduce the free passageway of the landings to a width less than the width of the stairs. Every such stairway shall be provided with a proper lighting system which shall furnish adequate light and shall be so arranged as to ensure its reliable operation when, through accident or other cause, the regular factory lighting is extinguished. The balconies giving access to such stairways shall be open on at least one side upon an open space not less than one hundred square feet in area.

§ 6. Section eighty-three-a of such chapter, as added by chapter three hundred and thirty of the laws of nineteen hundred and twelve, and amended by chapters two hundred and three of the laws of nineteen hundred and thirteen, three hundred and forty-seven of the laws of nineteen hundred and fifteen, four hundred and sixty-six of the laws of nineteen hundred and sixteen and six hundred and thirty-four of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

§ 83-a. Fire alarm signal systems and fire drills. 1. Every factory building over two stories in height in which more than twenty-five persons are employed above the ground floor, shall be equipped with a fire alarm signal system with a sufficient number of signals clearly audible to all occupants thereof, except in buildings in which every square foot of the floor area on all stories is protected with an automatic sprinkler system having two adequate sources of water supply and approved by the public authorities having jurisdiction and in which also the maximum number of occupants on any one floor does not exceed by more than fifty per centum the capacity of the exits as determined by subdivisions one, two and three of section seventy-nine-c, in addition to the prescribed occupancy under subdivisions four, five, six and seven of section seventy-nine-e of this chapter. *Provided, however, that the commission may, after investigation and when it is determined that the spirit of this chapter is observed and public safety secured, permit in lieu of a fire alarm signal system and fire drills, an automatic sprinkler system having one adequate source of water supply, approved by the public authorities having jurisdiction and in which also the maximum number of occupants on any one floor does not exceed by more than fifty per centum the capacity of the exits as determined by subdivisions one, two and three of section seventy-nine-e, in addition to the prescribed occupancy under subdivisions four, five, six and seven of section seventy-nine-e of this chapter.* The board of standards and appeals in the city of New York, and elsewhere the [industrial] commission, may make rules and regulations prescribing the number, character and location of such signals, and the mode, manner, method and character of installation, including the character of all appliances in connection therewith. Such system shall be installed by the owner or lessee of the building and shall permit the sounding of all the alarms within the building whenever the alarm is sounded in any portion thereof. Such system shall be maintained in good working order. No person shall tamper with, or render

ineffective any portion of said system except to repair the same. It shall be the duty of whoever discovers a fire to cause an alarm to be sounded immediately.

2. In every factory building over two stories in height in which more than twenty-five persons are employed above the ground floor, a fire drill which will conduct all the occupants of such building to a place of safety and in which all the occupants of such building shall participate simultaneously shall be conducted at least once a month, except in buildings in which every square foot of the floor area on all stories is protected with an automatic sprinkler system having two adequate sources of water supply and approved by the public authorities having jurisdiction and in which also the maximum number of occupants on any one floor does not exceed by more than fifty per centum the capacity of the exits as determined by subdivisions one, two and three of section seventy-nine-e, in addition to the prescribed occupancy under subdivisions four, five, six and seven of section seventy-nine-e of this chapter. *Provided, however, that the commission may after investigation and when it is determined that the spirit of this chapter is observed and public safety secured, permit in buildings, in lieu of a fire alarm signal system and fire drills, an automatic sprinkler system having one adequate source of water supply, approved by the public authorities having jurisdiction and in which also the maximum number of occupants on any one floor does not exceed by more than fifty per centum the capacity of the exits as determined by subdivisions one, two and three of section seventy-nine-e, in addition to the prescribed occupancy under subdivisions four, five, six and seven of section seventy-nine-e of this chapter.*

In the city of New York the fire commission of such city and elsewhere the [industrial board] *commission* shall make rules, regulations and special orders necessary or suitable to each situation and in the case of buildings containing more than one tenant, necessary or suitable to the adequate co-operation of all the tenants of such building in a fire drill of all the occupants thereof. Such rules, regulations and orders may prescribe upon whom shall rest the duty of carrying out the same. Such special orders may require posting of the same or an abstract thereof.

3. In the city of New York the fire commissioner of said city, and elsewhere the commission[er of labor] is charged with the duty of enforcing this section.

§ 7. Subdivision three of section eighty-three-c, as added by chapter three hundred and twenty-nine of the laws of nineteen hundred and twelve, and amended by chapter one hundred and ninety-four of the laws of nineteen hundred and thirteen and chapter three hundred and forty-seven of the laws of nineteen hundred and fifteen, is hereby amended to read as follows:

3. No person shall smoke in any factory but the [industrial board] *commission* in its rules may permit smoking in protected portions of a factory or in special [classes of] occupancies where in its opinion the safety of the employees would not be endangered thereby. A notice of such prohibition, stating the penalty for violation thereof, shall be posted in every entrance hall and in every elevator car, and in every stairhall and room on every floor of such factory in English and also in such other language or languages as the fire commissioner of the city of New York in such city, and elsewhere, the commission[er of labor] shall direct. The fire commissioner of the city of New York in such city, and elsewhere, the *commission may issue permits*

permitting smoking in protected portions of a factory or in special classes of occupancy, in accordance with rules adopted by the commission. The fire commissioner of the city of New York in such city, and elsewhere, the commission[er of labor] shall enforce the provisions of this subdivision.

§ 8. Section eighty-four of such chapter, as amended by chapter one hundred and fourteen of the laws of nineteen hundred and ten and chapter eighty-two of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

§ 84. Cleanliness of rooms. Every room in a factory and the floors, walls, ceilings, windows and every other part thereof and all fixtures therein shall at all times be kept in a clean and sanitary condition *and in proper repair*. The walls and ceilings of each room in a factory shall be lime washed or painted, except when properly tiled or covered with slate or marble with a finished surface. Such lime wash or paint shall be renewed whenever necessary as may be required by the commission[er of labor]. Floors shall, at all times, be maintained in a safe condition. No person shall spit or expectorate upon the walls, floors or stairs of any building used in whole or in part for factory purposes. Sanitary cuspidors shall be provided, in every workroom in a factory in sufficient numbers. Such cuspidors shall be thoroughly cleaned daily. Suitable receptacles shall be provided and used for the storage of waste and refuse; such receptacles shall be maintained in a sanitary condition.

§ 9. Section eighty-four-a of such chapter, as added by chapter one hundred and ninety-eight of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

§ 84-a. Cleanliness in factory buildings. Every part of a factory building and of the premises thereof and the yards, courts, passages, areas or alleys connected with or belonging to the same, shall be kept clean, and shall be kept free from any accumulation of dirt, filth, rubbish or garbage in or on the same. The roof, passages, stairs, halls, *ceilings, walls*, basements, cellars, privies, water-closets, cesspools, drains and all other parts of such building and the premises thereof shall at all times be kept in a clean, sanitary and safe condition *and in proper repair*. The entire building and premises shall be well drained and the plumbing thereof at all times kept in proper repair and in a clean and sanitary condition.

§ 10. This act shall take effect immediately.

Approved May 11.

Chapter 628.

An Act to amend the labor law, in relation to summer vacation permits.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," is hereby amended by inserting therein a new section, to be section one hundred and sixty-five-a, to read as follows:

§ 165-a. Summer vacation permit. During the months of July and August, children between the ages of fourteen and sixteen years, notwithstanding the provisions of sections one hundred and sixty-two and one hundred and sixty-three of this chapter, may be employed in or in connection with any mer-

cantile establishment or business office in cities or villages upon obtaining the summer vacation permit herein provided for. Such permit shall bear conspicuously across the face the following words in red ink: "Summer vacation permit good only from July first until August thirty-first inclusive." The summer vacation permit shall differ in size and color from the employment certificate and shall not be granted unless all the provisions of section one hundred and sixty-three, except that relating to the filing of a school record, shall have been complied with. No summer vacation permit shall be granted until the officer issuing employment certificates shall receive, examine and file, in lieu of a school record, a certificate of attendance, which shall contain a statement certifying that the child has regularly attended the public schools or schools equivalent thereto or parochial schools for not less than one hundred and thirty days during the twelve months next preceding his fourteenth birthday, or during the twelve months next preceding his application for such summer vacation permit. The certificate of attendance herein required shall be issued in the same manner as prescribed in section one hundred and sixty-five regulating the issuance of school records.

The officer issuing employment certificates shall not issue a summer vacation permit until he has also received, examined and filed a statement signed by the prospective employer, or some one duly authorized on his behalf, showing that he expects to give such child present employment and setting forth the character of the work to be required. The summer vacation permit herein described shall be granted to the prospective employer and shall contain, in addition to the contents prescribed for the employment certificate, the name of the employer and the address at which the child is to be employed, and shall be forwarded by mail by the issuing officer to such employer, and shall be valid for the employment of the child named therein by the employer to whom it is granted, and only during the months of July and August.

It shall be the duty of every person to whom a summer vacation permit has been granted to return such permit by mail to the issuing officer as follows:

1. Within three days after its receipt, in case the child for whose employment it was granted is not employed;
2. Within three days after the termination of the employment of the child, if occurring within the permitted period of summer employment;
3. Within three days after August thirty-first, in case such child is employed until the termination of the permit.

Any person, firm or corporation who fails to return the summer vacation permit when required to do so by this section, or who employs a child under sixteen years of age upon a summer vacation permit, except during the months of July and August, shall be guilty of a misdemeanor.

The issuing officer to whom a summer vacation permit has been returned shall file said permit and preserve it for at least one year. Any child whose summer vacation permit has been returned as above provided and who, after re-examination, is found to be physically fit to perform the work for which the new permit is to be granted, shall be entitled to a new permit upon presentation of a statement from a prospective employer as hereinbefore provided.

§ 2. This act shall take effect immediately.

Approved May 11.

Chapter 633.

An Act to amend the workmen's compensation law, in relation to certain officers and employees of the conservation commission.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section two of chapter eight hundred and sixteen of the laws of nineteen hundred and thirteen, entitled "An act in relation to assuring compensation for injuries or death of certain employees in the course of their employment, and repealing certain sections of the labor law relating thereto, constituting chapter sixty-seven of the consolidated laws," as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen and amended by chapter six hundred and twenty-two of the laws of nineteen hundred and sixteen and chapter seven hundred and five of the laws of nineteen hundred and seventeen, is hereby amended by inserting therein after group forty-four and before the succeeding paragraph a new group to be group forty-five, to read as follows:

Group forty-five. Employment as a district forest ranger, forest ranger, observer, chief railroad inspector, game protector, inspector, forester, land appraiser, surveyor, assistant on survey, engineer, or assistant on construction work, by the state, notwithstanding the definitions of the terms "employment," "employer" or "employee" in subdivision five of section three of this chapter.

§ 2. This act shall take effect immediately.

Approved May 13.

Chapter 634.

An Act to amend the workmen's compensation law, generally.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. That part of section two constituting group forty-two of chapter eight hundred and sixteen of the laws of nineteen hundred and thirteen, entitled "An act in relation to assuring compensation for injuries or death of certain employees in the course of their employment and repealing certain sections of the labor law relating thereto, constituting chapter sixty-seven of the consolidated laws," as re-enacted and amended by chapter forty-one of the laws of nineteen hundred and fourteen and amended by chapter six hundred and twenty-two of the laws of nineteen hundred and sixteen and chapter seven hundred and five of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

Group 42. Stone cutting or dressing; marble work; manufacture of artificial stone; steel building and bridge construction or repair; installation or repair of elevators, fire escapes, boilers, engines or heavy machinery; brick-laying, tile-laying, mason work, stone-setting, concrete work, plastering; and manufacture of concrete blocks; structural carpentry; painting, papering, picture hanging, glazing, decorating or renovating; sheet metal work; roofing; construction, repair and demolition of buildings, bridges and other structures; blasting; maintenance and care of buildings; salvage of buildings or

contents; plumbing, sanitary lighting or heating installation or repair; installation and covering of pipes or boilers; junk dealers; *theatrical stage carpenters, property men, electricians, stage hands, fly-men, lamp operators and moving picture machine operators.*

§ 2. Section two of such chapter is hereby amended by adding thereto a new subdivision or group, to be group forty-five, to read as follows:

Group 45. All other employments not hereinbefore enumerated carried on by any person, firm or corporation in which there are engaged or employed four or more workmen or operatives regularly, in the same business or in or about the same establishment, either upon the premises or at the plant or away from the plant of the employer, under any contract of hire, express or implied, oral or written, except farm laborers and domestic servants.

§ 3. Sections thirteen and eighteen of such chapter are hereby amended to read, respectively, as follows:

§ 13. Treatment and care of injured employees. The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches and apparatus *as the nature of the injury may [be] require[d or be requested by the employee,] during sixty days after the injury; but the commission may where the nature of the injury or the process of recovery requires a longer period of treatment require the same from the employer.* If the employer fail to provide the same, *after request by the injured employee such injured employee may do so at the expense of the employer.* The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so, *or unless the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide the same.* All fees and other charges for such treatment and services shall be subject to regulation by the commission as provided in section twenty-four of this chapter, and shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living.

§ 18. Notice of injury. Notice of an injury for which compensation is payable under this chapter shall be given to the commission and to the employer within [ten] *thirty* days after [disability] *the accident causing such injury*, and also in case of the death of the employee resulting from such injury, within thirty days after such death. Such notice may be given by any person claiming to be entitled to compensation, or by some one in his behalf. The notice shall be in writing, and contain the name and address of the employee, and state in ordinary language the time, place, nature and cause of the injury, and be signed by him or by a person on his behalf or, in case of death, by any one or more of his dependents, or by a person on their behalf. It shall be given to the commission by sending it by mail, by registered letter, addressed to the commission at its office. It shall be given to the employer by delivering it to him or sending it by mail, by registered letter, addressed to the employer at his or its last known place of [residence] *business*; provided that, if the employer be a partnership then such notice may be so given to any one of the partners, and if the employer be a corporation, then such notice may be given to any agent or officer thereof upon

whom legal process may be served, or any agent in charge of the business in the place where the injury occurred. [The failure to give such notice, unless excused by the commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the state fund, insurance company, or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim under this chapter.] *The failure to give notice of injury or notice of death unless excused by the commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the employer, or his or its agents in charge of the business in the place where the accident occurred or having immediate supervision of the employee to whom the accident happened, had knowledge of the accident, or on the ground that the employer has not been prejudiced thereby, shall be a bar to any claim under this chapter, but the employer and the insurance carrier shall be deemed to have waived such notice unless the objection to the failure to give such notice or the insufficiency thereof, is raised before the commission on the hearing of a claim filed by such injured employee, or his or her dependents.*

§ 4. Section twenty-eight of such chapter is hereby amended to read as follows:

§ 28. Limitation of right to compensation. The right to claim compensation under this chapter shall be forever barred unless within one year after the [injury] accident, or if death results therefrom, within one year after such death, a claim for compensation thereunder shall be filed with the commission, *but the employer and insurance carrier shall be deemed to have waived the bar of the statute unless the objection to the failure to file the claim within one year is raised before the commission on the hearing of a claim for compensation filed by the injured employee, or his or her dependents.*

§ 5. This act shall take effect immediately.

Approved May 13.

Chapter 635.

An Act to amend the workmen's compensation law, in relation to employees in lumbering operations.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Group fourteen of section two of chapter eight hundred and sixteen of the laws of nineteen hundred and thirteen, entitled "An act in relation to assuring compensation for injuries or death of certain employees in the course of their employment, and repealing certain sections of the labor law relating thereto, constituting chapter sixty-seven of the consolidated laws," as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen and amended by chapter six hundred and twenty-two of the laws of nineteen hundred and sixteen and chapter seven hundred and five of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

Group fourteen. Lumbering, *except operations solely for the production of fire wood in which not more than four persons are engaged by a single employer; logging, river-driving, rafting, booming, saw mills, bark mills;*

shingle mills, lath mills, lumber yards; manufacture of veneer and of excelsior; manufacture of barrels, kegs, vats, tubs, staves, spokes, or headings.

§ 2. This act shall take effect immediately.

Approved May 13.

Chapter 649.

An Act to amend the railroad law, in relation to equipment of engines.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section seventy-seven of chapter four hundred and eighty-one of the laws of nineteen hundred and ten, entitled "An act in relation to railroads, constituting chapter forty-nine of the consolidated laws," as amended by chapter three hundred and seventy of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

§ 77. Equipment of engines. It shall be unlawful for any railroad company to use within the state on its line or lines any locomotive engine not equipped with a power driving wheel brake and appliances for operating the train brake system, or to use any locomotive engine operated by steam not equipped with a mechanically operated door to the fire box of such locomotive engine, or to use any locomotive engine not equipped with a vestibuled cab. Such mechanically operated door shall be so constructed and operated by steam, compressed air, electricity or other means, and such vestibuled cab shall be so constructed as deemed best and most efficient by the officers of such railroad. The device for operating such door shall be so constructed that it may be operated by the fireman on said engine by means of a push button or other appliance located in or near the floor of the deck or floor of the tender at a suitable distance from such door to enable the fireman while firing such engine, by pressure with his foot to open such door for the firing of such engine; provided, however, that such mechanically operated doors shall not be required on locomotives equipped with mechanical stokers, and such vestibuled cabs shall be so constructed as to attach to the sides of, and enclose all openings between the engine cab and the water tank or coal tender attached to such engine; [and] provided [further], however, that nothing in this section shall be construed to inhibit the passage of a locomotive engine not so equipped with such mechanically operated door[,] or vestibuled cab, moving under its own steam either with or without a train, when such movement is from a point without this state through and to a point beyond its borders, or from a point without this state to a point within it, or from a point within this state to a point without it if such passage is for the purpose of moving it to or from a repair shop or shops for the purpose of repairing such locomotive engine, and when it is not intended for service within this state.

§ 2. All new locomotive engines placed in service, after this act shall take effect, shall be equipped with such mechanically operated doors and vestibuled cabs. As to all locomotive engines not actually in service, nor assigned to or held for such service, within this state, at the time of the passage of this act, it shall take effect on and after the first day of January, nineteen hundred and nineteen. As to any locomotive engine or engines in actual service, or assigned to and held for such service, within this state, when this act shall take effect, the same may be continued in service until it is necessary to with-

draw it or them for general heavy repairs; and every locomotive engine so withdrawn from service for general heavy repairs shall be properly equipped with such mechanically operated fire box doors and such vestibuled cabs before it shall be returned to service, unless the director general of railroad lines, or any other official or officials who may hereafter be designated or authorized by the federal authorities as the person or persons to control the operation of railroad lines, otherwise direct.

§ 3. This act shall take effect January first, nineteen hundred and nineteen.

Approved May 13.

INDEX OF BILLS RELATING TO LABOR IN THE
LEGISLATIVE SESSION OF 1918

[Explanation.—Only the principal purpose and final stage of each bill are indicated; identical bills in Senate and Assembly are recorded as one; bills enacted into laws are described in *italic type*; numbers in parentheses are "Printed" the other "Introductory," numbers. Abbreviations used are: S. or Sen. for Senate, A. or Assm. for Assembly, and Com. for Committee.]

ADMINISTRATION OF LABOR LAWS

To provide payment for members of the industrial council of the State Industrial Commission. Mr. Bewley, A. 725 (800, 874). *Approved April 30, as Chapter 355.*

Similar bill by Senator Carson, S. 823 (996). Finance Com.

To increase the salary of the counsel to the State Industrial Commission from \$6,000 to \$7,500 per year. Senator Carson, S. 723 (846) and Mr. Bewley, A. 713 (788). Sen. Labor and Industry Com.; Assm. Labor and Industries Com.

To increase the salary of the Third Deputy in the State Industrial Commission from five thousand to six thousand dollars and of the Counsel from six thousand to seven thousand dollars. Mr. Bewley, A. 891 (1031, 1432). *Approved May 10, as Chapter 595.*

To increase the salaries of factory and mercantile inspectors in the employ of the State Industrial Commission. Mr. Bewley, A. 714 (789, 1287, 1378). Sen. Finance Com.; Assm. passed.

To increase the minimum number of factory inspectors from 125 to 150 and providing that not less than 50 instead of not more than 30 shall be women. Senator Lawson, S. 1190 (1561). Labor and Industry Com.

To increase the number and raise the salaries of mercantile inspectors and to amend generally the mercantile provisions of the Labor Law. Senator Lockwood, S. 1134 (1460) and Mr. Blakely, A. 1140 (1347). Sen. Finance Com.; Assm. Ways and Means Com.

To extend the mercantile provisions of the Labor Law to cities of the third class. Senator Carson, S. 726 (849) and Mr. Bewley, A. 719 (794). Sen. Labor and Industry Com.; Assm. passed.

To amend generally provisions of the Labor Law relative to employment in mercantile establishments. Senator Carson, S. 725 (848) and Mr. Bewley, A. 717 (792, 1430). Sen. Labor and Industry Com.; Assm. passed.

To empower State Industrial Commission to suspend Labor Law provisions which interfere with prosecution of the war or are "opposed to public welfare and necessity." Senator E. R. Brown, S. 115 (115). War Com.

To suspend for the period of the war and six months thereafter all restrictions of the Labor Law, Public Health Law and Education Law relative to the employment of children under fourteen years of age. Mr. Klingmann, A. 623 (690). Labor and Industry Com.

To fix responsibility for observance of the Labor Law provisions as to cleanliness, drinking water, washrooms, water closets and ventilation in mercantile establishments upon the owner of the building, and to define the term "owner." Senator Carson, S. 870 (1047) and Mr. Bewley, A. 1065 (1246). Sen. Com. of the Whole; Assm. Labor and Industries Com.

To make appropriation for the establishment by the State Industrial Commission of public employment offices in Binghamton, Elmira, Newburgh, Utica and Watertown. Senator Hill, S. 568 (636) and Mr. Machold, A. 688 (762). Sen. Finance Com.; Assm. Ways and Means Com.

To exempt State Industrial Commission from furnishing employment certificate blanks in cities of the first and second class. Senator Carson, S. 722 (845) and Mr. Bewley, A. 716 (791). Approved May 6, as Chapter 459.

To rewrite the provisions of the Labor Law as to the organization and duties of the Bureau of Statistics and Information. Senator Carson, S. 717 (841) and Mr. Bewley, A. 720 (795). Approved May 6, as Chapter 456.

To create an advisory committee to the State insurance fund; to require all expenses of the fund to be paid directly from premium receipts; and to authorize the fund to insure liability at common law, admiralty law and otherwise. Senator Walters, S. 597 (680) and Mr. Pratt, A. 691 (765). Sen. Judiciary Com.; Assm. Judiciary Com.

To render the State Insurance Law, relative to rate making associations, applicable to the State insurance fund. Sen. 760 (883) and Mr. Martin, A. 935 (1084). Sen. Judiciary Com.; Assm. Judiciary Com.

To establish a health insurance bureau in the State Industrial Commission. Senator Nicoll, S. 619 (706). Labor and Industry Com.

To alter the definition of the term "factory." Senator Carson, S. 729 (852) and Mr. Bewley, A. 711 (786). Sen. Com. of the Whole; Assm. Labor and Industries Com.

To provide that service of notice and summons under the Labor Law shall be made upon factory owners personally and not upon an agent when such owners are within the court's jurisdiction. Senator Boylan, S. 97 (97) and Mr. Donohue, A. 99 (99). Sen. Labor and Industry Com.; Assm. laid aside.

To make verbal changes in the law governing proceedings before the Bureau of Industries and Immigration. Senator Carson, S. 731 (854) and Mr. Bewley, A. 724 (799). Sen. Com. of the Whole; Assm. passed.

To relieve the owner of a tenant-factory from requirements as to the lighting of halls and stairways, except those used by the public. Senator Boylan, S. 445 (489). Labor and Industry Com.

To define the term "owner" of a tenant-factory so as to exclude agents in charge of the property. Senator Boylan, S. 444 (488). Labor and Industry Com.

To relieve the owner of a tenant-factory from liability for non-observance of requirements as to access to means of egress. Senator Boylan, S. 442 (486). Labor and Industry Com.

To relieve the owner of a tenant-factory from liability for non-observance of requirements as to wash-rooms. Senator Boylan, S. 441 (485). Labor and Industry Com.

To relieve the owner of a tenant-factory from liability for non-observance of requirements as to fire drills. Senator Boylan, S. 440 (484). Labor and Industry Com.

To establish a bureau of old-age pension in the State Industrial Commission. Mr. Garfinkel, A. 1089 (1270). Ways and Means Com.

To enact a Social Insurance Law, providing old age, unemployment, sickness, accident and death benefits for all employees not covered by workmen's compensation. Mr. Waldman, A. 1287 (1711). Insurance Com.

To empower the State Industrial Commission to requisition, after proclamation by the Governor, all able-bodied male residents of the State between eighteen and sixty years of age, not regularly engaged in some useful occupation for service in essential occupations. Mr. Cowee, A. 1216 (1517, 1630). Vetoed by the Governor.

Similar bill by Mr. Decker, A. 269 (280). Labor and Industries Com.

Similar bill by Mr. Martin, A. 24 (24). Judiciary Com.

To require all able-bodied males between eighteen and fifty years of age to be engaged in some useful occupation until the termination of the present war. Senator Robinson, S. 951 (1173). *Approved May 11, as Chapter 625.*

Identical bill by Senator Lawson. S. 1193 (1564). War Com.

To provide for the establishment by the State Industrial Commission of an additional employment office to serve the interests of negroes. Mr. E. A. Johnson, A. 1167 (1401). *Approved April 30, as Chapter 356.*

To abolish all private fee-charging employment agencies and appropriating \$50,000 to the State Industrial Commission to carry on their work. Mr. Garfinkel, A. 513 (552). Ways and Means Com.

HEALTH AND SAFETY

FACTORIES AND MERCANTILE ESTABLISHMENTS

To revise Labor Law provisions as to floor area, required exits, fire alarm signal systems and occupancy in factory buildings. Senator Carson, S. 716 (840, 1650) and Mr. Bewley, A. 722 (797). *Approved May 11, as Chapter 627.*

To further regulate the manufacture and sale of mattresses and bed springs. Mr. A. Taylor, A. 111 (111, 1291). *Approved April 30, as Chapter 369.*

To regulate fire exits and stairway enclosures and to strike out the power of Industrial Commission to adopt rules relative to stairway exits in factory buildings of five stories or less. Mr. Karlin, A. 357 (370). Labor and Industries Com.

Identical bill by Mr. Rosenberg, A. 438 (462). Labor and Industries Com.

To require in all factory buildings more than six stories high and having more than five thousand square feet in area at least one dividing fire wall. Mr. Karlin, A. 358 (371). Labor and Industries Com.

To permit wood sash glazed with wire glass instead of fireproof windows and making other relaxations of the Labor Law provisions as to fireproof windows in factories. Mr. Shannon, A. 804 (907). Labor and Industries Com.

To amend generally the structural provisions of the Labor Law as to floor area, stairways, fire alarm systems, fire drills, smoking and other matters in factories. Mr. Bewley, A. 915 (1055, 1288, 1440). Stricken from calendar.

To extend the requirements as to fire alarm signal systems and fire drills to all factory buildings over two stories high, irrespective of the number of employees. Senator Boylan, S. 443 (487, 1208). Com. of the Whole.

BUILDING WORK

To make the application of the scaffolding provisions of the Labor Law statewide; to require the inspection of ammonia tanks in factories and mercantile establishments; and to prohibit compulsory deductions from wages

in factories, as well as in mercantile establishments, as contributions to any benefit or insurance fund. Senator Carson, S. 720 (843) and Mr. Bewley, A. 712 (787). Sen. Labor and Industry Com.; Assm. passed.

BOILERS AND EXPLOSIVES

To further regulate the inspection of boilers and the storage of explosives. Senator Carson, S. 718 (842, 1602) and Mr. Bewley, A. 729 (804, 1513). Sen. Com. of the Whole; Assm. Labor and Industries Com.

BAKERIES

To require a sanitary certificate for each building used as a bakery, such certificate to be applied for jointly by the owner of the building and the occupier of the bakery. Senator Carson, S. 724 (847) and Mr. Bewley, A. 710 (785). Sen. Com. of the Whole; Assm. passed.

TENEMENT HOUSES

To prohibit manufacturing in tenement houses. Mr. Garfinkel, A. 402 (421). Labor and Industries Com.

To prohibit the manufacture of toys and wearing apparel in tenement houses or in apartments. Mr. Youker, A. 1050 (1229). Labor and Industry Com.

To require removal of old paper or calcimine from walls of tenement or work rooms before repapering or recalcimining. Senator Gibbs, S. 77 (77) and Mr. Blakely, A. 527 (570, 1506). Sen. Public Health Com.; Assm. passed.

RAILROADS

To require vestibuled cabs on locomotive engines. Senator Hill, S. 647 (744, 1132, 1486) and Mr. J. M. Mead, A. 805 (908, 1369, 1668). Approved May 13, as Chapter 649.

To empower the Public Service Commissions to compel the enclosure or vestibuling of street car platforms in cities of more than 450,000 inhabitants. Mr. Braun, A. 646 (716). Railroads Com.

To empower Public Service Commission to suspend Full Crew Railroad Law during the war. Senator E. R. Brown, S. 116 (116). War Com.

To fix number of crew when a locomotive is operating within yard limits. Senator Whitney, S. 732 (855, 1155) and Mr. C. L. Mead, A. 788 (891, 1339). Sen. Public Service Com.; Assm. Railroads Com.

To extend protection of Labor Law to subway workers and all other workers in compressed air. Senator Carson, S. 730 (853) and Mr. Bewley, A. 721 (796). Sen. Com. of the Whole; Assm. Labor and Industries Com.

WOMAN AND CHILD LABOR

To regulate the employment and hours of labor of females on railroads. Mr. Meyer, A. 910 (1050). Labor and Industries Com.

To suspend the Compulsory Education Law, as to children over twelve years of age engaged in agricultural pursuits, from April 1 to November 1 of each year during the continuance of the war. Mr. Wiltzie, A. 489 (516). Education Com.

To further restrict street trading by children. Senator Wagner, S. 755 (878, 1450). Sen. passed; Assm. Labor and Industries Com.

To prohibit the employment in cities of the first and second class of females under twenty-one years of age for the delivery of goods or messages, and regulating the hours of labor of females over twenty-one engaged in such employment. Senator Nicoll, S. 783 (906, 1675) and Mr. Meyer, A. 911 (1051). Approved May 2, as Chapter 434.

To make it a misdemeanor to employ any boy between sixteen and nineteen years of age who does not hold a certificate of enrollment for military or vocational training. Senator Slater, S. (1074, 1406, 1488) and Mr. Welsh, A. 1091 (1272, 1563). Approved May 6, as Chapter 470.

To reduce by two years the ages at which children may be employed at carrying and selling papers and in other street trades. Senator Walters, S. 1001 (1246). Labor and Industry Com.

Identical bill by Senator Walters, S. 1256 (1696). Third reading.

To prohibit the employment of women under twenty-one years of age in employment on surface, elevated and subway railroads and regulating the working hours of women over twenty-one so employed. Senator Nicoll, S. 210 (213, 919, 1645). Sen. Com. of the Whole.

To make it a misdemeanor to employ women under twenty-one years of age on surface, elevated and subway railroads or to violate the law as to working hours of women over twenty-one so employed. Senator Nicoll, S. 211 (214). Codes Com.

To repeal chapter 689, laws of 1917, suspending the Compulsory Education Law from April to November of each year during the war. Mr. Claessens, A. 68 (68). Public Education Com.

To permit employment of children between fourteen and sixteen years of age without employment or school record certificates in cities of the first and second class during the period when the public schools are not in session. Mr. E. A. Johnson, A. 170 (170). Labor and Industries Com.

To authorize the issuance of summer vacation permits for the employment of children between fourteen and sixteen years of age in mercantile establishments during the months of July and August. Senator Wellington, S. 579 (653, 1159) and Mr. Cowee, A. 709 (784, 1505). Approved May 11, as Chapter 628.

To permit employment of women over twenty-one years of age in restaurants in first and second class cities until 1 A. M. but not to exceed nine hours per day or fifty-four hours per week. Mr. Soule, A. 1194 (1455, 1632, 1649). Lost.

To permit women over twenty-one years of age employed in restaurants, lunch rooms or ice cream parlors which are operated in connection with candy stores to work until 1 A. M., provided they do not work to exceed nine hours per day or fifty-four hours per week. Mr. Soule, A. 1195 (1456, 1619, 1638). Laid aside.

To permit employment of women in restaurants serving public markets for fourteen hours on Saturdays. Senator Gibbs, S. 677 (775) and Mr. Zimmerman, A. 855 (970, 1564, 1695). Sen. Labor and Industry Com.; Assm. laid aside.

To render the mercantile and street trading provisions of the Labor Law inapplicable to children under sixteen years of age during the period when

the public schools are not in session. Mr. E. A. Johnson, A. 171 (171). Labor and Industries Com.

To increase from fourteen to sixteen years the minimum age at which children may be employed in factories and requiring employment certificates for children between sixteen and eighteen years of age so employed. Mr. Claessens, A. 329 (340). Labor and Industries Com.

To reduce from fifty-four to forty-eight hours per week and from nine to eight hours per day the working time permitted for females in factories, mercantile establishments and restaurants. Mr. Link, A. 434 (458). Labor and Industries Com.

To shorten the working hours of minors and women in factories and mercantile establishments to forty-eight per week and eight per day. Senator Lockwood, S. 615 (702, 1804) and Mr. Caulfield, A. 983 (1134). Sen. Com. of the Whole; Assm. Labor and Industries.

To prohibit employment of females and male minors in a factory and in a mercantile establishment for a greater number of hours per day or week than is permitted in a single factory or mercantile establishment, and to prohibit their employment after 6 P. M. Senator Carson, S. 721 (844) and Mr. Bewley, A. 718 (793). Sen. third reading; Assm. Labor and Industries Com.

To except women over twenty-one years of age employed in composing rooms of printing establishments from Labor Law restrictions as to hours of labor. Senator Boylan, S. 736 (859) and Mr. Bewley, A. 872 (1000). Sen. passed; Assm. lost.

To make it a misdemeanor for any woman, whether as employee or otherwise, to be in any place of amusement or attend any entertainment or social gathering after 10 P. M. or oftener than twice each week at any hour of the day. Senator Gibbs, S. 1225 (1627). Codes Com.

HOURS OF WORK

To make September 22 of each year a legal holiday to be known as "Emancipation Day". Mr. Amos, A. 22 (22). General Laws Com.

To prohibit employment in bakeries before 5 A. M. or after 9 P. M. except for dough mixing and sponge setting. Mr. Shiplacoff, A. 487 (514, 873, 997). Labor and Industries Com.

To require that all retail stores shall close not later than 10 P. M. except on Saturdays when they remain open until 11 P. M. Mr. Leininger, A. 814 (926). Codes Com.

To provide a ten-hour day for male employees in surface, subway and elevated railroads in first and second class cities and a nine-hour day for females so employed. Mr. Shiplacoff, A. 307 (318). Labor and Industries Com.

To establish an eight-hour day and forty-four hour week for all employees in any occupation in this State except in farm, domestic and dairy service where five or less persons are employed. Agreements for overtime work at increased rates of pay are forbidden. Mr. Rosenberg, A. 844 (859). Labor and Industries Com.

To strike out the exception of certain State employees from the eight-hour law; to permit the State to make contracts for overtime work; and to extend

the one-day-of-rest-in-seven law to all State civil service employees. Senator Hill, S. 347 (374) and Mr. Bourke, A. 414 (438). Sen. Labor and Industry Com.; Assm. Labor and Industries Com.

SUNDAY WORK

To prohibit the retail sale of ice on Sunday. Mr. Morris, A. 775 (872). Codes Com.

To permit barber shops in Saratoga Springs and New York City to keep open on Sunday from 8 A. M. until noon instead of until 1 P. M. Senator G. F. Thompson, S. 1023 (1295). Codes Com.

ONE DAY OF REST IN SEVEN

To include restaurants within the application of the one-day-of-rest-in-seven law and to exclude managers and buyers in mercantile establishments therefrom. Senator Carson, S. 727 (850) and Mr. Bewley, A. 723 (798). Sen. Labor and Industry Com.; Assm. Labor and Industry Com.

To establish a ten-hour day for barbers in Saratoga Springs from June 15 to September 15 and in New York City throughout the year; Sunday hours from 8 A. M. until noon; and one full week day of rest for each barber who has worked on two consecutive Sundays. Senator G. F. Thompson, S. 1026 (1298). Codes Com.

To fix a nine-hour day for employed pharmacists and to provide one day of rest in each week. Senator Dunnigan, S. 1053 (1335, 1478). Public Health Com.

Similar bill by Mr. Orr, A. 224 (225). Public Health Com.

To extend the one-day-of-rest-in-seven law to all occupations except steam railroad employees, farm laborers and domestic servants. Senator Cotillo, S. 1232 (1651). Labor and Industry Com.

LEGAL RIGHTS

EMPLOYERS' LIABILITY

To require provision in employers' liability insurance policies that the injured party may maintain an action against the insurance carrier for the amount of any unsatisfied execution against an insolvent or bankrupt employer. Senator Walters, S. 603 (886, 983), and Mr. Crane, A. 779 (882, 1159). Approved April 10, as Chapter 182.

WAGES

To regulate the procedure in the New York City municipal court in actions for wages. Mr. Karlin, A. 484 (511, 1558). Approved May 7, as Chapter 503.

Concurrent resolution for amendment to State constitution authorizing the Legislature to fix living wages for women and child employees. Mr. Hamill, A. 244 (247). Judiciary Com.

To provide that a woman may be arrested in an action for the recovery of wages. Mr. Flynn, A. 318 (329). Codes Com.

To make officers as well as stockholders of corporations liable for wage debts. Mr. Flynn, A. 319 (330). Judiciary Com.

To subject weekly wages of sixteen dollars to garnishee action instead of twelve dollars as at present. Mr. McLaughlin, A. 678 (752). Codes Com.

To allow to plaintiff in a successful action for wages a reasonable attorney's fee as part of the taxable costs. Mr. Rosenberg, A. 704 (779). Labor and Industries Com.

To require that weekly payment of wages by corporations shall be in lawful money of the United States. Mr. Rosenberg, A. 1187 (1448). Labor and Industries Com.

To regulate wage contracts. Mr. Whitehorn, A. 1227 (1541). Labor and Industries Com.

To establish a State Wage Commission for the determination of living wages for women and minors. Senator Wagner, S. 93 (93), and Mr. Bloch, A. 777 (880). Sen. Labor and Industry Com.; Assm. Labor and Industries Com.

To permit insurance companies to write insurance against loss of wages occasioned by the discharge of employees. Senator Lockwood, S. 1063 (1345). Insurance Com.

WORKMEN'S COMPENSATION

To allow workmen's compensation benefits from date of injury instead of from two weeks after injury. Mr. Larney, A. 294 (305). Judiciary Com.

To increase workmen's compensation benefits for employees receiving ten dollars a week or less to full amount of wages. Mr. Larney, A. 295 (306). Judiciary Com.

To include theatrical scene shifters and other property men within coverage of Workmen's Compensation Law. Mr. Blakely, A. 340 (353). Sen. passed; Labor and Industry Com.

To begin benefits under the Workmen's Compensation Law within four, instead of fourteen days, from date of injury; to require medical care so long as the injury lasts instead of for sixty days; and to require compensation equal to full wages instead of two-thirds of wages. Mr. Karlin, A. 559 (602). Judiciary Com.

To include farm laborers and domestic servants within the Workmen's Compensation Law and to include restaurants and wholesale and retail establishments. Mr. Karlin, A. 560 (603). Judiciary Com.

To give the State Fund a monopoly of workmen's compensation insurance. Mr. Karlin, A. 561 (604). Judiciary Com.

To exempt for the period of the war woodcutting for fuel from the Workmen's Compensation Law. Mr. Showers, A. 573 (619). Judiciary Com.

To establish a merit rating bureau in the State Fund. Mr. A. Taylor, A. 628 (695). Judiciary Com.

To bring employment of a certain forest ranger to the Conservation Commission retroactively within coverage of the Workmen's Compensation Law. Senator Marshall, S. 142 (143), and Mr. Thayer, A. 172 (172). Approved May 10, as Chapter 598.

To include certain employees of the State Conservation Commission within coverage of the Workmen's Compensation Law. Senator Walton, S. 299 (314), and Mr. Talmadge, A. 393 (412). Approved May 13, as Chapter 633.

To establish a State health insurance system for employees in case of death, sickness and accident not covered by the Workmen's Compensation Law. Senator Nicoll, S. 496 (544, 692). Judiciary Com.

To except from coverage of the Workmen's Compensation Law operations solely for the production of firewood when not more than four persons are employed. Senator Walton, S. 589 (672), and Mr. Showers, A. 737 (824). Approved May 13, as Chapter 635.

To re-enact those portions of the Workmen's compensation Law dealing with the operation of vessels and with longshore work. Senator Walters, S. 601 (684), and Mr. Pratt, A. 689 (763). Approved April 17, as Chapter 249.

To amend the Workmen's Compensation Law generally. Senator Walters, S. 602 (685, 1608), and Mr. Pratt, A. 690 (764). Approved May 13, as Chapter 634.

To bring the employment of a certain engineer in a State institution retroactively within coverage of the Workmen's Compensation Law. Senator Cotillo, S. 668 (766), and Mr. Hamill, A. 840 (955). Approved May 10, as Chapter 599.

To require approval of premium rates of the State insurance fund by the State insurance department. Senator Wicks, S. 758 (881), and Mr. Martin, A. 932 (1081). Sen. Insurance Com.; Assm. laid aside.

To provide a system of group life insurance for employees. Senator Towner, S. 818 (978), and Mr. Gardner, A. 979 (1128, 1363). Approved April 13, as Chapter 192.

To prohibit stock companies and mutual companies from doing business under the Workmen's Compensation Law. Senator Gilchrist, S. 821 (994), and Mr. J. M. Mead, A. 914 (1054). Sen. Judiciary Com.; Assm. Judiciary Com.

To include certain occupational diseases within the definition of "Injury" under the Workmen's Compensation Law. Senator Walters, S. 1002 (1247). Labor and Industry Com.

To extend Workmen's Compensation Law to officers and employees generally of State prisons, hospitals and reformatories. Senator Walters, S. 1185 (1556), and Mr. Pratt, A. 1265 (1656). Vetoed by the Governor.

STATE AND MUNICIPAL EMPLOYEES

To include officers as well as employees and to regulate pensions and annuities in the system of State hospitals. Mr. Jenks, A. 997 (1152). Approved May 7, as Chapter 499.

To provide a retirement and pension system for Civil War veterans employed in the civil service of the State. Mr. Gardner, A. 190 (190). Ways and Means Com.

To provide a retirement and pension system for Spanish War veterans employed in the State civil service, and pensions for widows of Civil War and Spanish War veterans. Mr. Bates, A. 245 (250). Ways and Means Com.

To make mandatory the retirement upon pension of incapacitated New York City employees after twenty-five years' service and in the case of Civil War veterans after twenty years' service. Mr. Twomey, A. 598 (654, 1135). Cities Com.

To regulate pensions of members of the street cleaning department in New York City. Mr. Klingmann, A. 694 (768). Cities Com.

To regulate the retirement of members of the police force in New York City. Mr. Klingmann, A. 739 (826). Cities Com.

To provide for retirement on pension of New York City employees after twenty-five years' service in the case of Spanish War veterans, veterans of the present war, or veterans of a volunteer fire department. Mr. Curley, A. 919 (1059, 1137). Cities Com.

To provide for retirement on pension of Civil War veterans in the State civil service who have served seven years and are seventy-five years of age. Mr. Shannon, A. 923 (1063). Judiciary Com.

To provide for the voluntary retirement upon pension in all municipalities of the State of policemen and firemen who are veterans of the Spanish-American War after fifteen years of employment and compulsory retirement after twenty years. Mr. Blakely, A. 1243 (1578). Judiciary Com.

To establish a pension and retirement system for State employees. Senator Nicoll, S. 79 (79). Civil Service Com.

To provide a pension and retirement system for Civil War veterans in public service. Senator Towner, S. 180 (180, 1077). Sen. passed; Assm. Judiciary Com.

To amend the pension law for Civil War veterans in State, county or municipal service. Senator Hill, S. 191 (194), and Mr. Jenks, A. 533 (576). Sen. Civil Service Com.; Assm. Ways and Means Com.

To pension employees under the Superintendent of State Prisons. Senator Whitney, S. 192 (195). Approved March 26, as Chapter 89.

To establish a relief and pension fund in the bureau of street cleaning of the Borough of Queens. Senator Farrenkopf, S. 233 (243, 1226, 1480). Not accepted by City.

Similar bill by Mr. O'Hare, A. 281 (292, 1380). Cities Com.

To authorize the retirement on pension of Civil War veterans in the employ of the State Superintendent of Buildings. Senator Sage, S. 278 (293), and Mr. Fenner, A. 373 (386). Approved April 3, as Chapter 142.

To amend retirement pension system for members of the New York City police force. Senator Lawson, S. 522 (571). New York City Com.

To provide that time served by members of the water supply police force in New York City shall count in determining salary, promotion, retirement and pensions in the case of members who have been placed on regular police force. Senator Ottinger, S. 712 (832). Not approved by City.

Identical bill by Senator Carroll, S. 626 (723), and Mr. Flynn, A. 272 (283). Sen. New York City Com.; Assm. Cities Com.

Identical bill by Mr. Donnelly, A. 529 (572). Cities Com.

To provide retirement and pension system for Civil War veterans employed in the office of the Adjutant-General. Senator Stivers, S. 793 (933), and Mr. F. A. Wells, A. 879 (1,007). Approved May 8, as Chapter 557.

To shorten the length of service required on the New York City police force to be eligible for retirement on pension. Senator Dunnigan, S. 798 (947), and Mr. McDonald, A. 955 (1103). Sen. New York City Com.; Assm. Cities Com.

To provide for retirement on pension of New York City employees engaged in the operation of public utilities which may be taken over by that city. Senator Cromwell, S. 804 (953), and Mr. Seesselberg, A. 871 (991). Not accepted by City.

To make compulsory the retirement on pension of members of the New York City fire department who are permanently disabled in the actual performance of their duties. Senator Koenig, S. 992 (1237). New York City Com.

To provide additional pension benefits to widows of New York City policemen, who are killed while in performance of duty, in proportion to the number of dependent children under sixteen years of age. Senator Lockwood, S. 1040 (1318, 1487). Vetoed by Governor.

To establish a retirement and pension system for civil service employees of boards of education in all cities of the State having a population of one hundred thousand and more. Senator Murphy, S. 1111 (1422, 1727), and Mr. Farrell, A. 1244 (1579).

To establish a single retirement system for all New York City employees. Senator Nicoll, S. 1119 (1430). New York City Com.

To provide retirement and pension system for uniformed force of department of corrections in New York City. Senator Boylan, S. 1148 (1492). Not accepted by City.

To create a State commission to investigate the subject of retirement pensions for all State and municipal employees. Senator Lockwood, S. 1178 (1550). Approved May 1, as Chapter 414.

To increase pension benefits to families of deceased members of the uniformed force of New York City fire department in proportion to the number of dependent children under sixteen years of age. Senator Carroll, S. 1215 (1616, 1723). Vetoed by the Governor.

To prohibit the removal of subordinates in the classified civil service of the building bureaus of New York City without granting opportunity of explanation to such subordinates, and requiring, in case of removal, that a record of the reason therefor shall be filed. Senator Dunnigan, S. 258 (268), and Mr. McDonald, A. 492 (519). Approved May 11, as Chapter 617.

To provide that reinstated members of the New York City police department shall have credit for time served before dismissal but not for time during such dismissal. Senator Downing, S. 269 (279). Com. of the Whole.

To increase the maximum age for appointment, during the war, of patrolmen on New York City police force from twenty-nine years to thirty-five years. Senator Dunnigan, S. 629 (726), and Mr. McDonald, A. 635 (705, 1434).

To increase the maximum age of applicants for membership in the New York City fire department from twenty-nine years to thirty-five years during the present war. Senator Dunnigan, S. 799 (948), and Mr. McDonald, A. 957 (1105, 1433). Approved May 7, as Chapter 500.

To increase the salaries of chief engineers and electrical engineers in State hospitals having four thousand or more patients. Mr. Everett, A. 316 (327, 949, 978). Vetoed by the Governor.

To increase the pay of employees in State armories. Mr. F. A. Wells, A. 113 (113, 394, 499, 662). Vetoed by the Governor.

To provide a 10 per cent increase in the salaries of all State employees. Mr. Larney, A. 298 (309). Judiciary Com.

To increase the salaries of State civil service employees. Mr. Gitlow, A. 447 (471, 1186). Ways and Means Com.

To increase the salaries of New York City employees. Mr. Orr, A. 465 (492). Cities Com.

To regrade and increase the salaries of members of the New York City police force. Mr. Klingmann, A. 740 (827). Cities Com.

To regulate salaries and promotions of employees in State reformatories. Mr. Richford, A. 977 (1126, 1387). Ways and Means Com.

To regulate salaries of State hospital employees. Senator Wicks, S. 283 (298), and Mr. Jenks, A. 321 (332). Sen. Finance Com.; Assm. Ways and Means Com.

To increase the salaries of employees in State hospitals. Senator G. L. Thompson, S. 378 (409), and Mr. Murphy, A. 638 (708). Sen. Finance Com.; Assm. Ways and Means Com.

To increase the salaries of guards and certain other employees in Auburn, Clinton, Great Meadow and Sing Sing prisons. Senator Slater, S. 914 (1105, 1592), and Mr. Pierce, A. 1123 (1320). Approved May 8, as Chapter 566.

To increase the salary of guards in State prisons. Senator Slater, S. 915 (1106), and Mr. Pierce, A. 1122 (1319). Approved May 9, as Chapter 577.

To increase by 10 per cent the salaries of civilian employees of the State receiving less than \$1,500 per year. Senator Lockwood, S. 937 (1144, 1646, 1664, 1705), and Mr. Fearon, A. 1162 (1396, 1669, 1713). Approved May 8, as Chapter 556.

To provide that any person who has been employed in the New York City bureau of water supply for thirty years and who, while so engaged, has furnished his own horse and wagon, shall be retired on an annual pension of \$400. Mr. Hamill, A. 444 (468). Cities Com.

To permit State and municipal employees who are members of the New York Guard to absent themselves on military duty without prejudice to position, privilege or pay. Mr. Flynn, A. 477 (504). Ways and Means Com.

To provide that any city employee of New York City, who is over draft age, may, with the consent of the city government, absent himself during the war to engage in the manufacture of war materials without prejudice to his position or pension privileges. Mr. Farrell, A. 649 (719). Cities Com.

To grant leave of absence, without pay, to New York City employees engaged in the manufacture of munitions or war materials. Senator Dowling, S. 300 (315, 714; A. 1549). Not accepted by City.

To provide that, except for institutional service, a position in the State civil service when once placed in the competitive class shall not thereafter be exempted. Mr. Youker, A. 509 (548, 1593). Assm. passed; Sen. third reading.

To give preference as to retention in civil service of war veterans and members of volunteer fire companies. Senator G. L. Thompson, S. 871 (1048), and Mr. McWhinney, A. 1037 (1216). Sen. Civil Service Com.; Assm. Judiciary Com.

To guarantee the civil rights of all State, county and municipal employees; to permit teachers and civil service employees to organize and to freely express their views without prejudice to position or promotion. Mr. Feigenbaum, A. 1085 (1266). Judiciary Com.

To abolish the tenement house department and the bureau of fire prevention in the fire department in New York City and to transfer their duties and their employees to the building bureaus of the several boroughs. Senator Dunnigan, S. 991 (1236). New York City Com.

To require all State civil service examinations to be open to both sexes, except when the nature of the employment precludes. Mr. Showers, A. 1046 (1225). Judiciary Com.

Similar bill by Mr. Showers, A. 1205 (1480). Judiciary Com.

To establish a two platoon system for the fire departments in first class cities. Mr. Blakely, A. 252 (257). Cities Com.

Identical bill by Mr. Braun, A. 648 (718). Cities Com.

To require that all city employees, who are required to wear uniforms, shall be furnished with such uniforms without charge. Mr. Larney, A. 297 (308). Cities Com.

CONVICT LABOR

To authorize the employment of convicts in county jails on construction and repair of county roads. Mr. Wiltsie, A. 643 (713). Penal Institutions Com.

REGULATION OF TRADES AND OCCUPATIONS

To increase the license fee for employment agencies from twenty-five to one hundred dollars. Senator Newton, S. 1270 (1733). Sen. passed; Assem. General Laws Com.

To reduce from eighteen to seventeen years the minimum age of chauffeurs or motor vehicle operators. Senator Towner, S. 770 (893), and Mr. Donohoe, A. 823 (935, 1431). Sen. Internal Affairs Com.; Assem. passed.

To regulate the licensing of motor car "operators." Senator Murphy, S. 585 (668), and Mr. Welsh, A. 703 (777). Sen. Internal Affairs Com.; Assem. Ways and Means Com.

To permit the employment as masters, pilots and engineers on steam vessels of less than one hundred tons burden of persons between eighteen and twenty-one years of age. Senator Robinson, S. 537 (591, 1274), and Mr. E. O. Davis, A. 676 (750, 1464). Approved April 12, as Chapter 190.

To regulate the licensing of operators of moving picture apparatus. Senator Walker, S. 361 (388, 712), and Mr. Flynn, A. 930 (1079, 1597). Sen. Cities Com.; Assem. passed.

To provide for the renewal, without examination, at the end of the war of the licenses of chauffeurs who have been in military service. Senator Cromwell, S. 271 (286). Approved April 16, as Chapter 238.

To define the term "operator" and to regulate issuance of chauffeurs' licenses. Mr. Welsh, A. 746 (833). Ways and Means Com.

To create a State Board for the examination and licensing of horseshoers in this State. Mr. Fenner, A. 1255 (1610). General Laws Com.

INDUSTRIAL DISPUTES

To require reports of strikes and lockouts, existing or threatened, to be made in writing to the State Industrial Commission by city or village authorities. Senator Carson, S. 728 (851). Com. of the Whole.

To regulate court injunctions in labor disputes. Senator Wagner, S. 432 (466, 524, 962), and Mr. Martin, A. 551 (594, 1028). Sen. Codes Com.; Assem. Codes Com.

To amend the procedure as to punishment for criminal contempt of court. Senator Wagner, S. 431 (465, 523), and Mr. Martin, A. 552 (595). Sen. Judiciary Com.; Assem. Judiciary Com.

To require county residence of at least three years in the case of persons appointed as deputy sheriffs in connection with labor disputes. Mr. Feigenbaum, A. 1213 (1489). Internal Affairs Com.

To prohibit the use of the State troops or the State police in labor disputes. Mr. Feigenbaum, A. 1212 (1488). Military Affairs Com.

To require notice to the defendants and hearing and decision of the application before an injunction may be issued in labor disputes. Mr. Orr, A. 1117 (1314). Codes Com.

To require city and village authorities to notify State Industrial Commission at once by telegram of threatened strike or lockout. Mr. Bewley, A. 715 (790, 1025). Labor and Industries Com.

To require an employer, when advertising for laborers during the continuance of a labor dispute among his employees, to state the existence of such dispute. Mr. Rosenberg, A. 325 (336). Codes Com.

To prohibit the use of a body of armed men unauthorized by State law for the suppression of strikes and to regulate detectives. Mr. Feigenbaum, A. 233 (234). Codes Com.

To provide that human labor shall not be deemed to be a commodity and to except labor organizations from classification as illegal combinations. Senator Wagner, S. 433 (467, 958), and Mr. Martin, A. 550 (593, 1027). Sen. Judiciary Com.; Assm. General Laws Com.

To provide that human labor shall not be deemed to be a commodity. Senator Wicks, S. 797 (946), and Mr. Martin, A. 934 (1,083. Sen. passed; Assm. Judiciary Com.

To except labor organizations from classification as illegal combinations. Senator Wagner, S. 434 (468), and Mr. Martin, A. 553 (596). Sen. passed; Assm. Codes Com.

MISCELLANEOUS

To make exclusion from public employment on account of race, creed or color a misdemeanor. Mr. E. A. Johnson, A. 38 (38, 1557). Approved April 30, as Chapter 380.

Similar bill by Senator Dowling, S. 60 (60). Codes Com.

To prohibit discrimination by employers against employees, except domestic servants and teachers, on account of race, creed or color. Mr. Shiplacoff, A. 1208 (1484). Codes Com.

To authorize an employer to adopt a badge to be worn by employees while on the premises, and making it a misdemeanor to misuse such badge. Senator Nicoll, S. 470 (513, 1164; A. 1731), and Mr. Talmadge, A. 569 (615, 1515). Approved April 17, as Chapter 265.

To require school attendance or instruction in English and civics at the place of employment for illiterates between sixteen and twenty-one years of age. Senator Robinson S. 1168 (1540, 1672), and Mr. Meyer, A. 1199 (1474). Approved May 1, as Chapter 415.

To provide institutes to train teachers in methods for instructing illiterates over sixteen years of age. Senator Lockwood, S. 1062 (1344, 1593), and Mr. Meyer, A. 1218 (1519). Approved May 1, as Chapter 412.

To require fraternal organizations to expend within this State and upon citizens of this State, all sums collected within this State for the support of eleemosynary institutions. Senator Lawson, S. 748 (871). Judiciary Com.

Identical bill by Senator Lawson, S. 803 (952, 1674). Judiciary Com.

To require employers to grant two hours' absence from work without deduction from wages to employees at any election instead of at a general election as at present. Mr. Adler, A. 41 (41, 430). Approved March 4, as Chapter 32.

Similar bill by Senator Walters, S. 140 (140, 281, 441). Recalled from the Governor.

To require fraternal organizations which levy assessments upon members for support of orphanages, homes for aged or other eleemosynary purposes to expend within New York State all sums collected within this State. Mr. A. Taylor, A. 1083 (1264). Insurance Com.

To require employers to give, upon demand, to any employee of one year's standing who is leaving employment a certificate as to the nature of work done by such employee and whether performed in a satisfactory manner. Mr. Link, A. 401 (420). Labor and Industries Com.

Concurrent resolution urging support of congressional bill to raise salaries of United States postal employees. Mr. Link. Sen. War Measures Com.; Assm. adopted.

Assembly resolution urging support of a congressional bill to appropriate \$100,000,000 to reimburse workers east of the Mississippi river for loss of wages caused by shut-down of industrial plants due to the fuel crisis of last winter. Mr. Whitehorn. Laid over under Rules.

STATE OF NEW YORK
DEPARTMENT OF LABOR
SPECIAL BULLETIN

Issued Under the Direction of
THE INDUSTRIAL COMMISSION

JOHN MITCHELL, Chairman
EDWARD P. LYON **JAMES M. LYNCH**
LOUIS WIARD **HENRY D. SAYER**
WILLIAM S. COFFEY, Secretary

No. 89
NOVEMBER, 1918

HEALTH HAZARDS
OF THE
CLOTH SPONGING INDUSTRY

Prepared by
THE BUREAU OF INSPECTION

HEALTH HAZARDS OF THE CLOTH SPONGING INDUSTRY

The unhealthful conditions surrounding workmen engaged in the process of sponging and steaming of cloth, having been the subject of numerous complaints, a thorough investigation of the health hazards in this industry was made by the Bureau of Inspection of the New York State Industrial Commission.

In accordance with this survey, ninety establishments, using cloth sponging devices, in the State, were visited. Eighty-eight orders were issued to correct conditions inimical to the health of employees. Compliance with these orders will be insisted on and obtained.

The report shows the necessity for correcting these conditions for the removal of steam and vapor and the consequent lowering of humidity in the rooms in which these machines are operated and men employed.

DESCRIPTION OF PROCESS

Cloth sponging comprises the process of subjecting cloth, as it comes from the mill, to the action of steam under pressure, or, to the action of cold water according to the material and weave of the goods, in order to shrink it evenly and prevent further shrinkage when made up into clothing or used for other purposes.

This process is in use in every city and town of any size where cloth is made into garments, etc., in the State of New York, New York City alone having approximately sixty-five establishments which employ an average of three hundred men, no women being employed in any branch of this industry. The industry is divided into three branches: (1) Examining; (2) Cold Water or London Shrinking which is the older branch of the business; (3) Steam Shrinking or Sponging, which was devised as a labor and time saving device. Before the bolts of cloth are put through any of the following described processes, every yard is closely inspected by experts, known in the trade as cloth examiners. These men pull the cloth over a rack or "perch" as it is familiarly called, and all defects as found by them are marked by a tape put in the selvage of the goods. These distinguishing marks are put in the material for the purpose of guiding the cutters so that they may avoid placing the defects in the cut clothing. When the

examiners find that the defects run higher than a certain given percentage, the piece is rejected and sent back to the mill.

Cold water shrinking is conducted by running the bolts of cloth through a tank of clean, cold water and then, in some factories, as it emerges from the tank, a spray of cold water under pressure is thrown against the cloth. It is then run through wringers, to dispose of the excess water, and is dried by being hung for a period of twelve to forty-eight hours over wooden racks attached to the ceiling.

When dry, the cloth is taken down, measured on a measuring machine, and then rolled or wound on boards; some shops use a combination measuring and winding machine. It is then ready for the tailoring trade. This process is known as the "London, or Cold Water Process of Shrinking."

Warm water is used in some factories, instead of cold water, for certain weaves of goods, while other factories use drying machines to accelerate the process of drying after the cloth has been run through the dampening machine. This machine consists of a rectangular chamber approximately 25 feet long, 10 feet wide and 8 feet high; at the top of this chamber there are placed racks of wood over which the rolls of damp cloth are slowly drawn by motor power, about fifteen minutes being consumed in drying a seventy-five yard bolt of cloth. In a compartment at the side of this chamber, coils of steam pipe are installed, three fans being used to distribute the heat evenly throughout the drying chamber. This is an elaboration of the "London Process" and does not roughen or disturb the nap of the cloth, thus obviating the necessity of refinishing the goods.

Refinishing is often necessary when the nap on the cloth is roughened or disturbed; different machines and processes are used to restore the cloth to its proper condition for the trade. In some places, the cloth is run over a smooth roll under an endless sleeve, thereby smoothing and finishing it; in other places, a refinishing press is used, especially for canvas. After canvas is shrunk and dried it is often somewhat wrinkled and is put through this type of pressing machine which automatically smooths and presses the goods between flat chambers heated by steam. Another process of refinishing is that accomplished by the machine known as the Rowe Press. In this process the cloth is placed, in folds, between pieces of cardboard which are then piled between steel plates which have been heated to a proper degree of temperature in a metal heating box; these piles are placed

in the Rowe Press and pressed until the cloth is smooth and the nap lies properly, a knuckle back link being used to regulate the pressure. A machine called the Can Drying Machine is also used in some factories; this is a machine having several cylinder rolls arranged in a series, after the manner of a paper-making machine, between which the cloth is passed and dries by steam heat.

The Hebdon, or horizontal, roll process is that process in which the cloth, after being examined for defects, is passed over a hollow metal cylinder having therein a great number of small perforations connected with tubes about 2 inches long projecting into the cylinder through which live steam is forced under a pressure of from sixty to ninety pounds, depending on the weight, texture and quality of the



Photograph No. 1

Showing pitch ten degrees of sail cloth canopy over three Hebdon sponging machines, with two suction fans located in an advantageous position in wall of building, which discharge excess steam into a large stand pipe leading above roof of building. Capacity of the 36-inch disc fan—8484 cubic feet per minute; the 24-inch disc fan—6875 cubic feet per minute. In the picture steam is turned off and fans are not running.

goods to be shrunk. While being passed over one roll, of the two cylinder Hebdon machine, containing live steam, it is wound on the second, or dead, roll of the machine for drying; it is then carried on this roll to the measuring and winding machines where the exact yardage of the shrunk goods is ascertained and the cloth wound on boards ready for the tailoring trade.

The steam jet, or vertical cylinder, process consists of winding the cloth on short, perforated cylinders, about 3 feet 6 inches to 4 feet in length, prior to steaming. These rolls, when filled with cloth, are set in an upright position over steam jets placed in a row on a narrow table, after which the steam is forced under pressure into the cylinders and through the cloth. The rolls, weighing approximately sixty pounds are carried, while still hot and steaming, by the operators to the re-winding machines; in doing this it is necessary to wrap the rolls in cloth to prevent the operator being burned, but despite this precaution, the faces and shoulders of the operators are often burned and blistered.

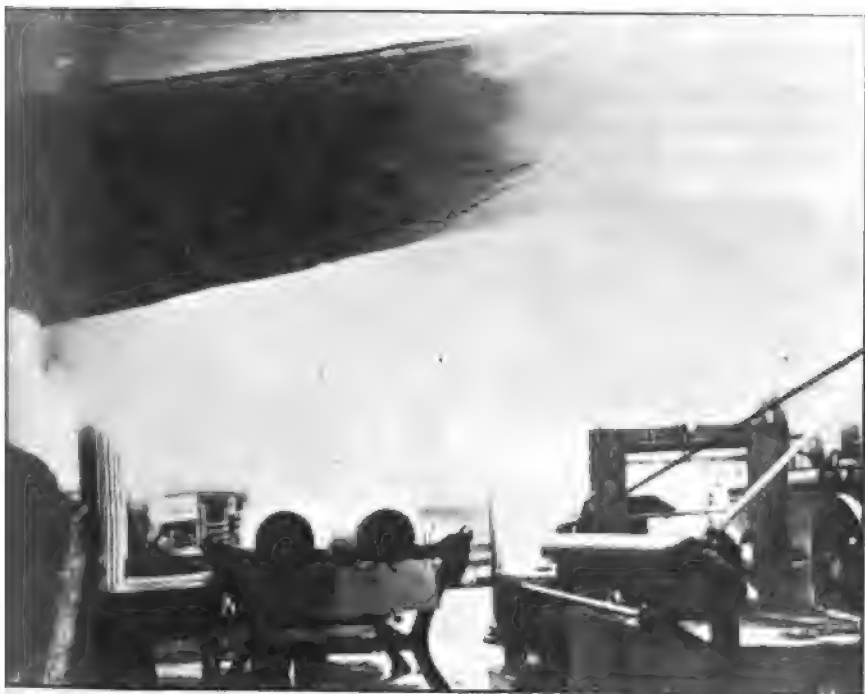
In some factories, a modification of the Hebdon machine is in use. This machine consists of one Hebdon cylinder and one steam box over which the cloth is passed and rolled on the remaining cylinder. This box is a rectangular metal chamber, about 24 inches wide and 18 inches deep, covered with cloth; the steam, being introduced by a jet percolates through the cloth top, steaming and shrinking the bolt of cloth which is being passed over it, and performing the same function as the perforated Hebdon cylinder.

HAZARDS

The health hazard in the sponging industry consists of the danger to which the examiners and the spongers and their helpers are subjected.

The hazard of the examiners can be dismissed briefly. It is the ordinary danger of the inhalation of the so-called "shod" or "fluff" which flies from the material as it is pulled over the "perch." Respiratory diseases are the natural consequence of this branch of the business. It is evident, that to eliminate the health hazard of the expert cloth examiner, a light mask or respirator should be worn during the hours of work. It is our opinion, and that opinion is coincided with by many of the workers who were spoken to, that this method would solve the difficulty under which they now labor at this point.

The health hazard of the sponger and his helper is a most difficult one to approach. The combining of actual hard labor, entailing the



Photograph No. 2

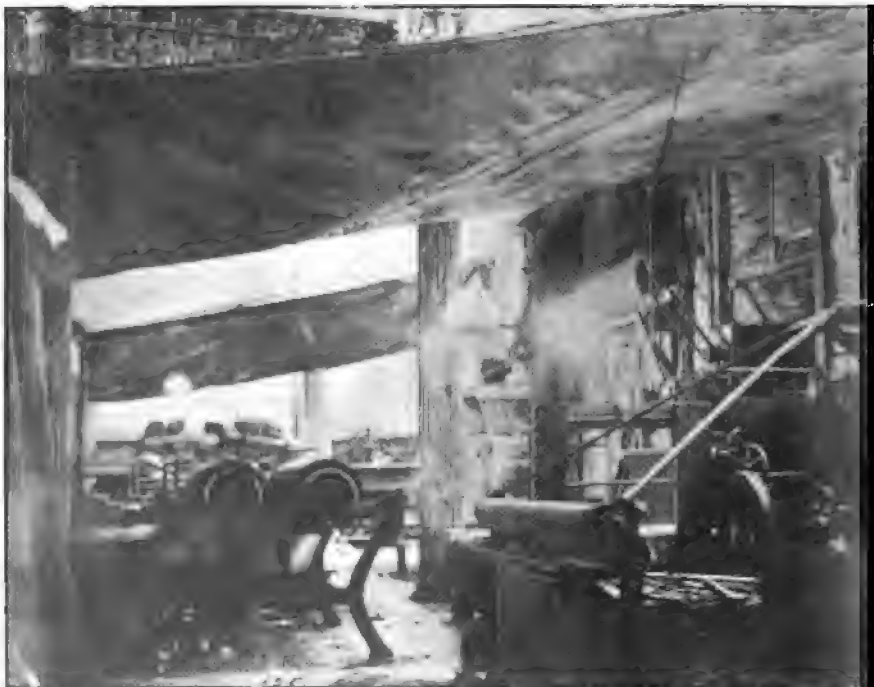
This picture shows the condition prevailing when cloth is being sponged on two Hebdon machines with no suction fans in operation. Note that steam is banked about the Hebdon rolls, envelops the canopy hood, filling the large room in front and would completely envelop any one working at the machines under these conditions. The sail cloth canopy above the rolls was enveloped in live steam given off under 80 lbs. pressure, for 20 minutes and did not show a trace of drip.

carrying of rolls of cloth weighing from sixty to one hundred and fifty pounds when rolled on the steam cylinders, with working in the presence of high temperature and humidity, must certainly be followed by a general lowering of the body vitality, and the workers not only suffer from the diseases coincident with the industry, but any inter-current diseases are intensified to a marked degree.

It has been shown by actual experiments that laboring under conditions in which there is a hot, humid air causes an increase of the body temperature, an increased pulse rate, and a loss of moisture by

the body which is entirely out of proportion to the work which is being performed.

Prof. F. C. Lee says that when working in a hot, humid atmosphere the blood-vessels of the skin are dilated and overcharged with blood, and the brain and spinal cord, among other organs, are rendered correspondingly anaemic. This is sufficient of itself to account largely for the feeling of weariness, indifference and apathy when working in an atmosphere of this kind.



Photograph No. 3

This picture shows the process of steam sponging with two exhaust fans. (one 24-inch disc and one 30-inch disc fan) in operation. The steam is being collected under the sail cloth canopy about 8 feet above the floor and is being drawn directly to the suction fans and discharged through stand pipes to the outer air. Steam is banked about 2 to 3 feet above and away from the heads of the workmen. (As this is a time exposure requiring about 20 minutes, workmen are not shown.)

The changed bodily sensations and the general bodily discomfort also tend toward the same end, but if the stage of elevated body temperature be reached, the internal conditions are still more radically changed: a febrile state, especially when pronounced and long con-

tinued, affords unusually good chemical conditions for the oncoming of fatigue.

Well known investigators, such as George M. Kober, M. D., of Washington, D. C., W. Gilman Thompson of New York, and C. E. A. Winslow of New York, who have written along the same lines, and also British experts agree on the report of the British Committee on Ventilation which says "The conclusion is drawn that prolonged exposure to a hot, moist atmosphere would appear to be more injurious than exposure to an even higher wet bulb temperature for a short time, and that the views expressed entirely support the contention that humidification in any shape or form causes bodily discomfort and injury to the health."

Barker's analysis, as quoted in his volume on Heating and Ventilation (page 106), was that the degree of discomfort experienced by workers in a hot, moist atmosphere is measured not by the temperature of the air, nor by its relative saturation, nor the absolute percentage of aqueous vapor present, but "*by the temperature shown by the wet bulb thermometer. If this exceeds about 78 degrees F. hard work becomes impossible.*" He further says that "*A temperature of 75 degrees F. wet bulb should not be exceeded, and a limit of 70 degrees F. is still more desirable.*"

A study of the comparative table appended will show the high degree of the wet bulb readings in sponging establishments.

It is the opinion of other investigators, as well as our own, that to a large degree the acute respiratory conditions, as found in this and other industries, are due to the fact that promptly at the hour of cessation of labor, at both noon and evening periods, the employees go immediately from this high humid atmosphere to the cold of the street, thus causing the many conditions complained of.

The factories engaged in carrying on this work, or industry, present a great similarity in their physical characteristics and methods of work:

FACTORY NO. 1

This factory occupies the entire second floor of a ten story building (semi-fireproof) with approximately 2,600 square feet of floor space.

The examining department employs six men and is situated in the eastern end of the building and in direct relation to the windows, some of which were open. Floors, walls, ceiling and windows were heavily covered with shod and dust.

The sponging department is located in the northwest corner of the floor and occupies approximately 20 feet by 20 feet of floor space.

One Hebdon machine without a hood and one table having three steam jets, are in use. The Hebdon machine, only, was in operation at the time of visit. There is extending downward from the ceiling a dwarf wooden partition 4 feet 6 inches deep. Natural ventilation is provided by two windows approximately 6 feet high by 3 feet wide. A 24 inch exhaust fan was in operation, but, despite this fan, clouds of steam were heavily banked on the ceiling and escaping into the room under the wooden partition. Two men were at work, the heads of both of whom were immersed in the steam.

The floor space between the Hebdon machine and the examiners was used for storage of goods waiting to be sponged. One winding or re-rolling machine was also in use.

FACTORY NO. 2

This factory occupies the entire first floor of a six story building (non-fireproof) with approximately 6,000 square feet of floor space.

The examining, sponging, and winding departments are situated in a one story addition located at the rear of the building. This addition is about 30 feet deep and has a skylight roof pitched from about 13 feet in the front to 9 feet in the rear.

The ventilation of this factory consists of two windows in the front of the building and four long, narrow openings in the skylight in the rear.

The sponging is carried on at one end of this addition in a room approximately 20 feet by 30 feet in area. The examining and winding is done in the remaining area of this addition. The main floor in front is occupied by bolts of cloth ready to be examined and sponged.

The ventilation in the examining room is poor and a large quantity of shod is noticeable on the walls and floors.

The sponging room is equipped with one Hebdon two-cylinder machine and one steam table with several jets for the vertical cylinders.

The Hebdon machine was in use at the time of visit, and the steam was banked over the cylinders and in the room while the cylinders were in operation.

Artificial ventilation was maintained by one 30 inch exhaust fan, but the temperature observed was 86 degrees F. and the humidity,

as registered by the wet bulb thermometer, was 82 degrees F., giving a relative humidity of 85 per cent.

The rolls of cloth carried from the sponging machine to the winding machines average from seventy-five to one hundred and fifty pounds in weight.

FACTORY NO. 3

This factory is situated on the first floor of a six story building (non-fireproof) and occupies the entire floor space of approximately 7,600 square feet.

The examining department is in the front of the building. The sponging and winding departments are situated in the southwest corner at the rear of the building. Bolts of cloth are stacked on the floor between the examining and sponging departments. One sponging machine was being used at the time of visit and the steam, arising during the process, hung in clouds over the rolls and the operators.

Natural ventilation was furnished on the front, side and rear by windows. A 36 inch exhaust fan was situated in the outside rear wall of the building about 9 feet above the floor; this fan discharges the steam directly into the outer air, clouds of steam arising along the side of the building.

The percentage of humidity is high in this establishment, being about 73½ per cent, with a room temperature of approximately 85 degrees F., and a wet bulb reading of 78 F.

Floors, walls and ceiling were not well kept, a great deal of shod and dust being in evidence.

FACTORY NO. 4

This factory occupies the second and fourth floors of a four story building (non-fireproof).

The sponging is carried on in three small rooms on the second floor and in the east end of a large room on the fourth floor.

Steam boards are employed by this factory to steam the goods. These are hollow metal boards shaped something like the pressing boards used by tailors, and are punctured with numerous small holes, in the upper surface, through which the steam escapes when introduced into the board from the live steam jets.

One rectangular steam-box was also in operation at the time of our visit. This is a metal box, having the top covered with several thicknesses of canvas, over which the goods are passed after live steam has been introduced through steam jets.

Two men were working over steam boards in a room 15 feet by 20 feet in area, and a mass of steam was arising from the boards and enveloping the men before passing out of an open window to the outer air. No exhaust fans or other artificial means of ventilation are employed in this factory.

In another room on this floor, approximately 18 feet by 22 feet in area, one man was working over the steam box heretofore described. This room is ventilated naturally by three windows, one of which was open at the time of visit.

In a room about 12 feet by 15 feet in area, two men were working over the steam boards, with three windows for ventilation.

In a room on the fourth floor, approximately 25 feet by 35 feet in area, having ten windows for ventilation, two men were working on horizontal steam boards before an open window. The same conditions of steam arising and enveloping the workers before passing through the open window prevailed as described above.

FACTORY NO. 5

This factory is situated on the fifth floor of a seven story building (non-fireproof), occupies the entire floor, and is devoted almost entirely to the cold water shrinking of canvas. This canvas, after passing through the cold water bath and being wrung out, is hung to dry on racks near the ceiling. An unpleasant odor is given off from the drying canvas, this being due to the gum used for sizing the goods.

Fourteen men are employed in this factory. A steam table having two vertical jet cylinders is used occasionally; this is set next to the wall and has a hood with a pipe leading above the roof for purposes of ventilation, but has no exhaust fan connected therewith.

The room has fifty windows, that are used for natural ventilation, most of which were open on the day of our visit. The temperature of this room registered 82 degrees F., and the wet bulb 78 degrees F., giving 84 per cent relative humidity although no steam was being used at the time.

FACTORY NO. 6

This factory is situated on the second floor of an eight story building (fireproof factory) and occupies the entire floor space of approximately 7,350 square feet.

The examining department occupies the entire front of the building. The sponging and winding departments are situated in the rear.

The sponging is done under a canopy, or large hood, of sail cloth situated just below the ceiling about 10 feet from the floor. This hood is pitched at an angle of approximately 8 degrees toward the center of the room from the outside wall.

On the day of visit one Hebdon machine and one combined Hebdon roll and steam box were being operated. A seven-jet condensing table was also being used. In this particular machine, a rectangular steam box with cloth cover was substituted for one of the hollow cylinders usually found in the Hebdon machine.

An exhaust fan was situated in the outside wall of the building just below the sail cloth top of the canopy or hood; clouds of steam were escaping into the room and banked about the heads of the workmen, the exhaust fan being of insufficient size and speed to properly remove the steam rising from the steaming machine toward the canopy which should be of greater pitch to properly guide steam toward suction fan.

Four men were employed at the two machines. After being steamed, while being carried to the winding machines, and while the winding process is being carried on, the rolls continue to give off steam in a greater or less degree. This floor has twenty-four windows which are used for natural ventilation in the summer.

FACTORY NO. 7

This is a small factory situated in the basement of a tenement house and is approximately 15 feet by 20 feet in area.

One man was employed sponging rolls of cloth on a horizontal sponging board; this is the stationary board, described heretofore, about 4 feet long, 10 inches wide and 5 inches deep.

Steam was escaping around the head of the operator. The only ventilation in this cellar was afforded by one open window in the rear, and the open entrance door at the foot of the stairs in front.

The temperature of the room, at the time of our visit, was 84 degrees F. and the humidity, as shown by the wet bulb, 76 degrees F., giving a relative humidity of 70 per cent.

FACTORY NO. 8

This factory is also situated in the cellar of a tenement house and occupies approximately 15 feet by 30 feet. Natural ventilation is afforded by two windows situated one front and one rear. One man was employed assisting the proprietor.

A small steam table having two steam jets was in use at the time of visit.

No exhaust fan was in use and the steam was escaping through the open windows.

The temperature of the room was 85 degrees F. and the wet bulb reading was 74 degrees F., giving a relative humidity of 63 per cent.

FACTORY NO. 9

This factory is situated on the first floor and in the cellar of a twelve story building (fireproof), and covers approximately 7,790 square feet in area.

The cloth sponging is carried on in the southwest corner of the first floor. Four Hebdon machines and one table containing four steam jets were in use at the time of visit. Eight men were at work at these machines steaming the bolts of cloth. The examining was performed at the front of the building.

Natural ventilation was furnished by one window situated at the front of the building, two windows at the side, and six skylight openings at the rear. One 36 inch exhaust fan was also in use. The temperature in the sponging room was 80 degrees F., the humidity, by the wet bulb, being 71 degrees F., giving a relative humidity of 64 per cent.

A canopy of heavy cloth pitched at an angle of approximately 12 degrees guides the rising steam to the exhaust fan and prevents condensation and drip. The wet bulb thermometer readings and the percentage of relative humidity were low in this workroom. The space between the sponging and examining departments was used for the storage of bolts of cloth.

In the cellar, cold water, or London, shrinking was being carried on.

Three men were employed at this work. The cloth was being dried in the open cellar, no drying machines being used.

Two 36 inch exhaust fans were used to exhaust the humid air from this workroom, and a plenum system of introducing fresh air from outside was also in use.

The temperature of the cellar workroom was 74 degrees F., and the relative humidity registered 60 per cent.

FACTORY NO. 10

This factory is situated on the first floor of a twelve story building (fireproof) and has an area of approximately 4,977 square feet.

The sponging department is located in the northeast corner of the floor. Two Hebdon machines, one steam box, and one steam table with eight steam jets from vertical cylinders were in use on the day of visit.

One Hebdon machine was equipped with a metal hood placed about 5 feet above the rolls; this hood was connected with a pipe that ended about 1 foot from a 36 inch exhaust fan set in the outer wall of the building. The fact that this hood and duct are not connected directly with the exhaust fan makes it entirely inefficient.

One Hebdon machine, one rectangular steam box, and one steam table with eight steam jets are placed under a large hood of galvanized iron having a 5 foot drop dwarf partition of galvanized iron extending downward from the ceiling with a fringe of canvas about 1 foot in depth. The pipes and walls of this sponging room were covered with dirt and shod. Ventilation was furnished by one window on the side, one window under the fan, and one skylight opening. Artificial ventilation was maintained by one 36 inch exhaust fan set in the outside wall of the workroom. Four men were at work on the Hebdon machine and the steam box. The steam hung in clouds over the machines and under the ceiling of the canopy.

The ten plants reported are typical of the thirty-seven factories out of a total of ninety visited, in which the wet and dry bulb thermometer readings were taken.

An analysis of Table 1, which is hereto appended will show conclusively that the temperature and humidity conditions as found in this investigation are practically similar in all of the shops.

In but few instances does the wet bulb reading show less than 74 degrees F. In four shops were found 82 F. registered; in two shops 80; in two shops 79; in seven shops 78; in two shops 77; in eight shops 76; in five shops 75; in one shop 74; in five shops 72; and in one shop 71.

A comparatively limited number of men are employed at this work. It has been shown by inquiries that during the entire period of their employment, a large percentage of the men, at one time or other, have worked in almost all of the factories engaged in this particular industry, therefore exposing themselves to all the adverse conditions found.

During the investigation, ninety-five men employed in the industry

were examined physically. From a study of these cases, the appended Table 2 was compiled.

The table shows groups of men who have worked in the industry in periods ranging from one to thirty-five years. In the group from 31 to 35 years, but one man was found and examined. A close perusal of the chart shows the marked preponderance of diseases of the respiratory tract, the most important of which is pulmonary tuberculosis. With the exception of one group, (31 to 35 years), this lesion was found present in all the groups; eighteen cases showing various stages of tuberculosis were observed, giving a percentage for this condition of 19.

Roy T. Nichols, of Western Reserve University, in a paper published in 1912, states:

"Is it not time that we not only recognize, as one must, that tuberculosis is not the inevitable lot of certain races, or the inherited lot of certain families, but that it is largely due to the effect of the industrial and living conditions, and that we must therefore expend large amounts not only in combating the disease by sanitary instruction and segregation, but by appropriations for the safeguarding of workers in certain industries? * * *"

In a bulletin printed by the Ohio State Board of Health in April 1914, the following sentence is of striking importance—

"If foul air, abnormal humidity, fatigue, inactivity, poisons, etc., predispose to tuberculosis between 6 P. M. and 6 A. M., must they not also, during the day, when heat and dust are also added, and respiration and other vital processes are much accentuated?"

Other diseases of the respiratory tract, such as acute bronchitis, chronic bronchitis, asthma and pleurisy were found. Skin diseases were also noticed, and some cases of anaemia.

In the group 16 to 20 years, the largest number of incidental diseases were observed, these comprising gastric ulcer, lipoma, cataract, chronic endocarditis, myocarditis, chronic alcoholism and cirrhosis of the liver.

It will also be observed in the column showing previous histories, that all of the groups, except that of 31 to 35 years, give histories of diseases of the respiratory tract at some time during the period of employment.

The presence of a high morbidity rate in the diseases of the respira-

tory tract led to an analysis of the mortality of the industry. It was shown by the records that seventeen men engaged in this industry had died during the last three years. Through the courtesy of the Department of Health of the City of New York, the actual cause of death in eleven cases out of the seventeen cases was ascertained. In five instances death was due to tuberculosis of the lungs (pulmonary tuberculosis) thus bearing out to an unusual degree the relation between morbidity and mortality statistics.



Photograph No. 4

The above photograph shows a Hebdon sponging machine, equipped with metal hood, connected with exhaust fan. The metal hood is too small and placed too low to properly collect excess steam and conduct it to the exhaust fan. Note the streaks made by steam condensing on outside of hood, causing dirty water to drip on cloth being sponged and on to the operators.

In many of these establishments which were visited during the investigation, the proprietors stated that when metal hoods were placed above Hebdon rolls, steam boxes and condenser tables, the drip, (water which condenses from the steam), from the hoods and pipes spotted the cloth which was under treatment. It is true that

hoods and pipes placed above these devices usually contain more or less dust both of a soluble and an insoluble nature, this being particularly true when the apparatus remains idle for a few days; when the steam given off from the rolls or steam boxes strikes the under side of hoods and pipes, some of it condenses and falls on the machines, floor, and, frequently on the cloth, causing spotting. Metal hoods soon rust or corrode and wooden hoods contain salts and other extractives, all of which are easily carried down by the drip which causes spotting of the cloth, and gives rise to the objections stated by the proprietors of these places.



Photograph No. 5

Showing an effective sail cloth hood over Hebdon sponging machine. It represents an arc of a circle in cross section, increasing in size and pitch up to exhaust fan located in outside wall of building.

To overcome these objectionable features, hoods or canopies made of sailcloth stretched on wooden, aluminum, or other non-rustable metal frames, should be placed at heights varying from ten to twelve feet above the machines and provided with an exhaust fan of sufficient

capacity at upper end to completely remove all excess steam generated in the process of sponging; the size of the fan will vary according to conditions, it being found that a 30 inch disc fan removing 7,500 cubic feet of air per minute usually suffices, under ordinary conditions, for the removal of steam from a Hebdon roll and a steam box. When the height of the ceiling will permit, the canopy should have a pitch of not less than 1 foot in 6 feet to properly guide the steam to the fan. In some instances, where metal hoods are now in use, gutters at base of hoods were found to be necessary to convey the drip away from machines.



Photograph No. 6

Steam turned on, fan not running. Notice volume of steam over and around cylinders.

It must be remembered that atmospheric conditions, factory conditions, construction, outside temperature, relative humidity, air currents, size of room, size, type and velocity of fan, also size of hood, all have an important bearing on steam removal. Admission of cold air from outside, during winter months especially, lowers the

dew points in the room and renders the removal of steam much more difficult, therefore, heated air injected into the rooms containing these machines raises the dew point and assists in the removal of the steam.



Photograph No. 7

Steam turned on, fan in operation. Note that steam rising from rolls is conducted directly over the heads of workmen to exhaust fan and does not escape into room from under the canopy. The 24-inch disc fan is removing 2,983 cubic feet of air per minute.

It has been found by experience, that sail cloth, instead of wood is the most suitable material for use in the construction of the canopies, as the fibres soon swell and thereby lessen the size of the interstices of the cloth partly filling them with water, thus rendering the material practically vapor-proof; felt is too expensive; burlap is too loosely woven and wood does not dry out with sufficient rapidity, while wooden hoods lined with felt show less condensation than wood alone. The point of discharge from the fans must be so located as regards the factory that the vapors do not again enter the workroom. Various Boards of Health in different cities require steam to be so removed.

During the investigation 90 establishments in the State were visited and inspected; it was found that orders were necessary in



Photograph No. 8

Showing large wooden canopy erected above Hebdon rolls, lined on inner side with sail cloth to prevent drip. The lining prevents condensation of steam and drip. The device effectively guides the steam to the fan, where it is removed.

50 of these factories and a total of 88 orders were issued, compliance of which will be insisted upon within the time required by law.

As a result of this investigation, the following recommendations are made:

That a dressing room, properly heated to 68 degrees F. in winter, containing sanitary lockers be installed in each factory for use of sponging workers.

That suitable means shall be provided to dry clothing of employees working in sponging rooms.

That fans should be of such capacity as to maintain a wet bulb temperature in sponging rooms not to exceed 75 degrees F.

TABLE 1 — TEMPERATURE AND HUMIDITY READINGS IN SPONGING ESTABLISHMENTS

FACTORY NUMBER	Number of em- ployees*	NUMBER OF MACHINES USED			London or cold water process	Number of windows	Number of exhaust fans	Tempera- ture F. dry bulb	Tempera- ture F. wet bulb humidity	Per- centage relative humidity	Outside mean temp. F. U. S. Weather Bureau	Per- centage relative humidity outside 2 P. M.
		Hebdon rolls in use	Steam jets in use	Other steaming machines in use								
1.....	16	2	6 cyl.	.....	No	5	1-30"	86°	82°	85	77°	61
2.....	9	.....	4 cyl.	.....	Yes	11	1-24"	86°	82°	85	70°	69
3.....	15	2	3 cyl.	.....	Yes	20	1-42"	86°	76°	83	76°	53
4.....	4	.....	1	.....	No	7	1-36"	85°	78°	73½	76°	53
5.....	9	1	2 cyl.	.....	No	10	1-32"	84°	79°	80	76°	53
6.....	15	.....	.....	.....	Yes	20	1-36"	84°	79°	80	76°	53
7.....	15	2	.....	.....	No	30	1-36"	85°	78°	73½	76°	62
8.....	6	1	.....	.....	No	40	1-42"	86°	76°	63	76°	62
9.....	35	.....	4 cyl.	.....	Yes	16	2-36"	81°	77°	85½	74°	75
10.....	8	.....	.....	.....	Yes	22	1-24"	82°	75°	72	74°	75
11.....	25	2	10 cyl.	.....	No	26	2-24"	86°	76°	76	71°	75
12.....	30	.....	6 cyl.	.....	Yes	30	1-42"	86°	78°	70	71°	82
13.....	26	2	6 cyl.	.....	Yes	18	None	88°	82°	80	71°	82
14.....	12	.....	.....	.....	Yes	28	None	82°	77°	80	71°	82
15.....	8	1	6	.....	No	13	1-36"	90°	82°	71	76°	70
16.....	10	1	2	One combination steam box and Hebdon roll....	No	24	1-24"	88°	80°	71	76°	70
17.....	20	2	8	One combination steam box and Hebdon roll....	No	10	1-36"	84°	72°	58	72°	36
18.....	6	1	3	.....	No	12	None	86°	78°	70	72°	81
19.....	1	.....	2	.....	No	2	None	86°	76°	63	72°	51
20.....	1	1	2	.....	No	3	None	86°	76°	63	72°	51
21.....	1	.....	.....	Horizontal steam board.....	No	2	None	84°	76°	70	72°	57
22.....	7	.....	.....	.....	No	5	1-30"	84°	76°	66	72°	57
23.....	1	.....	.....	.....	No	2	1-24"	85°	75°	63	76°	66
24.....	4	.....	.....	2 hot water tanks	Yes	18	1-54"	88°	78°	64	76°	66
25.....	9	4	.....	1 steam box	No	10	2-36"	88°	80°	71	76°	66
26.....	7	.....	.....	1 steam box	No	10	1-32"	84°	78°	77	74°	77
27.....	11	2	9 cyl.	.....	No	16	1-30"	82°	72°	62	74°	74
28.....	12	.....	2 cyl.	.....	No	4	None	84°	70°	84	74°	74
29.....	14	.....	.....	.....	Yes	50	None	82°	78°	84	69°	58

30.....	20	.....	6 cyl.	One combination steam box and Hebdon roll....	No	22	1-24"	1-30"	82°	73°	62	68°	83
31.....	15	2	.....	.....	No	14	1-24"	1-24"	80°	75°	70	64°	42
32.....	35	3	6 cyl.	3 steam boxes....	Yes	40	1-36"	1-36"	82°	75°	76	66°	80
33.....	30	4	.....	1 steam box....	No	40	1-42"	1-42"	80°	75°	79	66°	80
34.....	8	4	4 cyl.	1 steam box....	No	11	1-36"	1-36"	84°	76°	77	69°	43
35.....	40	4	4 cyl.	.....	No	48	1-36"	1-36"	80°	71°	64	66°	72
36.....	20	.....	.....	1 steam box and 5 steam boards....	No	21	None	None	80°	72°	68	66°	72
37.....	30	4	6 cyl.	.....	Yes	23	1-42"	1-42"	80°	72°	68	54°	45

* Number of employees reported include all employees as well as the spongers and examiners.

TABLE 2 — RESULTS OF MEDICAL INSPECTION IN SPONGING INDUSTRY

Number years employed in industry	Number of em- ployees examined	Negative	RESPIRATORY DISEASES					SKIN DISEASES		Anaemia	Incidental diseases	Previous history
			Pul- monary tuber- culosis	Acute bron- chitis	Chronic bron- chitis	Asthma	Pleurisy	Acne vulgaris	Lichen planus			
1-5	*13	8	4	.....	.....	.....	.....	1	1	2	Varicocoele.....	Pneumonia..... 2 Chronic gastritis... 1 Pneumonia..... 1 Nocturnal hyper- trophia..... 2 Bronchitis and rheu- matism..... 1 Grippe..... 1 Pneumonia..... 2 Typhoid fever..... 1 Pleurisy..... 1 Renal (?)..... 1 Chronic rhinitis... 1 Bronchitis..... 1
6-10	20	13	4	.....	1	.....	.....	.....	2	.....	Conjunctivitis..... 1 Fissula in ano..... 1 Kypocosis..... 1	
11-15	16	12	1	.....	1	1	1	.....	.....	.....	Gastric ulcer..... 1 Lipoma..... 1 Cataract right eye... 1 Chronic endocarditis... 1 Myocarditis..... 1 Chronic alcoholism... 1 Cirrhosis of liver... 1	
16-20	*21	12	5	1	2	1	.....	.....	1	.....	
21-25	*16	9	3	.....	2	1	.....	1	.....	2	Hemorrhoids..... 1 Jaundice..... 1 Rheumatism..... 1	
26-30	*8	6	1	.....	.....	.....	.....	.....	.....	3	Chronic endocarditis... 1 Pleuro-pneumonia... 1 Grippe..... 1 Erysipelas..... 1	
31-35	1	.....	.....	.....	.....	1	.....	.....	.....	.....
Total.	95	60	18	1	6	4	1	2	4	7	13	21

* Several employees were affected with more than one disease.

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THE INDUSTRIAL COMMISSION

JOHN MITCHELL, Chairman
EDWARD P. LYON JAMES M. LYNCH
LOUIS WIARD HENRY D. SAYER
WILLIAM S. COFFEY, Secretary

No. 90
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A SIMPLE AND INEXPENSIVE RESPIRATOR
FOR
DUST PROTECTION

Prepared by
DIVISION OF INDUSTRIAL HYGIENE
THE BUREAU OF INSPECTION

A SIMPLE AND INEXPENSIVE RESPIRATOR FOR DUST PROTECTION

Working conditions in all factories should be such as to render the use of respirators unnecessary, but conditions are sometimes encountered in which the wearing of these devices for a period of time becomes a necessity as a secondary aid to protect the health of employees by preventing the inhalation of dust which is generated under certain working conditions.

Industrial dusts often give rise to irritation of the eyes, ears, nose, throat and lungs with thickening of the membranes and the production of conjunctivitis, otitis, coryza, pharyngitis, laryngitis, bronchitis, and pulmonary tuberculosis, according to the character of the dust, the length of time the worker is exposed to its action and the amount inhaled and deposited in the organs mentioned; certain dusts, such as chemical agents may be absorbed through the mucous membranes and produce acute or chronic poisoning, ulceration and destruction of the membranes.

Dusts may be conveniently divided according to their physical properties into six main classes:

1. Cutting dusts, composed of minute crystalline particles with sharp cutting edges, which include sand, stone, lime, steel, glass, etc.
2. Irritant dusts which include wood, ivory, textile fabrics, that is wool, fluff, silk, cotton, flax, shoddy and hair.
3. Inorganic poisonous dusts derived from certain chemicals, such as mercury, copper, arsenic, lead, etc.
4. Soluble saline dusts derived from soluble crystalline substances such as sulphate of iron, sulphate of copper or sodium sulphate.
5. Organic poisonous dusts, such as tobacco, hellebore and certain drugs.
6. Obstructive and irritating dusts such as soot, coal, flour and starch.

In a few instances such as sand blasting of metal castings, rag sorting, working with several poisonous substances, bag filling and bin trimming of the cement industry, the constant use of some form of a good respirator becomes necessary, and this Bulletin is published

to describe a cheap form of respirator which not only filters out dust while being worn by employees, but which can be kept clean at a small cost.

No objection is made to the use of respirators which fit the nose and mouth and protect the eyes of the person obliged to wear them, if they are kept clean and worn under proper conditions.

The term "respirator" means a device made of various materials, the frame or body of which is made of rubber, aluminum or fabric, which covers the nose and mouth, and contains a porous material allowing the wearer to breathe air through it. The object is to absorb by mechanical means or screen out suspended material in the air breathed.

Such devices range in style from a rubber cone containing a sponge to a full fledged gas mask or oxygen helmet.



Paris green worker provided with patent respirator showing necessity of gauze on top and bottom to prevent infiltration of dust. Demonstrates the improper fit of the respirator. This muzzle or respirator, having been repeatedly worn and hung about workroom, was dirty inside, thus becoming a menace instead of a protection to the person wearing it.

Many types of these devices are found on the market, but some of them are almost useless for the reason that they interfere with respiration, chafe the skin of the face, cause perspiration to flow, prevent proper vision or become dirty and unsightly, because they are worn day after day without proper care or cleansing. They also prevent the chewing of tobacco, blowing the nose or spitting, which results in the early discard of the muzzle, mask or respirator by the person obliged to wear it.

Rule 722 of the Industrial Code of the Labor Law of New York State provides that the employer shall provide, and renew when necessary, at least two respirators of approved type for each employee who is engaged in any work or process which produces lead dusts; but no provision is made in the law that their use is obligatory except where lead dust is created.

Respirators give but little protection against gases, vapors or fumes, contrary to popular supposition unless the filtering medium is soaked or impregnated with some substance which chemically combines with the gas or vapor filtering through the sponge or fabric of the respirator; such a respirator could be worn but a brief period or until such time as the chemical reagent had fully combined with the infiltrating gas. Volatile liquids, however, placed on sponges to absorb certain gases are more detrimental than the material in the air being breathed.

When gases or vapors of a poisonous nature are met with in the process of manufacturing, gas masks or helmets, covering the entire head, are necessary. Into these oxygen or air from a cylinder carried by the operator, or from some distant point through a hose, can flow under a slight pressure into the helmet in such manner that no external air containing objectionable gases can enter and be breathed by the person wearing the device. Another method is to absorb the gas by some chemical substance, placed in a canister or tube connected with the mask, which will combine with the specific gas, allowing the air freed of such gas to pass on and be breathed. For instance, by the use of caustic soda in the canister, chlorine, carbon dioxide and hydrogen sulphide can be absorbed. Nickel salts will absorb cyanogen gas, hexamethylenetetramine absorbs phosgene gas and a zinc or an iron salt absorbs ammonia gas. Charcoal is also used in such masks on account of its power of absorption of various gases.

Improvised respirators are often preferred by workmen obliged to handle dusty and poisonous materials. These are far more sanitary and can be made up at a minimum of cost.

A series of tests were made by the Bureau of Inspection of the New York State Industrial Commission of various types of respirators as to their value to filter out dust. As the result of these tests it was determined that with the use of one-half ounce of clean, absorbent cotton pinned or otherwise fastened to a piece five inches wide of cheese cloth, or of coarsely woven muslin, and of sufficient length, about thirty-three inches, to tie about the head, or of a length, if preferred, to thoroughly cover nose and mouth, seven or eight inches, to which is attached a tape which can be fastened at back of head, all dust would be filtered out for a period of four hours or more. The absorbent cotton of the respirator should be covered with a small piece of muslin or cheesecloth to prevent the small particles of fibre touching the lips or tongue of the operator wearing it; the total weight should be about two-thirds of an ounce.



Workman provided with cheesecloth or muslin respirator as described.

The tests conducted by the Division of Inspection as to the efficiency in filtering out and excluding dust by the use of absorbent cotton or clean cotton waste, covered periods of four hours each. Dust laden air containing a basic lead salt was drawn through the filtrating media of a respirator constructed as described, at a rate equal to the amount of air breathed by an average individual (about 15.6 cubic feet per hour). Careful analytical tests revealed no lead drawn through the gauzy material forming the filtrating material of the respirator.

Respirators thus constructed filter out the dust in the air being breathed, are cheap, light in weight, do not obstruct vision, can be changed daily at little cost and be washed when necessary. There is less incentive for a workman to appropriate the respirator of another. They neither break, rust or wear out. They cause no excessive perspiration and absorb what is produced; cause no irritation of the cheeks, nose and chin and can be more readily arranged to fit the face than the patented types. It is recommended on account of the properties possessed by this form of respirator and superiority described that this type be accepted in compliance with Rule 722 of the Industrial Code of the Labor Law of New York State.



Improvised or home-made respirator, made of muslin, 33 inches long by 5 inches wide; supplied with absorbent cotton filtrating media 5 inches wide, 6 inches long, of $\frac{1}{2}$ ounce weight, about $\frac{3}{4}$ inch thick, held in place by two safety pins—A. The absorbent cotton is covered with a thin film of cheese cloth—B. The muslin strip is cut to allow free use of eyes. Total weight, $\frac{3}{8}$ ounce.

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JOHN MITCHELL, Chairman
EDWARD P. LYON JAMES M. LYNCH
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WILLIAM S. COFFEY, Secretary

No. 91
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A PLAN FOR SHOP
SAFETY, SANITATION AND HEALTH
ORGANIZATION

Prepared by
THE BUREAU OF STATISTICS AND INFORMATION

CONTENTS

INTRODUCTION

	PAGE
Value of Shop Safety Organization	5
Why this Plan Was Prepared	7
How the Plan Was Prepared	7
Plan is Designed Only for a Guide	8
The Fundamental Spirit of the Plan	9
Advantage of a Printed Edition	10
Announcement of the Plan	10
Promotion of Safety Sentiment	12
Safety Literature	12
Consultation Safety Service	13

THE PLAN

Part I. Purpose and Organization	16
Purpose	16
Organization	16
Executives' Committee	16
Foreman's Committee	17
Workers' Committee	18
Safety Supervisor	20
Inspection and Investigation	20
Supervision	21
Information and Education	21
Records and Accident Statistics	22
Part II. Special Rules Governing Organization and Employees	23
Joint Meetings	23
Amendments	23
Violations of Shop Rules	24
Foremen's Duties	24
Workers' Duties	25
Part III. Rules for Guidance of Members on Foremen's and Workers' Committees, and the Safety Supervisor	26
How to Inspect	26
Look Out for Unsafe Practices and Conditions	26
Guarding of Machinery	27
What to Study	27
Report Blanks	28
Part IV. Shop Safety, Sanitation and Health Rules	30
Statement	30
Rules	30

INTRODUCTION

VALUE OF SHOP SAFETY ORGANIZATION

The indispensable function of accident prevention and maintenance of cleanliness and orderliness is carried on haphazardly in most manufacturing plants. Instead of centralizing the work in the care of one person, it is generally divided up and parts are added to the other duties of several of the managerial staff. As the management and its subordinates are mostly preoccupied with the more pressing responsibilities of production and marketing, shop safety, sanitation and health usually receive but incidental and unsystematic attention. Even where the management assigns a person to supervise this work, its failure to realize the significance of this phase of shop management often leads it to choose one who can be spared rather than one best qualified for this highly important task. Yet these matters vitally affect the compensation insurance premium as well as plant output. Practical business men, who have resorted to this form of shop activity, testify enthusiastically that a safe and sanitary shop not only means fewer accidents but a more efficient working force. Since it is good business to prevent accidents and maintain orderliness and cleanliness in the factory, supervision of the work is assigned to a competent person, who can give to it whatever time is required in accordance with the size of the working force and the hazard of the industry.

Notwithstanding that a large percentage of the accidents can be prevented only by the good will and coöperation of the employees, the average employer has done little to enlist their aid. He relies upon safeguards alone, whereas a cursory study of his accident records would indicate that a large proportion of accidents cannot be prevented by them. Those employers who are aware of this fact arrive at the hasty conclusion that the worker is "careless." This opinion, if voiced publicly, instead of imbuing the workers with cautiousness and a desire to coöperate with the management, actually stirs up "bad blood." Very few employees are deliber-

ately careless. The ordinary employee generally subjects himself and fellow workers to danger because it has not occurred to him that he is going about his work in an unsafe manner. The same can be said with reference to maintaining cleanliness and orderliness in the shop. The remedy is to educate and interest the worker in "safe and sanitary practices." But signs and posters alone are inadequate. Success in such matters can best be attained with the coöperation of the employees. Hearty coöperation has been secured in those plants where the workers have been made responsible for their share of plant accident prevention and maintenance of cleanliness and orderliness. To interest the workers, they must be given definite responsibilities and duties. Human beings learn by doing and sharing in responsibilities. Wherever this principle has been adopted and properly applied the workers have responded most enthusiastically.

Manufacturers who have a cohesive shop safety, sanitation and health organization, guided by a competent person, point to the following as some of the more obvious benefits of such an organization:

It relieves the management and its subordinates from attending to the numerous details connected with maintaining orderliness, cleanliness and safety in the shop.

It provides a medium through which these matters, so vital to the successful and economical operation of the plant, will receive the consideration they merit without encroaching upon the time required for other business problems.

It enlists the coöperation of all employees from the superintendent to the rank and file worker by introducing collective responsibility.

It furnishes a means of interesting the rank and file whose coöperation is absolutely necessary in the successful conduct of a shop safety, sanitation and health organization.

It systematizes the work so that maximum results ensue from the time devoted to this phase of shop activity. Nothing is more wasteful and ineffective than haphazard methods.

It provides a check on the efficiency of safety work.

It makes possible the accumulation and exchange of knowledge and experience in shop safety, sanitation and health work.

It makes possible the creation and perpetuation of an enthusiasm and "safety first" spirit without which the best intentions are but vain dreams.

WHY THIS PLAN WAS PREPARED

A field investigation has revealed that employers generally are not aware of the value of a shop safety, sanitation and health organization. Many plants having such an organization lack the requisite information in order to make it succeed. The bare skeleton outlines with which they are provided do not convey a comprehensive idea of the necessary form and functions of a thoroughgoing shop safety, sanitation and health organization. The plan presented herewith aims to aid manufacturers in forming a shop safety organization and in understanding its functions.

HOW THE PLAN WAS PREPARED

While, as already noted, this plan is an outgrowth of a field investigation, the information thus gathered was supplemented by literature bearing on these subjects. The plan is therefore a composite of the experience of a wide range of plants in numerous industries. The plan was originally issued in tentative form and submitted for criticism to leading safety authorities and practical manufacturers. The large number of painstaking suggestions is conclusive evidence that safety leaders not only preach but actually practice coöperation. The spirit and substance of the plan were, however, practically unanimously endorsed. Three classes of suggestions and criticisms on specific items in the plan were received. Those that were of a general nature and therefore coincided with the purpose of the plan, which, as stated in the introduction, was designed to serve "as a guide rather than as an inflexible program," were incorporated on their merit. Suggestions and criticisms that were suitable only for a particular plant, or industry, were generally omitted. A third class of recommendations comprised a number of comments on the most successful manner of launching a safety organization; on how to guide it successfully; on how to manipulate the various human elements composing the organization; on the attitude of the management toward specific phases of a safety plan, and so on. These psychological problems pertain to the human or policy aspect of accident

prevention work. The plan presented herewith aims to aid manufacturers in forming a shop safety organization and in understanding its functions. It confines itself chiefly to the machinery of plant accident prevention work rather than its psychological side. The psychological phase is treated to some extent in the Department's Special Bulletin No. 77, on Accident Prevention.

In addition to circulation for general criticism, the plan was submitted to the Industrial Council which by resolution approved the idea "of formulating a standard plan of organization of shop safety committees for submission to the industries of the state for adoption and adaptation to conditions in their various plants, and approves the tentative plan submitted to the Council with such modifications as may hereafter be found to be necessary."

PLAN IS DESIGNED ONLY FOR A GUIDE

The plan has been drafted in detail even at the risk of arousing fear that it is unwieldy and perhaps disproportionately expensive. In reality, only such provisions as plants have by experience found practicable are contained in this plan. It is, however, intended as a guide rather than as an inflexible program. Local conditions, size of the plant and so on will make it necessary to modify the plan and alter its provisions. In general, the plan as it stands should meet the needs of plants employing 150 workers or more. Plants of 1,000 workers or more have secured best results by having a workers' committee for each department or division. In plants employing less than 150 workers the organization would doubtless need to be simplified.

Experience in the field, as well as many of the comments on the plan, indicate that each individual plant may have to decide for itself, on the basis of its particular production problem, at what intervals the various divisions should meet, how often the different committees should make inspections, whether the supervisor and workers' committee should make inspections and the foremen's committee should be relieved of this duty, and so on. The fact that it is not possible to exactly decide these matters in advance should not deter manufacturers from installing a shop safety organization. Since practical knowledge is primarily acquired by the trial and error method, manufacturers may feel confident that

experience will guide them in detecting and discarding such features as do not bring maximum results in their individual plant. In all probability only slight modifications will be sufficient. It is hoped manufacturers will not too hastily brand this method as theoretical experimentation. If they will but reflect upon their methods when the most up-to-date machine or improvement in process is introduced they will recall that they practically follow this procedure in every line of manufacturing activity. In other words, no matter how perfect a machine or process its proper adaptation to a particular plant must be studied at least in the first stages of its use in that plant. The criterion for introducing the new machine or process is that it has brought results elsewhere. This, in all fairness, should be the only test that a safety organization should be put to. As practical manufacturers testify from their personal experience, and statistical evidence corroborates them, that shop safety organizations have aided in reducing accidents and in improving the efficiency of the working force, the fear that slight modifications might be necessary when actually tried in a particular plant should not weigh against it.

THE FUNDAMENTAL SPIRIT OF THE PLAN

Workers are easily skeptical about improvements for their welfare that come solely from the top. Their suspicions can be effectively disarmed by freely giving them a direct voice in the conduct of affairs that affect their welfare. This new spirit, based upon the simple psychological principle that human beings are more responsive and more easily directed when an appeal is made to their self-respect, is rapidly penetrating industry. Some employers have tried to neutralize the old and new methods by consulting with representatives of their employees, but choosing those representatives for them. Undoubtedly this is an improvement, but it lays the employer open to the charge of insincerity. Experience proves, that a lasting coöperation and mutual good will between employer and employees can best be attained through granting a full measure of actual participation, by allowing the workers to choose their representatives and by giving those representatives an equal voice with the management in matters affecting their welfare. This practice is calculated to enlarge their

sense of responsibility. Upon this principle hinges the success of enlisting the unstinted coöperation of the workers.

While this plan presents alternative methods wherever the question of joint, mutual participation arises, it is urged that best results can be obtained by freely consulting and giving the workers a voice in matters affecting their welfare. Employers frequently complain that their employees do not manifest the proper appreciation, nor do they coöperate wholeheartedly in making a success of costly improvements installed for their benefit. This complaint seldom comes from those who have consulted their employees and who have invited them to participate in the management of the welfare work.

ADVANTAGE OF A PRINTED EDITION

Manufacturers having, or desiring to establish a shop safety organization are urged to adapt this plan to their needs and to publish it in pocket size booklet form as the plan of the firm. The advantages to be gained are numerous. In plants where printed copies are made available the serious-minded workers use their spare moments during working hours, and some of their leisure time at home to study and familiarize themselves with the plan. But what is perhaps the most important consideration is, that a printed plan available to all will create greater interest and forestall misunderstandings or malicious attempts to block the organization. Persons hostile toward this activity or ignorant of its true purpose can foment dissatisfaction by assigning false attributes to the plan. If there is no readily accessible means of ascertaining the true features, those who are credulous are apt to be misled, while the honest upholder is helpless in defending it. With a printed copy in the hands of everyone, dishonest or ignorant criticism can easily be disarmed by reference to the booklet.

ANNOUNCEMENT OF THE PLAN

The imperativeness of giving proper publicity to the new organization cannot be over emphasized. Unless the rank and file workers know that such an organization is in existence, are fairly conversant with its purpose, and feel that it has the management's

unqualified approval, it will be difficult to secure their coöperation. Indeed there is danger that the whole undertaking may turn out to be a farce. The most effective method of publicity is to call a mass meeting of the workers, wherever possible, at which the purpose of the organization and its functions should be explained by some one high in authority. Should this not be practicable, a printed announcement is a fair substitute. (Manufacturers will find it worth while to use both methods.)

The following statement, signed by the firm, is suggested as a sample for a poster or dodger to be distributed or inserted in the pay envelope when the organization is launched. The membership of the workers' committee and the occupation or department that each member represents might be incorporated in the statement:

ANNOUNCING THE FORMATION OF A SAFETY, SANITATION AND
HEALTH ORGANIZATION OF THE

.....
(Insert firm name.)

The (insert firm name) has always been solicitous for the comfort and safety of its employees. In pursuance of this policy it has done everything practicable to safeguard the life, limb and health of the workers. The New York State Industrial Commission has brought to our attention a method of systematizing plant safety, sanitation and health work so that it will be placed on as business-like a basis as any other phase of plant management. The plan which they recommend is being used by many progressive manufacturing firms in the State, and is bringing excellent results. Its chief merit is that it enlists the mutual coöperation of every one in the plant, from the superintendent to the rank and file worker. *We particularly appeal to the rank and file workers in our plant to assist us in this worthy endeavor.* You spend the best part of each day in the plant, and some unsafe and unsanitary conditions and practices come to your attention that we may overlook. We want to remedy these shortcomings and invite suggestions from every one.

The organization will consist of three committees — one representing the management, one the foremen and one the workers in the plant. (Indicate here how the workers' committee will be chosen, and, if possible, the members of the first committee, also give the name of the Safety Supervisor.)

The workers' committee has been chosen to work for YOU. The duty of this committee is to study ways of protecting YOU, of promoting YOUR comfort and safeguarding YOUR health while you are in this building. In some cases changes suggested by this committee have to do with machines or equipment. In other cases the committee finds that certain practices among the people in the various departments are not for the best interests of all. If through thoughtlessness or ignorance any one in the building is doing something that endangers YOUR health or safety or comfort, it is the duty of the committee to see that this practice is stopped. If the committee fails to do this, they fail to protect YOUR INTERESTS.

In other words, the committee points out certain unsafe and unsanitary practices and conditions that endanger YOU, and recommends certain improvements that should be made in YOUR interest. Don't you think that the COMMITTEE in their work for you should have your help and coöperation?

PROMOTION OF SAFETY SENTIMENT

If the Shop Safety, Sanitation and Health Organization plan is issued in pamphlet form, space on the cover or elsewhere might be used for brief matter to promote the safety sentiment. The following is an example of such matter found in safety literature:

THE "SAFETY FIRST" IDEAL

"And the end is that the workman shall live to enjoy the fruits of his labor; that his mother shall have the comfort of his arm in her age; that his wife shall not be untimely a widow; that his children shall have a father; and that cripples and hopeless wrecks who were once strong men, shall no longer be a by-product of industry."— P. B. JUHNKE.

SAFETY LITERATURE

The movement for prevention of accidents and conservation of health of wage workers, like all human movements, depends for its success on the proper mental attitude of those affected by it. This fact assumes greater significance in this phase of industrial betterment, since the best results are attained only when mechanical safeguards and devices are supplemented by the good will and hearty coöperation of the personnel connected with the plant. The proper psychology cannot be maintained without constant contact with the movement. The Safety Supervisor can hardly be expected to imbue others with the "safety first" idea unless he has a continuous source of inspiration which will stimulate his intellect and emotions. Current literature treating all phases of this movement is indispensable.

Without undertaking to specify all that might be desirable the following non-commercial sources are suggested as affording a minimum of literature such as any safety organization should have:

Government Publications

New York State. The Bureau of Statistics and Information of the State Industrial Commission will upon request send regularly the Commission's publications which might be of service, particularly the Proceedings of the Annual State Industrial Safety Con-

gress, the Monthly Bulletin, and Special Bulletins which from time to time contain material relating to industrial safety and hygiene.

Federal Government. The Bureau of Labor Statistics will upon request send regularly its Monthly Labor Review, as well as other publications. For current literature dealing with safety, sanitation, health and general employee relations problems, consult "Publications Relating to Labor" in each issue of the Review.

The Public Health Service of the Surgeon-General's Office, Washington, D. C., issues reprints from its weekly Public Health Reports and supplements thereto, relating to the health of industrial workers. These will be sent upon request.

The newly established Division of Safety Engineering and the Division of Industrial Hygiene and Medicine of the Working Conditions Service in the U. S. Department of Labor, Washington, D. C., should be requested to supply all material which they plan to publish.

Other Literature

In addition to the government publications above referred to, attention is called to the publications of the American Museum of Safety and the National Safety Council referred to below.

Aside from the above there is a considerable body of literature relating to industrial safety and hygiene, in various forms (books, periodicals and pamphlets), prepared by various agencies (individuals, insurance companies, and industrial concerns). The Industrial Commission, through its Bureau of Statistics and Information, will gladly furnish upon request information concerning such literature with relation to either general or particular topics in which any safety organization may be interested.

CONSULTATION SAFETY SERVICE

Besides aid from the literature of the subject, it is more and more coming to be realized that the varying needs of individual concerns due to their varying conditions and circumstances can often be most helpfully met by consultation with persons having special experience or technical knowledge in this field. Such consultation service is available from several agencies, both private and public. So far as its resources will permit, the State Industrial Commission will gladly render to any firm or shop safety

organization all possible aid along this line. The Federal Government is planning for such service through the Working Conditions Service in Department of Labor above referred to. Prominent in this kind of work, as well as for other work indicated, are the two following non-commercial coöperative associations:

American Museum of Safety (14 West Twenty-fourth street, New York City). Renders service to engineers, inspectors and industrial firms. It has maintained for a number of years a permanent exhibit of approved safety and sanitary appliances. The Museum's resources include an inquiry and research service, a highly specialized library, inspection and consultation service to meet the engineering and other problems arising in safety and sanitation work, lectures, and traveling exhibits illustrating various phases of accident prevention and health conservation, as well as a monthly bulletin, *Safety*, a technical noncommercial publication, free to members. To nonmembers the subscription price of the bulletin is \$1 per year.

The National Safety Council (208 La Salle street, Chicago, Ill.). Renders a safety service which consists of a weekly bulletin service, special publications and a consultation safety service. Membership dues are based on the nature of service rendered and number of employees on the payroll.

THE PLAN

Part I

PURPOSE AND ORGANIZATION

PURPOSE

Prevention of accidents and the promotion of the general good order, hygiene and sanitation of a manufacturing plant can be most successfully accomplished when there is a hearty coöperation between the management and its employees. It is to their mutual interest to work harmoniously in such matters. While the company loses financially whenever an accident occurs or a worker is obliged to lay off because of sickness, the employee is the greater sufferer in such cases. He must bear the pain, and, regardless of the amount of financial compensation awarded to an employee, it does not equal his earnings.

With this consideration in view a shop safety, sanitation and health organization is instituted to establish standards for the reasonable and adequate protection of the lives, health and safety of all persons employed by the (insert name of firm).

The (insert name of firm) and those in its employ obligate themselves to maintain such standards to the best of their ability and to the full extent of their power.

ORGANIZATION

The shop safety, sanitation and health organization shall consist of the following divisions: executives' committee, foremen's committee, workers' committee, and safety supervisor.

Executives' Committee

This committee shall be composed of at least three persons from the executive authorities representing the general management and operating or production branch of the plant.

The *functions* of this committee shall be as follows:

1. Have general charge of and supervision over all matters affecting the safety and health of the employees.
2. Pass upon reports and recommendations made by the foremen's and workers' committees, and the safety supervisor.

3. Pass upon general plans for the conduct of accident prevention and health conservation work.

4. Review comparative data as to accident frequency and severity in the plant.

5. This division shall (should) furnish satisfactory reason to the other divisions whenever it vetoes or modifies recommendations submitted for its consideration.

6. This division shall (should) submit new policies or proposed deviations from established policies to the consideration of the other divisions comprising this organization.

7. This division may delegate as much of its authority as it chooses to other divisions comprising this organization, provided due notice of such action shall be given in writing to all divisions.

8. This division shall meet at least quarterly. (Monthly meetings are preferred by many.)

Foremen's Committee

This committee shall be composed of not less than five foremen and subforemen (in some plants membership of all foremen is considered desirable) chosen as follows:

- a. By the executives' committee, or
- b. By the foremen and subforemen.

This division shall choose its chairman from among its membership.

Rotation in membership by periodic changes in personnel may be provided for.

The *functions* of this committee shall be as follows:

1. Make quarterly inspections for the purpose of standardizing the safety, sanitation and health work throughout the plant. (In some plants monthly inspections are considered desirable.)

2. So far as possible investigate at time of occurrence all serious accidents and report thereon.

3. Discuss accidents or near accidents in the plant, determine responsibility and attempt to devise means of preventing recurrence.

4. Consider ways and means of furthering safety, sanitation and health work in the plant.

5. Formulate rules for instructing workers in "safe and sanitary practices."
6. Consider communications from executives' committee.
7. Consider recommendations and reports of the workers' committee.
8. Consider recommendations and reports of the safety supervisor.
9. Receive reports from individual committee members on personal activity in furthering shop safety, sanitation and health work.
10. Receive information from safety supervisor on accidents, sanitation and health.
11. This division shall meet at least once a month.

Workers' Committee

This committee shall be composed of not less than five wage workers from the rank and file of the employees and representing the major departments or occupations. (Workers holding a position of even minor authority, such as "working boss," or "subforeman," are not eligible to serve on this committee.)

Members of this committee may be chosen according to any of the following methods:

- a. The wage workers of each department or occupation to elect their representative (this method of choosing the workers' committee is the best means of securing the confidence and good will of the employees), or
- b. The executives' committee to elect the initial workers' committee, and the wage workers of each department or occupation to fill future vacancies by election, or
- c. The executives' committee to select the initial workers' committee, and the members of the latter body to designate from time to time their successors, or
- d. By the executives' committee, upon consultation with the foremen.

Rotation in membership by periodic changes in personnel may be provided for.

This division shall choose its chairman from among its membership.

This division may upon occasion invite the executives or foremen to its meetings.

Members of this division doing piece, task, bonus or premium work shall be compensated on the basis of their average hourly earnings when attending committee meetings or making inspections during working hours. Members paid by the hour, day or week shall receive the usual pay while attending committee meetings or making inspections during working hours.

Members of this division shall be compensated on the basis of the regular rate of pay when attending committee meetings or making inspections outside of working hours.

The *functions* of this committee shall be as follows:

1. Make at least monthly (preferably semi-monthly) inspections of the plant — collectively where practicable. If this is not practicable individual committee members may inspect the departments they represent, or that portion of the plant most familiar to them.

At least a quarterly inspection of the whole plant shall be made collectively by the committee.

A report of every inspection should be prepared and signed by the entire committee.

2. So far as possible investigate at time of occurrence all serious accidents and report thereon.

3. Discuss accidents or near accidents in the plant, determine responsibility and attempt to devise means of preventing recurrence.

4. Consider ways and means of improving safety, sanitation and health conditions in the plant.

5. Make recommendations for elimination of unsafe and unsanitary conditions in the plant.

6. Consider communications from the executives' committee.

7. Consider recommendations and reports of the foremen's committee.

8. Consider recommendations and reports of the safety supervisor.

9. Consider recommendations and reports of individual committee members, or any other wage workers.

10. Receive reports from individual committee members on personal activity in furthering "safety first" ideas among fellow workers.

11. Receive information from safety supervisor on accidents, sanitation and health.

12. This division shall meet at least monthly (preferably semi-monthly).

The *duties of individual members* of this committee shall be as follows:

1. Committee members shall interest fellow workers in the "safety first" idea.

2. Committee members shall caution fellow workers whenever they resort to unsafe and unsanitary practices.

3. Committee members shall present safety, sanitation and health suggestions of fellow workers to the workers' committee for action.

Safety Supervisor

The Safety Supervisor shall be appointed by and be responsible to the Management. (The Management should authorize the Safety Supervisor to expend reasonable sums of money in furtherance of the safety, sanitation and health work, and to give orders necessary to the carrying out of his duties, his actions to be reviewable only by the General Manager or General Superintendent. His standing should be at least equal to that of head of a department or foreman, and in large plants he should receive clerical and other assistance necessary to relieve him from the routine work.)

The *duties of the Safety Supervisor* shall include the following:

INSPECTION AND INVESTIGATION

1. Become thoroughly familiar with the structural and other physical conditions of the buildings, and the lay-out of the equipment and premises.

2. With a view to eliminating unsafe, unsanitary and unhealthful conditions inspect plant constantly for:

a. Need of safeguards.

b. Maintenance of old guards, general order and cleanliness.

c. Arrangement of materials, tools and equipment.

d. Lighting, ventilation and physical condition of buildings.

e. Conditions on premises.

3. Look after fire conditions, extinguishers, filling of fire pails, keeping exits clear and exit signs in good condition.

4. See that first aid equipment is properly stocked and kept in proper place.

5. See that approved recommendations are carried out and report thereon to respective committees.

6. Investigate all accidents or near accidents, fix responsibility, and make recommendations to prevent their possible recurrence.

7. See that drawings and specifications for new machinery cover guarding of hazardous parts, and inspect new machinery before it is permanently installed to see that the necessary safeguards have been provided.

8. See that drawings and specifications for alterations, extensions and additions to plant have proper safety, sanitation and health provisions.

SUPERVISION

1. Administer first aid, or supervise those assigned to administer it.

2. Keep in touch with injured persons requiring medical treatment while at work, as well as with those whose injuries necessitate their absence from work.

INFORMATION AND EDUCATION

1. Keep himself informed of latest developments in the "safety first" movement through literature, attending conferences, conventions, lectures, exhibits, visiting other plants, and so on.

2. Maintain "safety first" library for reference and use of every one in the plant.

3. Supply committee members, foremen, and rank and file wage workers with readable "safety" literature.

4. Make brief reports at committee meetings on topics of interest appearing in current "safety" literature, or which have otherwise come to his attention.

5. Report at committee meetings on activities of other divisions of this organization.

6. Supervise and conduct educational work on safety, hygiene and sanitation through committees, bulletins, lectures, etc.

7. Stimulate interest in safety, sanitation and hygiene among foremen and rank and file wage workers through personal contact.

8. Prepare, post and maintain danger signs, bulletins and bulletin boards.

9. Coöperate with foremen concerned in giving advice and instruction to new employees, as well as with old employees who do not fully understand the safe method of performing their work.

10. Caution backward employees against unsafe and unsanitary practices.

RECORDS AND ACCIDENT STATISTICS

1. Keep records and statistics of accidents and sickness, and make monthly and special comparative reports to the Executives' Committee. Copies of such reports are also to be furnished the other committees.

2. Attend all regular or special meetings of all committees and act as secretary and custodian of minutes and other records.

3. Supply copies of reports and recommendations of each division to the other divisions for their consideration.

4. Act as intermediary for the various divisions.

Part II

SPECIAL RULES GOVERNING ORGANIZATION AND EMPLOYEES

JOINT MEETINGS

1. Regular Joint Meetings of the Shop Safety, Sanitation and Health Organization should be held at least quarterly to consider:

- a. Preventive ideas.
- b. Suggestions for general safety, sanitation and health.
- c. Special recommendations made by any division involving an unusually large expenditure.
- d. Means of safeguarding new machinery or equipment, or new additions to plant.

2. Special Joint Meetings of the Shop Safety, Sanitation and Health Organization should be called by the Safety Supervisor promptly after the occurrence of a serious accident of exceptional character in order to fix responsibility and consider measures to prevent its recurrence.

3. Special Joint Meetings of the Shop Safety, Sanitation and Health Organization should be called by the Safety Supervisor whenever all divisions cannot agree on recommendations, deviations from old policies, or proposed new policies.

4. Either committee may at any time call a special joint meeting to consider matters of vital importance.

AMENDMENTS

1. Amendments to the Shop Safety, Sanitation and Health Organization plan may be initiated by any of the divisions composing the organization, provided they shall become effective,

a. after submission to the foremen's committee, and when favorably passed upon by the Executives' and Workers' Committees. (This is the most desirable method), or

b. after consideration and report by the Foremen's and Workers' Committees, and approval by the Executives' Committee, or

c. when favorably passed upon by the Executives', Foremen's and Workers' Committees.

2. Agreeable to the Executives' and Workers' Committees, amendments to the Shop Safety, Sanitation and Health Organization plan that would alter it materially may be submitted to a vote of the rank and file of the wage workers, provided the amendments are first submitted to the Foremen's Committee for consideration and report.

3. Amendments to the Shop Safety, Sanitation and Health Rules may be initiated by any of the divisions composing this organization, provided they shall become enforceable,

a. after submission to the Foremen's Committee, and when favorably passed upon by the Executives' and Workers' Committees, (This is the most desirable method), or

b. after consideration and report by the Foremen's and Workers' Committees, and approval by the Executives' Committee, or

c. when favorably passed upon by the Executives', Foremen's and Workers' Committees.

VIOLATIONS OF SHOP RULES

1. Penalties for violations by wage workers of Shop Safety, Sanitation and Health Rules may be imposed,

a. by the Workers' Committee, subject to approval by the Foremen's and Executives' Committees, (This is the most desirable method), or

b. by the Safety Supervisor, subject to approval by the Executives', Foremen's and Workers' Committees, or

c. by the Safety Supervisor, subject to approval by the General Manager, or

d. by the Foreman, subject to approval by the General Superintendent.

FOREMEN'S DUTIES

1. Foremen and subforemen are morally bound to give special and constant attention to the proper instruction and observation of new employees so as to protect them against accidents. Old employees when placed on new work should also be instructed as to the hazards of that work.

2. Foremen and subforemen should study and guard against conditions and practices in the plant that are apt to endanger the life, limb and health of the workers.

WORKERS' DUTIES

1. Each employee should regard himself in honor bound to coöperate with the management to reduce accidents and to maintain orderliness and cleanliness in the plant by observing the Shop Safety, Sanitation and Health Rules.

2. The employees of this plant regard it a reflection upon their honor for an injured worker to feign incapacity to work, or attempt to artificially prolong such incapacity.

Part III

RULES FOR GUIDANCE OF MEMBERS ON FOREMEN'S AND WORKERS' COMMITTEES, AND THE SAFETY SUPERVISOR

HOW TO INSPECT

1. In making inspections the one question which should be asked is: Can an accident occur? Not: Has an accident occurred at this particular point?

2. Remember, it has been conclusively demonstrated that practically every point of danger around machinery or the buildings can be efficiently guarded without interfering with the work.

3. Follow the oiler. Remember he must oil every bearing in the shop. Visit each bearing and satisfy yourself on one question — Can the oiler reach it in safety? If not, correction should be made at once.

4. Make it a point to inspect out-of-the-way places as well as more obvious hazards. It is surprising how many persons are injured in places where it has been said "Nobody ever goes."

5. Conditions in yards and on roadways and passageways are always changing. They should be frequently inspected to find dangerous piles, defective floors, protruding nails and objects over which a man may stumble and fall.

LOOK OUT FOR UNSAFE PRACTICES AND CONDITIONS

1. Keep a sharp lookout for all kinds of unsafe practices and conditions. Remember a large proportion of accidents are directly attributable to ignorance of the safe way of doing the work, or unsafe plant conditions not easily detected.

2. A good guard out of place is a poor guard. See that guards are kept in use. Particularly watch adjustable guards on such machines as saws, joiners, shapers, emery wheels and punch presses.

3. Watch for loose sleeves, flapping blouses and flying neckties — anything which may get caught in the machinery and draw the man or woman in.

4. Bear in mind that the following are among the main causes of accidents:

The manner in which a worker handles himself or performs his work.

Fall of workers from elevations; into openings; or on level by slipping, stumbling, etc.

Falling objects from elevations or on level because improperly piled, stacked, etc.

Handling of tools or objects.

5. Try to detect slight cuts, scratches, bruises and burns which are not being properly cared for. They may cause infection and blood poisoning. Remember that the great majority of all infections are the direct result of neglecting small injuries.

GUARDING OF MACHINERY.

1. Become familiar with all the requirements of the Labor Law and Industrial Code as to guarding of machinery and see that none of these are overlooked. For information as to these requirements write to the Bureau of Inspection, State Industrial Commission, Capitol, Albany, N. Y., or 230 Fifth avenue, New York City.

2. Become familiar also with the safety standards of the Compensation Inspection Rating Board, 135 William street, New York City. This is a semi-official body in which all compensation insurance carriers are represented. The Hand Book of Industrial Safety Standards, issued by this Board, and which will be furnished free upon request, reflects the requirements of compensation insurance carriers with reference to guarding of machinery.

WHAT TO STUDY

Machinery and Plant Lay Out

1. Study the present arrangement and guarding of machinery and suggest better safety appliances to prevent accidents.

2. Study the general lay out of the plant with a view to detecting faulty engineering (1) in construction of the buildings, (2) in installation of the equipment, and (3) in the arrangement of the premises. Often serious accidents are charged to these defects.

3. Study the present method of storing and handling of materials and objects, and help prevent unsafe conditions and

practices by watching daily and suggesting better methods. Also help prevent overloading of floors.

4. Study how to reduce unnecessary sounds, vibrations and noises.

5. Study the best kind of clothing to be worn to guard against danger.

Lighting, Ventilation and Sanitation

1. Study the present lighting arrangements. Help eliminate all dark and unsafe spots by suggesting a better arrangement, so that all parts of the factory may be properly and adequately lighted.

2. Study the present ventilating system and suggest possible improvements.

3. Study how to keep work-rooms, wash-rooms and toilet-rooms clean and sanitary and free from obscene pictures and writing.

4. Study and suggest methods of guarding against diseases.

5. See that the supply of drinking water is always kept clean and pure and that the pipes, etc., are in working order.

6. Help prevent the accumulation of waste materials and rubbish.

Fire Hazards

1. Study the best methods to guard against and minimize fire hazards.

2. Discourage smoking in prohibited places and urge the use of safety matches.

REPORT BLANKS

In order to properly record and preserve the findings and recommendations of the Safety Supervisor and the Workers' Committee, uniform report blanks should be supplied for this purpose. Nothing is more convincing of the importance and seriousness of the duties of this kind of an organization than systematic maintenance of records. Supplying the blanks in pad form would make them handier for use when on an inspection tour.

Compensation insurance carriers furnish blanks for reports of safety organizations in plants of their policy holders. Aside from these, the following are suggested as forms which are proving highly satisfactory to a firm with plants distributed throughout

the State of New York and the United States. They have been modified to meet the general needs of most medium and large-sized manufacturing plants:

REGULAR REPORT OF WORKERS' COMMITTEE

Name of firm.....
 Date of Report, 191.... Date of last report, 191....
 A.— The following Departments have been inspected since last report:
 B.— The following unsafe practices in our opinion exist (give location):
 C.— The following unsafe conditions were found (this refers to conditions, not individuals):
 D.— The following recommendations are made (use back of report or attach letter if necessary):
 Date of last meeting of Committee,, 191....
 Chairman
 Members
 Copy of this report delivered to Executives' Committee,, 191....

REGULAR REPORT OF SAFETY SUPERVISOR

Name of firm
 Date, 191.... Date of previous report, 191....
 Inspections since last report include following Departments:

 A.— Defects including lack of or improper guards and location of same:
 B.— Wrong conditions are as follows:
 C.— Unsafe or dangerous practices are as follows:
 D.— Defects, wrong conditions, unsafe or dangerous practices reported which have been corrected:
 E.— Items previously reported which have not been corrected, because of:
 F.— Recommendations (use back of report or attach letter when necessary):
 Copy of this report delivered to Executives' Committee., 191....

 Supervisor.

Copy of last Workers' Committee report, dated....., 191...
 Date of last meeting of Workers' Committee....., 191...
 Date of last meeting of Foremen's Committee....., 191...

Part IV

SHOP SAFETY, SANITATION AND HEALTH RULES

STATEMENT

Only a certain proportion of the accidents occurring daily can be prevented by mechanical safeguards. Many accidents not preventable by safeguards are caused by "unsafe practices," that is by the worker performing his work or conducting himself in the shop so as to subject others or himself to danger. Similarly, many of the problems of shop sanitation and hygiene which vitally affect the comfort and health of the worker cannot be solved by mechanical devices.

This statement is not intended to absolve the employer from responsibility in such matters, nor to charge the employee with deliberate unsafe practices or neglect of shop sanitation and hygiene. These dangerous and unwholesome methods are practiced because neither the worker nor employer realize that they often result disastrously — frequently to innocent fellow workers. The following rules are, therefore, intended to call attention to the most common unsafe and unhygienic practices. By a strict observance of these rules it should be possible to practically eliminate the accidents and discomforts due to unsafe and unhygienic practices.

Employees should also be on guard against other less common unsafe and unhygienic practices that might lead to serious consequences.

Remember: *A careful man is the best safeguard.*

RULES

1. Be cautious and alert at all times, and under all circumstances.
2. Conduct yourself at all times in an orderly and careful manner. Scuffling, playful wrestling, or any other kind of horse play is dangerous.
3. Never disregard a warning sign.

4. Do not go across dangerous places, nor through them, merely to save a few steps or a few seconds of time.

5. Be careful in going up or down stairs.

6. Do not throw articles of any kind out of windows.

7. Do not spit upon the floors, passageways, walks or in corners.

8. Never fail to use a safeguard provided, and under no condition remove a safeguard unless you are authorized to do so.

9. Never repair or clean machinery when in motion.

10. Do not wear loose or torn clothing, loose neckties, dangling sleeves, aprons, gloves, loose suspender straps, unbuttoned jumpers or pants with cuffs when working around moving parts of machinery.

11. Goggles must be worn in all operations by workers doing any work where there is danger of flying particles, such as chipping of concrete or any kind of metals, handling of molten metal, using unprotected grinding wheels, etc.

12. Never use an elevator without permission from those in authority. Never attempt to step or jump on or off a moving elevator.

13. Examine all tools before using them. No tools should be used, or issued, having "burred" or "mushroom" heads, defective or loose handles.

14. Tools, appliances, materials or equipment must not be left in aisles or passageways.

15. Broken, weak or rickety ladders should never be used. Ladders should always rest firmly upon a level surface, and special care should be taken to prevent them from slipping at the foot or at the top.

16. In piling up materials, be careful to stow them so that they cannot fall over. Also guard against overloading floors or racks.

17. If a nail is protruding from a board, knock it down or bend it over.

18. Wash-rooms and toilet-rooms must be kept clean and sanitary.

19. Maintain your self-respect and that of your fellow workers by neither drawing obscene pictures nor writing obscene matter on walls, doors, etc. If you do not practice such indecencies, do not countenance them from others.

20. Never play or tamper with any fire fighting apparatus. If it is not ready for use when needed, it may contribute to serious injury to yourself or fellow workers.

21. It is the duty of every employee to report every unsafe or dangerous condition or practice he sees either to his foreman, representative on the safety committee, or safety supervisor.

22. Call attention of your foreman when there is insufficient light about machinery or passageways.

23. Call attention of your foreman to any lack of proper ventilation.

24. If you are injured, no matter how slightly, report it to your foreman at once.

25. Be careful in everything you do. Take no chances. Remember that small neglects and oversights often cause serious accidents. Warn other men when you see them in danger, and try to get them to do things in a safe way. Look out for new workers and see that they do not meet with accidents, nor expose others to danger. Talk freely about safety with other employees, and remember that safety and sanitation suggestions are always welcome.

26. Watch carefully for new rules that may be adopted from time to time.

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DEPARTMENT OF LABOR
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THE INDUSTRIAL COMMISSION

JOHN MITCHELL, Chairman
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WEEKLY EARNINGS OF WOMEN
IN FIVE INDUSTRIES
(PAPER BOXES, SHIRTS AND COLLARS, CONFEC-
TIONERY, CIGARS AND TOBACCO, AND
MERCANTILE ESTABLISHMENTS)

Prepared by
THE BUREAU OF STATISTICS AND INFORMATION

WEEKLY EARNINGS OF WOMEN IN FIVE INDUSTRIES

PURPOSE AND SCOPE OF INVESTIGATION

The investigation of which the results are set forth in this Bulletin was undertaken to throw light on the question of what women's wages are at present. In addition to the general interest attaching to the subject, there was special occasion for securing such information just at this time, owing to the active movement for minimum wage legislation at the present session of the Legislature. With the question of the wisdom of such legislation or with argument for or against it, this Bulletin does not undertake to deal. The aim is only to afford some substantial, impartial and accurate information as to what women's wages actually are at the present time, which information would seem to be the necessary background for most intelligent discussion of legislative proposals dealing with the subject.

In the time available between the date when the need of such information became evident and the date when the work must be completed if results were to be available early in the legislative session, it was possible to cover only a limited field. In selecting the field three considerations were in mind, namely, to take, first, those employing considerable numbers of women; second, those in which women's wages are of grades relatively low rather than high; third, those for which a sufficient number of reports could be secured in a limited time to afford fairly representative figures. It was desirable also to take the same industries as were covered by the investigation of the Factory Investigating Commission of 1913-14 in order to afford evidence as to the movement of wages between that time and the present. On this basis four factory industries — paper boxes, shirts and collars, confectionery, and cigars and tobacco — and mercantile establishments, were selected.

The data called for in the form used consisted of transcripts from the payroll for a single week of the number of hours worked where recorded and amount of wages received by each female employee on that payroll, those under sixteen years of age being so designated, together with report of the number of working days in the week covered. The payrolls were not all for the same week in different establishments. Up-state the reports were

all for the week ended November 23, 1918, or for the payroll nearest thereto. In New York City the reports were for different weeks in the period from December 11, 1918, to January 10, 1919.

The form of the tabulations presented was dictated by the purpose of the investigation. The essential point in connection with the minimum wage question upon which such an investigation could throw light is that of how low wages actually are and what proportion of women are receiving the lower wages. Hence the tables present percentages of those receiving a given grade or less. Median wages * are also shown approximately by the tables, that is, to within less than fifty cents since they fall in grades of that limit. The grade containing the median is, of course, the one for which the cumulative percentage is fifty or nearest above that.

But while presenting the figures from the point of view of the extent of low wages, care was taken to guard against any possible exaggeration or over-statement in that direction. To this end the following was done. Wherever a week reported for included a public holiday on which no work was done, earnings were increased by a ratio equal to that of one day to the actual working time in that week. For example, if in a six-day week there was such a holiday, leaving actual working time five days, the reported earnings were increased by one-fifth to represent equivalent earnings for a full week. Where commissions or bonuses were paid these were included in earnings. In the case of mercantile establishments it is frequently the practice to have a certain number of employees as a supplementary force working regularly only in the afternoons or on certain days of the week. To eliminate such cases, in the tabulations for mercantile establishments all workers reported as working less than half time were omitted. Girls under sixteen, as being likely to be learners or beginners, were left out of all the tables. Finally, in addition to tables including all women except those excluded as just noted, a second set of tables was made which included only those who worked forty-eight hours or more in the week or, if full time was less than forty-eight hours, who worked full time. Those tables present, therefore, approximately full time earnings.

* For the subject with which this investigation is concerned, averages would have almost no significance.

Tabulations for factories include only shop workers, excluding office employees, the distinction between those two classes being easily made in factories, but for mercantile establishments, in which such a distinction is difficult, all occupations are included.

The tabulated returns cover 623 establishments and 61,160 women, including 417 factories with 32,881 women and 206 mercantile establishments with 28,279 women. It is possible on the basis of United States census figures of 1914 and the labor market figures of the Bureau of Statistics of the State Industrial Commission to estimate what proportion of all the women employed in this State in the four factory industries covered are included in these returns. As nearly as can be estimated, about 60 per cent of the women in those four industries are here represented, including about that same percentage for paper boxes and for shirts and collars, with about 67 per cent for confectionery and 57 per cent for cigars, etc.

In tables in the appendix the results of the investigation are shown in detail. The broad general results may be summarized as follows.

ALL EARNINGS IN FACTORIES

In 417 factories, for all women on the payroll, 32,881 in number, it is found that 3,305 (10 per cent) earned for the week reported less than six dollars, 6,434 (20 per cent) less than eight dollars, 11,377 (35 per cent) less than ten dollars, 17,593 (53 per cent) less than twelve dollars, and 22,426 (68 per cent) less than fourteen dollars; 10,455 (32 per cent) earned fourteen dollars or over, and 2,711 (8 per cent) twenty dollars or over. Following are the figures for each of the four factory industries covered:

EARNINGS	PERCENTAGE OF WOMEN WHO RECEIVED THE SPECIFIED EARNINGS			
	Paper boxes	Shirts, collars	Confec- tionery	Cigars, etc.
Less than \$ 6.....	8	11	17	5
" " \$ 8.....	18	23	28	9
" " \$10.....	36	38	51	17
" " \$12.....	59	58	72	32
" " \$14.....	77	72	85	46
\$14 or over.....	23	28	15	54
\$20 " ".....	2	5	2	21

EARNINGS IN MERCANTILE ESTABLISHMENTS

(Excluding Less than Half-Time Workers)

In 206 mercantile establishments, for all women who worked at least half time, 28,279 in number, 751 (3 per cent) earned less than six dollars, 3,354 (12 per cent) less than eight dollars, 8,340 (29 per cent) less than ten dollars, 14,218 (50 per cent) less than twelve dollars, and 19,199 (68 per cent) less than fourteen dollars; 9,080 (32 per cent) earned fourteen dollars or over and 2,148 (8 per cent) twenty dollars or over.

FULL-TIME EARNINGS

The tabulations limited to those working practically full time included 20,597 women in factories and 23,203 in mercantile establishments. The week's earnings of these full-time workers were as follows:

FULL-TIME EARNINGS	WOMEN RECEIVING SPECIFIED EARNINGS			
	FACTORIES		STORES	
	Number	Per cent	Number	Per cent
Less than \$ 6.....	176	1	173	1
" " \$ 8.....	1,418	7	1,567	7
" " \$10.....	4,390	21	5,354	23
" " \$12.....	8,660	42	10,308	44
" " \$14.....	12,226	59	14,762	64
\$14 or over.....	8,371	41	8,441	36
\$20 " ".....	2,284	11	2,058	9

EARNINGS IN NEW YORK CITY

Earnings in New York City were considerably higher than those up-State. Thus, for all women tabulated, the median earnings for 16,215 women in the 237 factories in New York City was between \$12 and \$12.50, while that for 16,666 women in the 180 up-State factories was between \$10.50 and \$11. Similarly for 20,736 women in 88 mercantile establishments in New York City the median was between \$12 and \$12.50, while that for 7,543 women in 118 establishments up-State was between \$9 and \$9.50. The following shows the general distribution of earnings for all women in the New York City establishments:

WOMEN RECEIVING SPECIFIED EARNINGS

EARNINGS	FACTORIES		STORES	
	Number	Per cent	Number	Per cent
Less than \$ 6.....	1,467	9	324	2
" " \$ 8.....	2,433	15	1,465	7
" " \$10.....	4,478	28	4,299	21
" " \$12.....	7,385	45	8,708	42
" " \$14.....	9,724	60	12,746	61
\$14 or over.....	6,491	40	7,990	39
\$20 " ".....	2,053	13	1,925	9

Distribution of earnings of women working practically full time was as follows in New York City establishments, for 11,354 women in factories and 17,014 in mercantile establishments:

WOMEN RECEIVING SPECIFIED EARNINGS

FULL-TIME EARNINGS	FACTORIES		STORES	
	Number	Per cent	Number	Per cent
Less than \$ 6.....	23	.....	21	.....
" " \$ 8.....	244	2	374	2
" " \$10.....	1,602	14	2,382	14
" " \$12.....	3,940	35	6,022	35
" " \$14.....	5,881	52	9,606	56
\$14 or over.....	5,473	48	7,408	44
\$20 " ".....	1,757	16	1,849	11

INCREASE IN EARNINGS IN FIVE YEARS

The New York Factory Investigating Commission made an investigation of the wages of women in 1913 and 1914, the results of which were reported in Volumes 2 and 3 of its Fourth Report. In that investigation, among other data, earnings for a single week were secured for four of the five industries covered in the present investigation and for weeks in November or December, 1913, or January, 1914, in the case of New York City firms, and in May or June, 1914, for up-State firms. This makes very nearly a five-year period between the returns of the two investigations, thus affording evidence as to the increase in earnings in that time. In tables in the appendix the comparative figures are presented in the form in which the earlier returns were tabulated. It should be noted that the figures for 1913-14 have been put on a comparable basis by eliminating children under sixteen years of age and to that extent differ from the figures published in the Factory Commission report.

There is no means of knowing to what extent the returns represent the same firms for both dates, but to the extent that the returns in each investigation are typical for their respective periods, and there is every reason to believe that they are, they are fairly comparable.

Using here the median* earnings for comparative purposes the very considerable rise in women's earnings during the five years may be seen in the following comparison:

	GRADE CONTAINING MEDIAN EARNINGS	
	1913-14	1918-19
Factory Industries:		
Paper boxes.....	\$6.50-\$6.99	\$11.00-\$11.49
Shirts and collars.....	6.50- 6.99	11.00- 11.49
Confectionery.....	5.50- 5.99	9.50- 9.99
Mercantile Establishments.....	7.00- 7.49	11.50- 11.99

In the present instance the exact median earnings are not known, but only the grade in which they fall. However, the grade is narrow enough so that the median is apparent to within less than 50 cents of the actual. Under these conditions it is permissible for the purpose of a rough measure of the rise in the median to take the middle point of the grade as representing the median earnings. That would be to take in the case of paper boxes, for example, \$6.75 as the median for 1913-14 and \$11.25 for 1918-9. On that basis it would appear that the median earnings of women has increased during the last five years 67 per cent in paper box factories and in shirt and collar factories. 70 per cent in candy factories and 62 per cent in mercantile establishments.

* The median earnings are those at that point in the scale of different earnings received such that 50 per cent of the workers receive those earnings or less, or, vice versa, 50 per cent receive those earnings or more.

APPENDIX

Statistical Tables

Weekly Earnings of Women Shop Workers in 1918-19 in —

Paper Box Factories.

Shirt and Collar Factories.

Confectionery Factories.

Cigar and Tobacco Factories.

Weekly Earnings of Women in 1918-19 in —

Mercantile Establishments.

Comparison of Weekly Earnings of Women in 1913-14 and 1918-19.

WEEKLY EARNINGS OF WOMEN SHOP WORKERS

(As reported by 115 establishments, 66

Grades of weekly earnings	ALL EARNINGS								
	NEW YORK CITY			UP-STATE			TOTAL		
	Number in the grade	Receiving grade or less		New- ber in the grade	Receiving grade or less		Number in the grade	Receiving grade or less	
		Number	Per cent		Number	Per cent		Number	Per cent
Less than \$3	52	52	2.4	74	74	3.2	126	126	2.8
\$3 00-\$3 49	11	63	2.9	14	88	3.8	25	151	3.3
3 50- 3 99	7	70	3.2	18	106	4.6	25	176	3.9
4 00- 4 49	11	81	3.7	17	123	5.3	28	204	4.5
4 50- 4 99	18	99	4.5	27	150	6.4	45	249	5.5
5 00- 5 49	26	125	5.7	36	186	8.0	62	311	6.9
5 50- 5 99	30	155	7.1	44	230	9.9	74	385	8.5
6 00- 6 49	34	189	8.6	63	293	12.6	97	482	10.7
6 50- 6 99	27	216	9.9	54	347	14.9	81	563	12.4
7 00- 7 49	48	264	12.1	75	422	18.1	123	686	15.2
7 50- 7 99	57	321	14.7	89	511	22.0	146	832	18.4
8 00- 8 49	56	377	17.2	125	636	27.3	181	1,013	22.4
8 50- 8 99	45	422	19.3	102	738	31.7	147	1,160	25.7
9 00- 9 49	107	529	24.2	165	903	38.8	272	1,432	31.7
9 50- 9 99	93	622	28.4	91	994	42.7	184	1,616	35.8
10 00-10 49	169	791	36.2	151	1,145	49.2	320	1,936	42.9
10 50-10 99	125	916	41.9	98	1,243	53.4	223	2,159	47.8
11 00-11 49	196	1,112	50.8	113	1,356	58.3	309	2,468	54.7
11 50-11 99	104	1,216	55.6	100	1,456	62.6	204	2,672	59.2
12 00-12 49	155	1,371	62.7	132	1,588	68.3	287	2,959	65.6
12 50-12 99	97	1,468	67.1	71	1,659	71.3	168	3,127	69.3
13 00-13 49	112	1,580	72.2	99	1,758	75.6	211	3,338	74.0
13 50-13 99	51	1,631	74.6	92	1,850	79.5	143	3,481	77.1
14 00-14 49	103	1,734	79.3	59	1,909	82.1	162	3,643	80.7
14 50-14 99	39	1,773	81.1	61	1,970	84.7	100	3,743	82.9
15 00-15 49	116	1,889	86.4	68	2,038	87.6	184	3,927	87.0
15 50-15 99	35	1,924	88.0	48	2,086	89.7	83	4,010	88.9
16 00-16 49	76	2,000	91.4	33	2,119	91.1	109	4,119	91.3
16 50-16 99	22	2,022	92.4	35	2,154	92.6	57	4,176	92.5
17 00-17 49	47	2,069	94.6	40	2,194	94.3	87	4,263	94.5
17 50-17 99	25	2,094	95.7	23	2,217	95.3	48	4,311	95.5
18 00-18 49	23	2,117	96.8	17	2,234	96.0	40	4,351	96.4
18 50-18 99	10	2,127	97.3	17	2,251	96.8	27	4,378	97.0
19 00-19 49	15	2,142	97.9	16	2,267	97.4	31	4,409	97.7
19 50-19 99	6	2,148	98.2	11	2,278	97.9	17	4,426	98.1
20 00-20 99	17	2,165	99.0	20	2,298	98.8	37	4,463	98.9
21 00-21 99	9	2,174	99.4	10	2,308	99.2	19	4,482	99.3
22 00-22 99	5	2,179	99.6	8	2,316	99.6	13	4,495	99.6
23 00-23 99	2	2,181	99.7	4	2,320	99.7	6	4,501	99.7
24 00-24 99	2	2,183	99.8	2	2,322	99.8	4	4,505	99.8
25 00-25 99	1	2,184	99.9	1	2,323	99.9	2	4,507	99.9
26 00-26 99	.....	2,184	99.9	1	2,324	99.9	1	4,508	99.9
27 00-27 99	2	2,186	99.9	1	2,325	99.9	3	4,511	99.9
28 00-28 99	.....	2,186	99.9	1	2,326	100.0	1	4,512	99.9
29 00-29 99	.....	2,186	99.9	.....	.....	.....	.....	.....	.....
30 or over...	1	2,187	100.0	.....	.....	.....	1	4,513	100.0

* As reported by 107 establishments.

WEEKLY EARNINGS OF WOMEN

9

IN REPRESENTATIVE PAPER BOX FACTORIES
In New York City and 49 up-state)

FULL-TIME EARNINGS*									Grades of weekly earnings
NEW YORK CITY			UP-STATE			TOTAL			
Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less		
	Number	Per cent		Number	Per cent		Number	Per cent	
.....	.....	.....	.....	.....	.....	.....	.....	.....	Less than \$3
.....	.....	.....	.....	.....	.....	.....	.....	.....	\$3 00-\$3 49
.....	.....	.....	.....	.....	.....	.....	.....	.....	3 50- 3 99
1	1	0.1	1	1	0.1	2	2	0.1	4 00- 4 49
.....	1	0.1	1	2	0.1	1	3	0.1	4 50- 4 99
.....	1	0.1	5	7	0.4	5	8	0.3	5 00- 5 49
4	5	0.3	6	13	0.8	10	18	0.6	5 50- 5 99
5	10	0.7	25	38	2.3	30	48	2.0	6 00- 6 49
5	15	1.1	20	58	3.5	25	73	2.4	6 50- 6 99
16	31	2.2	40	98	6.0	5	129	4.3	7 00- 7 49
11	42	3.0	52	150	9.1	63	192	6.4	7 50- 7 99
19	61	4.4	68	218	13.3	87	279	9.2	8 00- 8 49
13	74	5.3	73	291	17.7	86	365	12.1	8 50- 8 99
64	138	9.9	140	431	26.3	204	569	18.8	9 00- 9 49
49	187	13.5	68	499	30.4	117	686	22.7	9 50- 9 99
132	319	23.0	132	631	38.4	264	950	31.4	10 00-10 49
82	401	28.9	73	704	42.9	155	1,105	36.5	10 50-10 99
164	565	40.7	98	802	48.9	262	1,367	45.1	11 00-11 49
68	633	45.6	84	886	54.0	152	1,519	50.1	11 50-11 99
130	763	54.9	111	997	60.8	241	1,760	58.1	12 00-12 49
72	835	60.1	58	1,055	64.3	130	1,890	62.4	12 50-12 99
90	925	66.6	91	1,146	69.8	181	2,071	68.3	13 00-13 49
34	959	69.0	79	1,225	74.6	113	2,184	72.1	13 50-13 99
79	1,038	74.7	55	1,280	78.0	134	2,318	76.5	14 00-14 49
31	1,069	77.0	54	1,334	81.3	85	2,403	79.3	14 50-14 99
90	1,159	83.4	66	1,400	85.3	156	2,559	84.5	15 00-15 49
27	1,186	85.4	37	1,437	87.6	64	2,623	86.6	15 50-15 99
62	1,248	89.8	28	1,465	89.3	90	2,713	89.6	16 00-16 49
17	1,265	91.1	32	1,497	91.2	49	2,762	91.2	16 50-16 99
34	1,299	93.5	32	1,529	93.2	66	2,828	93.4	17 00-17 49
20	1,319	95.0	20	1,549	94.4	40	2,868	94.7	17 50-17 99
19	1,338	96.3	14	1,563	95.2	33	2,901	95.8	18 00-18 49
7	1,345	96.8	13	1,576	96.0	20	2,921	96.4	18 50-18 99
10	1,355	97.5	14	1,590	96.9	24	2,945	97.2	19 00-19 49
4	1,359	97.8	9	1,599	97.4	13	2,958	97.6	19 50-19 99
14	1,373	98.8	16	1,615	98.4	30	2,988	98.6	20 00-20 99
7	1,380	99.3	9	1,624	99.0	16	3,004	99.1	21 00-21 99
3	1,383	99.5	7	1,631	99.4	10	3,014	99.5	22 00-22 99
2	1,385	99.7	4	1,635	99.6	6	3,020	99.7	23 00-23 99
2	1,387	99.8	2	1,637	99.8	4	3,024	99.8	24 00-24 99
.....	1,387	99.8	1	1,638	99.8	1	3,025	99.9	25 00-25 99
.....	1,387	99.8	1	1,639	99.9	1	3,026	99.9	26 00-26 99
2	1,389	100.0	1	1,640	99.9	3	3,029	99.9	27 00-27 99
.....	.....	.....	1	1,641	100.0	1	3,030	100.0	28 00-28 99
.....	.....	.....	.....	.....	.....	.....	.....	.....	29 00-29 99
.....	.....	.....	.....	.....	.....	.....	.....	.....	30 or over

WEEKLY EARNINGS OF WOMEN SHOP WORKERS
 (As reported by 130 establishments)

Grades of weekly earnings	ALL EARNINGS								
	NEW YORK CITY			UP-STATE			TOTAL		
	Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less	
		Number	Per cent		Number	Per cent		Number	Per cent
Less than \$3	91	91	2.4	318	318	3.1	409	409	2.9
\$3 00-\$3 49	30	121	3.2	101	419	4.0	131	540	3.8
3 50-3 99	33	154	4.1	119	538	5.2	152	692	4.9
4 00-4 49	31	185	4.9	149	687	6.6	180	872	6.2
4 50-4 99	41	226	6.0	153	840	8.1	194	1,066	7.5
5 00-5 49	47	273	7.3	208	1,048	10.1	255	1,321	9.3
5 50-5 99	33	306	8.2	218	1,266	12.1	251	1,572	11.1
6 00-6 49	58	364	9.7	321	1,587	15.2	379	1,951	13.8
6 50-6 99	51	415	11.1	293	1,880	18.0	344	2,295	16.2
7 00-7 49	73	488	13.0	445	2,325	22.3	518	2,813	19.9
7 50-7 99	57	545	14.6	402	2,727	26.2	459	3,272	23.1
8 00-8 49	100	645	17.2	474	3,201	30.7	574	3,846	27.2
8 50-8 99	70	715	19.1	387	3,588	34.4	457	4,303	30.4
9 00-9 49	108	823	22.0	456	4,044	38.8	564	4,867	34.4
9 50-9 99	97	920	24.6	457	4,501	43.2	554	5,421	38.3
10 00-10 49	182	1,102	29.4	501	5,002	48.0	683	6,104	47.4
10 50-10 99	101	1,203	32.1	513	5,515	52.9	614	6,718	53.2
11 00-11 49	154	1,357	36.2	657	6,172	59.2	811	7,529	57.7
11 50-11 99	112	1,469	39.2	538	6,710	64.4	650	8,179	62.6
12 00-12 49	210	1,679	44.8	484	7,194	69.0	694	8,873	65.8
12 50-12 99	90	1,769	47.2	360	7,554	72.4	450	9,323	68.7
13 00-13 49	152	1,921	51.3	395	7,949	76.3	547	9,870	72.5
13 50-13 99	91	2,012	53.7	303	8,252	79.2	394	10,264	75.8
14 00-14 49	159	2,171	58.0	314	8,566	82.2	473	10,737	78.2
14 50-14 99	96	2,267	60.5	239	8,805	84.5	335	11,072	81.1
15 00-15 49	195	2,462	65.8	220	9,025	86.6	415	11,487	83.1
15 50-15 99	85	2,547	68.0	196	9,221	88.4	281	11,768	85.2
16 00-16 49	130	2,677	71.5	171	9,392	90.1	301	12,069	87.0
16 50-16 99	90	2,767	73.9	161	9,553	91.7	251	12,320	88.9
17 00-17 49	122	2,889	77.2	149	9,702	93.1	271	12,591	90.2
17 50-17 99	55	2,944	78.6	133	9,835	94.4	188	12,779	92.3
18 00-18 49	141	3,085	82.4	148	9,983	96.8	289	13,068	93.3
18 50-18 99	56	3,141	83.9	96	10,079	96.7	152	13,220	94.2
19 00-19 49	68	3,209	85.7	60	10,139	97.3	128	13,348	94.9
19 50-19 99	44	3,253	86.9	45	10,184	97.7	89	13,437	96.2
20 00-20 99	114	3,367	89.9	78	10,262	98.4	192	13,629	97.1
21 00-21 99	76	3,443	92.0	52	10,314	99.0	128	13,757	97.9
22 00-22 99	75	3,518	94.0	30	10,344	99.3	105	13,862	98.3
23 00-23 99	42	3,560	95.1	21	10,365	99.4	63	13,925	98.7
24 00-24 99	39	3,599	96.1	12	10,377	99.6	51	13,976	99.1
25 00-25 99	29	3,628	96.9	29	10,406	99.9	58	14,034	99.3
26 00-26 99	25	3,653	97.6	4	10,410	99.9	29	14,063	99.4
27 00-27 99	20	3,673	98.1	.....	10,410	99.9	20	14,083	99.5
28 00-28 99	13	3,686	98.4	3	10,413	99.9	16	14,099	99.6
29 00-29 99	10	3,696	98.7	3	10,416	99.9	13	14,112	99.6
30 and over	48	3,744	100.0	4	10,420	100.0	52	14,164	100.0

* As reported by 105 establishments.

WEEKLY EARNINGS OF WOMEN

11

IN REPRESENTATIVE SHIRT AND COLLAR FACTORIES
66 in New York City and 64 up-state)

FULL-TIME EARNINGS*										Grades of weekly earnings
NEW YORK CITY			UP-STATE			TOTAL				
Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less			
	Number	Per cent		Number	Per cent		Number	Per cent		
.....	.....	.....	7	7	0.1	7	7	0.1	Less than \$3
.....	.....	.....	3	10	0.2	3	10	0.1	\$3 00-\$3 49
.....	.....	.....	5	15	0.3	5	15	0.2	3 50- 3 99
1	1	0.0	12	27	0.5	13	28	0.4	5 00- 4 49	
2	3	0.1	9	36	0.7	11	39	0.6	4 50- 4 99	
3	6	0.3	25	61	1.2	28	67	0.9	5 00- 5 49	
2	8	0.4	31	92	1.9	33	100	1.4	5 50- 5 99	
15	23	1.1	101	193	3.9	116	216	3.0	6 00- 6 49	
17	40	1.9	97	290	5.8	114	330	4.6	6 50- 6 99	
27	67	3.1	247	537	10.8	274	604	8.5	7 00- 7 49	
18	85	3.9	203	740	14.9	221	825	11.6	7 50- 7 99	
52	137	6.3	254	994	20.0	306	1,131	15.9	8 00- 8 49	
26	163	7.5	174	1,168	23.6	200	1,331	18.7	8 50- 8 99	
67	230	10.6	234	1,402	28.3	301	1,632	22.9	9 00- 9 49	
50	280	12.9	199	1,601	32.3	249	1,881	26.4	9 50- 9 99	
132	412	19.0	252	1,853	37.4	384	2,265	31.7	10 00-10 49	
52	464	21.3	248	2,101	42.4	300	2,565	35.9	10 50-10 99	
94	558	25.7	275	2,376	47.9	369	2,934	41.1	11 00-11 49	
68	626	28.8	294	2,670	53.8	362	3,296	46.2	11 50-11 99	
154	780	35.8	261	2,931	59.1	415	3,711	52.0	12 00-12 49	
46	826	38.0	190	3,121	62.9	236	3,947	55.3	12 50-12 99	
108	934	42.9	230	3,351	67.6	338	4,285	60.0	13 00-13 49	
60	994	45.7	181	3,532	71.2	241	4,526	63.4	13 50-13 99	
126	1,120	51.5	195	3,727	75.2	321	4,847	67.9	14 00-14 49	
55	1,175	54.0	164	3,891	78.4	219	5,066	71.0	14 50-14 99	
152	1,327	61.0	133	4,024	81.1	285	5,351	75.0	15 00-15 49	
56	1,383	63.5	120	4,144	83.6	176	5,527	77.4	15 50-15 99	
96	1,479	67.9	106	4,250	85.7	202	5,729	80.3	16 00-16 49	
53	1,532	70.4	109	4,359	87.9	162	5,891	82.5	16 50-16 99	
88	1,620	74.4	105	4,464	90.0	193	6,084	85.2	17 00-17 49	
30	1,650	75.8	92	4,556	91.9	122	6,206	87.0	17 50-17 99	
114	1,764	81.0	81	4,637	93.5	195	6,401	89.7	18 00-18 49	
33	1,797	82.5	58	4,695	94.7	91	6,492	91.0	18 50-18 99	
46	1,843	84.7	42	4,737	95.5	88	6,580	92.2	19 00-19 49	
27	1,870	85.9	39	4,776	96.3	66	6,646	93.1	19 50-19 99	
79	1,949	89.5	57	4,833	97.4	136	6,782	95.0	20 00-20 99	
45	1,994	91.6	43	4,876	98.3	88	6,870	96.3	21 00-21 99	
44	2,038	93.6	22	4,906	98.8	66	6,936	97.2	22 00-22 99	
25	2,063	94.8	21	4,919	99.2	46	6,982	97.8	23 00-23 99	
24	2,087	95.9	8	4,927	99.4	32	7,014	98.3	24 00-24 99	
18	2,105	96.7	26	4,953	99.9	44	7,058	98.9	25 00-25 99	
11	2,116	97.2	1	4,964	99.9	12	7,070	99.1	26 00-26 99	
13	2,129	97.8	.....	4,964	99.9	13	7,083	99.2	27 00-27 99
7	2,136	98.1	2	4,956	99.9	9	7,092	99.4	28 00-28 99	
5	2,141	98.3	1	4,957	99.9	6	7,098	99.5	29 00-29 99	
37	2,178	100.0	2	4,959	100.0	39	7,137	100.0	30 or over	

WEEKLY EARNINGS OF WOMEN SHOP WORKERS

(As reported by 68 establishments, 44

Grades of weekly earnings	ALL EARNINGS								
	NEW YORK CITY			UP-STATE			TOTAL		
	Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less	
		Number	Per cent		Number	Per cent		Number	Per cent
Less than \$3	257	257	5.8	45	45	4.4	302	302	5.4
\$3 00-\$3 49	107	364	8.2	1	46	4.4	108	410	7.4
3 50-3 99	49	413	9.3	10	56	5.4	59	469	8.5
4 00-4 49	146	559	12.5	14	70	6.8	160	629	11.4
4 50-4 99	86	645	14.4	15	85	8.2	101	730	13.3
5 00-5 49	101	746	16.7	10	95	9.2	111	841	15.3
5 50-5 99	89	835	18.7	11	106	10.3	100	941	17.1
6 00-6 49	119	954	21.4	35	141	13.6	154	1,095	19.9
6 50-6 99	113	1,067	23.9	22	163	15.3	135	1,230	22.4
7 00-7 49	134	1,201	26.9	64	227	22.0	198	1,428	26.0
7 50-7 99	92	1,293	29.0	34	261	25.3	126	1,554	28.3
8 00-8 49	171	1,464	32.8	85	346	33.4	256	1,810	32.9
8 50-8 99	185	1,649	37.0	32	378	36.6	217	2,027	36.9
9 00-9 49	450	2,099	47.0	70	448	43.4	520	2,547	46.4
9 50-9 99	250	2,349	52.6	27	475	46.0	277	2,824	51.4
10 00-10 49	446	2,795	62.6	100	575	55.7	546	3,370	61.3
10 50-10 99	144	2,939	65.9	42	617	59.7	186	3,556	64.7
11 00-11 49	205	3,144	70.4	47	664	64.3	252	3,808	69.3
11 50-11 99	132	3,276	73.4	34	698	67.6	166	3,974	72.3
12 00-12 49	231	3,507	78.6	88	786	76.1	319	4,293	78.1
12 50-12 99	95	3,602	80.7	19	805	77.9	114	4,407	80.2
13 00-13 49	152	3,754	84.1	37	842	81.6	189	4,596	83.6
13 50-13 99	63	3,817	85.5	27	869	84.1	90	4,686	85.3
14 00-14 49	101	3,918	87.8	25	894	86.5	126	4,812	87.6
14 50-14 99	67	3,985	89.3	12	906	87.7	79	4,891	89.0
15 00-15 49	90	4,075	91.3	29	935	90.5	119	5,010	91.2
15 50-15 99	38	4,113	92.2	11	946	91.6	49	5,059	92.1
16 00-16 49	36	4,149	93.0	20	966	93.5	56	5,115	93.1
16 50-16 99	39	4,188	93.9	7	973	94.2	46	5,161	93.9
17 00-17 49	49	4,237	95.0	15	988	95.6	64	5,225	95.1
17 50-17 99	21	4,258	95.4	9	997	96.5	30	5,255	95.6
18 00-18 49	49	4,307	96.5	12	1,009	97.7	61	5,316	96.7
18 50-18 99	20	4,327	97.0	2	1,011	97.9	22	5,338	97.1
19 00-19 49	22	4,349	97.4	6	1,017	98.4	28	5,366	97.7
19 50-19 99	14	4,363	97.8	2	1,019	98.6	16	5,382	97.9
20 00-20 99	29	4,392	98.4	7	1,026	99.3	36	5,418	98.6
21 00-21 99	15	4,407	98.8	3	1,029	99.6	18	5,436	98.9
22 00-22 99	16	4,423	99.1	1	1,030	99.7	17	5,453	99.2
23 00-23 99	10	4,433	99.3	.....	1,030	99.7	10	5,463	99.4
24 00-24 99	12	4,445	99.6	.....	1,030	99.7	12	5,475	99.6
25 00-25 99	6	4,451	99.8	1	1,031	99.8	7	5,482	99.8
26 00-26 99	3	4,454	99.8	1	1,032	99.9	4	5,486	99.8
27 00-27 99	4	4,458	99.9	.....	1,032	99.9	4	5,490	99.9
28 00-28 99	.....	4,458	99.9	.....	1,032	99.9	.....	5,490	99.9
29 00-29 99	.....	4,458	99.9	.....	1,032	99.9	.....	5,490	99.9
30 or over...	4	4,462	100.0	1	1,033	100.0	5	5,495	100.0

* As reported by 67 establishments.

IN REPRESENTATIVE CONFECTIONERY FACTORIES
in New York City and 24 up-state)

FULL-TIME EARNINGS*									Grades of weekly earnings
NEW YORK CITY			UP-STATE			TOTAL			
Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less		
	Number	Per cent		Number	Per cent		Number	Per cent	
.....	.....	.....	.....	.....	.....	.....	.....	.....	Less than \$3
.....	.....	.....	.....	.....	.....	.....	.....	.....	\$3 00-\$3 49
.....	.....	.....	.....	.....	.....	.....	.....	.....	3 50- 3 99
1	1	0.1	.....	.....	.....	1	1	0.1	4 00- 4 49
.....	1	0.1	.....	.....	.....	.....	1	0.1	4 50- 4 99
1	2	0.1	1	1	0.1	2	3	0.1	5 00- 5 49
.....	2	0.1	.....	1	0.1	.....	3	0.1	5 50- 5 99
3	5	0.2	17	18	2.5	20	23	0.7	6 00- 6 49
15	20	0.8	7	25	3.5	22	45	1.4	6 50- 6 99
34	54	2.1	48	73	10.3	82	127	3.8	7 00- 7 49
27	81	3.1	24	97	13.6	51	178	5.3	7 50- 7 99
80	161	6.1	72	169	23.8	152	330	9.9	8 00- 8 49
128	289	11.0	18	187	26.3	146	476	14.2	8 50- 8 99
386	675	25.6	55	242	34.0	441	917	27.4	9 00- 9 49
204	879	33.3	22	264	37.1	226	1,143	34.1	9 50- 9 99
398	1,277	48.3	86	350	49.2	484	1,627	48.5	10 00-10 49
109	1,386	52.5	32	382	53.7	141	1,768	52.7	10 50-10 99
180	1,566	58.9	36	418	58.8	216	1,984	59.2	11 00-11 49
107	1,673	63.3	28	446	62.7	135	2,119	63.2	11 50-11 99
201	1,874	70.9	82	528	74.3	283	2,402	71.6	12 00-12 49
73	1,947	73.7	14	542	76.2	87	2,489	74.2	12 50-12 99
128	2,075	78.5	28	570	80.2	156	2,645	78.9	13 00-13 49
47	2,122	80.3	15	585	82.3	62	2,707	80.7	13 50-13 99
87	2,209	83.6	20	605	85.1	107	2,814	83.9	14 00-14 49
56	2,265	85.7	8	613	86.2	64	2,878	85.8	14 50-14 99
73	2,338	88.5	23	636	89.4	96	2,974	88.7	15 00-15 49
31	2,369	89.6	8	644	90.6	39	3,013	89.9	15 50-15 99
28	2,397	90.7	16	660	92.8	44	3,057	91.2	16 00-16 49
26	2,423	91.7	4	664	93.4	30	3,087	92.1	16 50-16 99
38	2,461	93.1	13	677	95.2	51	3,138	93.6	17 00-17 49
18	2,479	93.8	6	683	96.1	24	3,162	94.3	17 50-17 99
39	2,518	95.3	9	692	97.3	48	3,210	95.7	18 00-18 49
17	2,535	95.9	1	693	97.4	18	3,228	96.3	18 50-18 99
19	2,554	96.6	6	699	98.3	25	3,253	97.0	19 00-19 49
10	2,564	97.0	1	700	98.4	11	3,264	97.3	19 50-19 99
26	2,580	98.0	5	705	99.2	31	3,295	98.3	20 00-20 99
10	2,600	98.4	2	707	99.4	12	3,307	98.6	21 00-21 99
14	2,614	98.9	1	708	99.6	15	3,322	99.1	22 00-22 99
6	2,620	99.1	.....	708	99.6	6	3,328	99.2	23 00-23 99
10	2,630	99.5	.....	708	99.6	10	3,338	99.5	24 00-24 99
5	2,635	99.7	1	709	99.7	6	3,344	99.7	25 00-25 99
1	2,636	99.8	.....	709	99.7	1	3,345	99.8	26 00-26 99
4	2,640	99.9	1	710	99.9	5	3,350	99.9	27 00-27 99
.....	2,640	99.9	.....	710	99.9	.....	3,350	99.9	28 00-28 99
.....	2,640	99.9	.....	710	99.9	.....	3,350	99.9	29 00-29 99
3	2,643	100.0	1	711	100.0	4	3,354	100.0	30 or over

WEEKLY EARNINGS OF WOMEN SHOP WORKERS IN
(As reported by 104 establishments, 61

Grades of weekly earnings	ALL EARNINGS								
	NEW YORK CITY			UP-STATE			TOTAL		
	Num- ber in the grade	Receiving grade or less		New- ber in the grade	Receiving grade or less		Num- ber in the grade	Receiving grade or less	
		Num- ber	Per cent		Num- ber	Per cent		Num- ber	Per cent
Less than \$3	61	61	1.0	59	59	2.0	120	120	1.4
\$3 00-\$3 49	12	73	1.3	25	84	2.9	37	157	1.8
3 50-3 99	23	96	1.6	25	109	3.8	48	205	2.4
4 00-4 49	16	112	1.9	22	131	4.5	38	243	2.8
4 50-4 99	16	128	2.2	27	158	5.4	43	286	3.3
5 00-5 49	28	156	2.7	41	199	6.9	69	355	4.1
5 50-5 99	15	171	2.9	37	236	8.2	52	407	4.7
6 00-6 49	20	191	3.3	68	304	10.5	88	495	5.7
6 50-6 99	19	210	3.6	41	345	12.0	60	555	6.4
7 00-7 49	34	244	4.2	74	419	14.5	108	663	7.6
7 50-7 99	30	274	4.7	83	502	17.4	113	776	8.9
8 00-8 49	107	381	6.5	96	598	20.7	203	979	11.2
8 50-8 99	49	430	7.4	76	674	23.3	125	1,104	12.7
9 00-9 49	98	528	9.1	133	807	28.0	231	1,335	15.3
9 50-9 99	68	596	10.2	113	920	31.9	181	1,516	17.4
10 00-10 49	367	963	16.5	135	1,055	36.5	502	2,018	23.2
10 50-10 99	82	1,045	17.9	67	1,122	38.9	149	2,167	24.9
11 00-11 49	273	1,318	22.6	121	1,243	43.1	394	2,561	29.4
11 50-11 99	106	1,424	24.4	101	1,344	46.6	207	2,768	31.8
12 00-12 49	340	1,764	30.3	115	1,459	50.5	455	3,223	37.0
12 50-12 99	125	1,889	32.4	75	1,534	53.1	200	3,423	39.3
13 00-13 49	264	2,153	37.0	123	1,657	57.4	387	3,810	43.8
13 50-13 99	111	2,264	38.9	74	1,731	60.0	185	3,995	45.9
14 00-14 49	413	2,677	46.0	109	1,840	63.7	522	4,517	51.9
14 50-14 99	96	2,773	47.6	66	1,906	66.0	162	4,679	53.7
15 00-15 49	243	3,016	51.8	88	1,994	69.1	331	5,010	57.5
15 50-15 99	107	3,123	53.6	68	2,062	71.4	175	5,185	59.5
16 00-16 49	150	3,273	56.2	73	2,135	74.0	223	5,408	62.1
16 50-16 99	114	3,387	58.2	56	2,191	75.9	170	5,578	64.0
17 00-17 49	170	3,557	61.1	68	2,259	78.2	238	5,816	66.8
17 50-17 99	124	3,681	63.2	59	2,318	80.3	183	5,999	68.9
18 00-18 49	382	4,063	69.8	74	2,392	82.9	456	6,455	74.1
18 50-18 99	107	4,170	71.6	49	2,441	84.6	156	6,611	75.9
19 00-19 49	127	4,297	73.8	42	2,483	86.0	169	6,780	77.8
19 50-19 99	101	4,398	75.5	44	2,527	87.5	145	6,925	79.5
20 00-20 99	229	4,627	79.4	99	2,626	91.0	328	7,253	83.3
21 00-21 99	207	4,834	83.0	86	2,712	93.9	293	7,546	86.6
22 00-22 99	173	5,007	86.0	50	2,762	95.7	223	7,769	89.2
23 00-23 99	152	5,159	88.6	34	2,796	96.8	186	7,955	91.3
24 00-24 99	150	5,309	91.2	32	2,828	98.0	182	8,137	93.4
25 00-25 99	132	5,441	93.4	17	2,845	98.5	149	8,286	95.1
26 00-26 99	95	5,536	95.1	20	2,865	99.2	115	8,401	96.5
27 00-27 99	77	5,613	96.4	4	2,869	99.4	81	8,482	97.4
28 00-28 99	49	5,662	97.3	3	2,872	99.4	52	8,534	98.0
29 00-29 99	52	5,714	98.1	5	2,877	99.7	57	8,591	98.6
30 or over	108	5,822	100.0	10	2,887	100.0	118	8,709	100.0

* As reported by 98 establishments.

REPRESENTATIVE CIGAR AND TOBACCO FACTORIES
in New York City and 43 up-state)

FULL-TIME EARNINGS*									Grades of weekly earnings
NEW YORK CITY			UP-STATE			TOTAL			
Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less		
	Number	Per cent		Number	Per cent		Number	Per cent	
.....	.....	.....	2	2	0.1	2	2	0.0	Less than \$3
1	1	0.0	6	8	0.4	7	9	0.1	\$3 00-\$3 49
1	2	0.0	6	14	0.7	7	16	0.2	3 50- 3 99
.....	2	0.0	3	17	0.9	3	19	0.3	4 00- 4 49
5	7	0.1	17	34	1.8	22	41	0.6	4 50- 4 99
1	8	0.1	13	47	2.4	14	55	0.8	5 00- 5 49
2	10	0.2	33	80	4.1	35	90	1.3	5 50- 5 99
3	13	0.3	21	101	5.2	24	114	1.6	6 00- 6 49
14	27	0.5	43	144	7.4	57	171	2.4	6 50- 6 99
9	36	0.7	43	187	9.7	52	223	3.2	7 00- 7 49
67	103	2.0	48	235	12.2	115	338	4.8	7 50- 7 99
30	133	2.6	40	275	14.2	70	408	5.8	8 00- 8 49
73	206	4.0	77	352	18.2	150	558	7.9	8 50- 8 99
50	256	5.0	72	424	21.9	122	680	9.6	9 00- 9 49
343	599	11.6	91	515	26.7	434	1,114	15.7	9 50- 9 99
68	667	13.0	51	566	29.3	119	1,233	17.4	10 00-10 49
249	916	17.8	86	652	33.7	335	1,568	22.2	10 50-10 99
92	1,008	19.6	66	718	37.2	158	1,726	24.4	11 00-11 49
325	1,333	25.9	82	800	41.4	407	2,133	30.1	11 50-11 99
119	1,452	28.2	59	859	44.4	178	2,311	32.7	12 00-12 49
251	1,703	33.1	91	950	49.2	342	2,653	37.5	12 50-12 99
103	1,806	35.1	53	1,003	51.9	156	2,809	39.7	13 00-13 49
399	2,205	42.9	85	1,088	56.3	484	3,293	46.5	13 50-13 99
89	2,294	44.6	51	1,139	59.0	140	3,433	48.5	14 00-14 49
230	2,524	49.1	65	1,204	62.3	295	3,728	52.7	14 50-14 99
90	2,614	50.8	46	1,250	64.7	136	3,864	54.6	15 00-15 49
137	2,751	53.5	56	1,306	67.6	193	4,057	57.3	15 50-15 99
105	2,856	55.5	56	1,362	70.4	161	4,218	59.6	16 00-16 49
151	3,007	58.4	54	1,416	73.3	205	4,423	62.5	16 50-16 99
121	3,128	60.8	48	1,464	75.8	169	4,592	64.9	17 00-17 49
365	3,493	67.9	63	1,527	79.0	428	5,020	70.9	17 50-17 99
100	3,593	69.8	45	1,572	81.4	145	5,165	73.0	18 00-18 49
113	3,706	72.0	36	1,608	83.2	149	5,314	75.1	18 50-18 99
98	3,804	73.9	33	1,641	84.9	131	5,445	77.0	19 00-19 49
214	4,018	78.1	76	1,717	88.9	290	5,735	81.1	19 50-19 99
187	4,205	81.7	70	1,787	92.4	257	5,992	84.7	20 00-20 49
163	4,368	84.9	33	1,820	94.2	196	6,188	87.5	20 50-20 99
146	4,514	87.7	32	1,852	95.9	178	6,366	90.0	21 00-21 49
142	4,656	90.5	30	1,882	97.4	172	6,538	92.4	21 50-21 99
128	4,784	93.0	17	1,899	98.3	145	6,683	94.4	22 00-22 49
94	4,878	94.8	15	1,914	99.1	109	6,792	96.0	22 50-22 99
76	4,954	96.3	3	1,917	99.2	79	6,871	97.1	23 00-23 49
49	5,003	97.2	3	1,920	99.4	52	6,923	97.8	23 50-23 99
49	5,052	98.2	4	1,924	99.6	53	6,976	98.6	24 00-24 49
92	5,144	100.0	8	1,932	100.0	100	7,076	100.0	24 50-24 99

**WEEKLY EARNINGS OF WOMEN SHOP WORKERS IN REPRESENTATIVE
SHIRTS AND COLLARS, CONFECTIONERY
(As reported by 417 establishments, 1937)**

Grades of weekly earnings	ALL EARNINGS								
	NEW YORK CITY				UP-STATE			TOTAL	
	Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less	
		Number	Per cent		Number	Per cent		Number	Per cent
Less than \$3	461	461	2.8	496	496	3.0	957	957	2.9
\$3 00-\$3 49	180	621	3.8	141	637	3.8	301	1,258	3.8
3 50-3 99	112	733	4.5	172	809	4.9	284	1,542	4.7
4 00-4 49	204	937	5.8	202	1,011	6.1	406	1,948	5.9
4 50-4 99	161	1,098	6.8	222	1,233	7.4	383	2,331	7.1
5 00-5 49	202	1,300	8.0	295	1,528	9.2	497	2,828	8.6
5 50-5 99	187	1,467	9.0	310	1,838	11.0	477	3,306	10.1
6 00-6 49	231	1,698	10.4	487	2,325	14.0	718	4,023	12.2
6 50-6 99	210	1,908	11.8	410	2,735	16.4	620	4,643	14.1
7 00-7 49	289	2,197	13.5	658	3,393	20.4	947	5,590	17.0
7 50-7 99	236	2,433	15.0	608	4,001	24.0	844	6,434	19.6
8 00-8 49	434	2,867	17.7	780	4,781	28.7	1,214	7,648	23.3
8 50-8 99	349	3,216	19.8	597	5,378	32.3	946	8,594	26.1
9 00-9 49	763	3,979	24.5	824	6,202	37.2	1,587	10,181	31.0
9 50-9 99	508	4,487	27.7	688	6,890	41.3	1,196	11,377	34.6
10 00-10 49	1,164	5,651	34.9	887	7,777	46.7	2,051	13,428	40.1
10 50-10 99	452	6,103	37.6	720	8,497	51.0	1,172	14,600	44.4
11 00-11 49	828	6,931	42.7	938	9,435	56.6	1,766	16,366	49.8
11 50-11 99	454	7,385	45.5	773	10,208	61.8	1,227	17,593	53.5
12 00-12 49	936	8,321	51.3	819	11,027	66.2	1,755	19,348	58.8
12 50-12 99	407	8,728	53.8	525	11,552	69.3	932	20,290	61.7
13 00-13 49	680	9,408	58.0	654	12,206	73.2	1,334	21,614	65.7
13 50-13 99	316	9,724	60.0	496	12,702	76.2	812	22,426	68.2
14 00-14 49	776	10,500	64.8	507	13,209	79.3	1,283	23,709	72.1
14 50-14 99	298	10,798	66.6	378	13,587	81.5	676	24,385	74.2
15 00-15 49	644	11,442	70.6	405	13,992	84.0	1,049	25,434	77.3
15 50-15 99	265	11,707	72.2	323	14,315	85.9	588	26,022	79.1
16 00-16 49	392	12,099	74.6	297	14,612	87.7	689	26,711	81.2
16 50-16 99	265	12,364	76.3	259	14,871	89.2	524	27,235	82.8
17 00-17 49	388	12,752	78.6	272	15,143	90.9	660	27,895	84.8
17 50-17 99	225	12,977	80.0	224	15,367	92.2	449	28,344	86.2
18 00-18 49	595	13,572	83.7	251	15,618	93.7	846	29,190	88.8
18 50-18 99	193	13,765	84.9	164	15,782	94.7	357	29,547	89.9
19 00-19 49	232	13,997	86.3	124	15,906	95.4	356	29,903	90.9
19 50-19 99	165	14,162	87.3	102	16,008	96.1	267	30,170	91.7
20 00-20 99	389	14,551	89.7	204	16,212	97.3	593	30,763	93.6
21 00-21 99	307	14,858	91.6	151	16,363	98.2	458	31,221	94.9
22 00-22 99	269	15,127	93.3	89	16,452	98.7	358	31,579	96.0
23 00-23 99	206	15,333	94.6	59	16,511	99.1	265	31,844	96.8
24 00-24 99	203	15,536	95.8	46	16,557	99.3	249	32,093	97.6
25 00-25 99	168	15,704	96.8	48	16,605	99.6	216	32,309	98.3
26 00-26 99	123	15,827	97.6	26	16,631	99.8	149	32,458	98.7
27 00-27 99	103	15,930	98.2	5	16,636	99.8	108	32,566	99.0
28 00-28 99	62	15,992	98.6	7	16,643	99.9	69	32,635	99.2
29 00-29 99	62	16,054	99.0	8	16,651	99.9	70	32,705	99.3
30 or over	161	16,215	100.0	15	16,666	100.0	176	32,881	100.0

* As reported by 377 establishments.

ESTABLISHMENTS IN FOUR FACTORY INDUSTRIES (PAPER BOXES, IONERY, AND CIGARS AND TOBACCO)

In New York City and 186 up-state)

FULL-TIME EARNINGS*

NEW YORK CITY			UP-STATE			TOTAL			Grades of weekly earnings
Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less		
	Number	Per cent		Number	Per cent		Number	Per cent	
.....	.....	.....	7	7	0.1	7	7	0.0	Less than \$3
.....	.....	.....	5	12	0.1	5	12	0.1	\$3 00-\$3 49
1	1	0.0	11	23	0.2	12	24	0.1	3 50- 3 99
4	5	0.0	19	42	0.4	23	47	0.2	4 00- 4 49
2	7	0.1	13	55	0.6	15	62	0.3	4 50- 4 99
9	16	0.1	48	103	1.1	57	119	0.6	5 00- 5 49
7	23	0.2	50	153	1.7	57	176	0.8	5 50- 5 99
25	48	0.4	176	329	3.6	201	377	1.8	6 00- 6 49
40	88	0.8	145	474	5.1	185	562	2.7	6 50- 6 99
91	179	1.6	378	852	9.2	469	1,031	5.0	7 00- 7 49
65	244	2.1	322	1,174	12.7	387	1,418	6.9	7 50- 7 99
218	462	4.1	442	1,616	17.4	660	2,078	10.1	8 00- 8 49
197	659	5.8	305	1,921	20.8	502	2,580	12.5	8 50- 8 99
590	1,249	11.0	506	2,427	26.3	1,096	3,676	17.8	9 00- 9 49
353	1,602	14.1	361	2,788	30.2	714	4,390	21.3	9 50- 9 99
1,005	2,607	23.0	561	3,349	36.2	1,566	5,956	28.9	10 00-10 49
311	2,918	25.7	404	3,753	40.6	715	6,671	32.4	10 50-10 99
687	3,605	31.7	495	4,248	46.0	1,182	7,853	38.1	11 00-11 49
335	3,940	34.7	472	4,720	51.1	807	8,660	42.0	11 50-11 99
810	4,750	41.8	536	5,256	56.9	1,346	10,006	48.6	12 00-12 49
310	5,060	44.6	321	5,577	60.3	631	10,637	51.6	12 50-12 99
577	5,637	49.6	440	6,017	65.1	1,017	11,654	56.6	13 00-13 49
244	5,881	51.8	328	6,345	68.6	572	12,226	59.4	13 50-13 99
691	6,572	57.9	355	6,700	72.4	1,046	13,272	64.4	14 00-14 49
231	6,803	60.0	277	6,977	75.4	508	13,780	66.9	14 50-14 99
545	7,348	64.7	287	7,264	78.6	832	14,612	70.9	15 00-15 49
204	7,552	66.5	211	7,475	80.9	415	15,027	73.0	15 50-15 99
323	7,875	69.4	206	7,681	83.1	529	15,556	75.5	16 00-16 49
201	8,076	71.1	201	7,882	85.3	402	15,958	77.5	16 50-16 99
311	8,387	73.9	204	8,086	87.4	515	16,473	80.0	17 00-17 49
189	8,576	75.5	166	8,252	89.3	355	16,828	81.7	17 50-17 99
537	9,113	80.3	167	8,419	91.1	704	17,532	85.1	18 00-18 49
157	9,270	81.6	117	8,536	92.4	274	17,806	86.4	18 50-18 99
188	9,458	83.3	98	8,634	93.4	286	18,092	87.8	19 00-19 49
139	9,597	84.5	82	8,716	94.3	221	18,313	88.9	19 50-19 99
333	9,930	87.5	154	8,870	96.0	487	18,800	91.3	20 00-20 99
249	10,179	89.6	124	8,994	97.3	373	19,173	93.1	21 00-21 99
224	10,403	91.6	63	9,057	98.0	287	19,460	94.5	22 00-22 99
179	10,582	93.2	57	9,114	98.6	236	19,696	95.6	23 00-23 99
178	10,760	94.8	40	9,154	99.0	218	19,914	96.7	24 00-24 99
151	10,911	96.1	45	9,199	99.5	196	20,110	97.6	25 00-25 99
106	11,017	97.0	17	9,216	99.7	123	20,233	98.2	26 00-26 99
95	11,112	97.9	5	9,221	99.8	100	20,333	98.7	27 00-27 99
56	11,168	98.4	6	9,227	99.8	62	20,395	99.0	28 00-28 99
54	11,222	98.8	5	9,232	99.9	59	20,454	99.3	29 00-29 99
132	11,354	100.0	11	9,243	100.0	143	20,597	100.0	30 or over

WEEKLY EARNINGS OF WOMEN IN REPRE
(As reported by 202 establishments, 88

Grades of weekly earnings	ALL EARNINGS							
	NEW YORK CITY			UP-STATE			TOTAL	
	Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less		Number in the grade	Receiving grade or less
		Number	Per cent		Number	Per cent		Number
Less than \$3	4	4	0.0	5	5	0.1	9	9
\$3 00-\$3 49	19	23	0.1	22	27	0.4	41	50
3 50-3 99	13	36	0.2	22	49	0.6	35	85
4 00-4 49	26	62	0.3	51	100	1.3	77	162
4 50-4 99	52	114	0.5	55	155	2.1	107	269
5 00-5 49	128	242	1.2	165	320	4.2	293	562
5 50-5 99	82	324	1.6	107	427	5.7	189	751
6 00-6 49	197	521	2.5	441	868	11.5	638	1,389
6 50-6 99	268	789	3.8	189	1,057	14.0	457	1,846
7 00-7 49	342	1,131	5.4	626	1,683	22.3	968	2,814
7 50-7 99	334	1,465	7.1	206	1,889	25.0	540	3,354
8 00-8 49	840	2,305	11.1	1,034	2,923	38.7	1,874	5,228
8 50-8 99	252	2,557	12.3	143	3,066	40.6	395	5,623
9 00-9 49	1,356	3,913	18.9	878	3,944	52.3	2,234	7,857
9 50-9 99	386	4,299	20.7	97	4,041	53.5	483	8,340
10 00-10 49	1,952	6,251	30.1	970	5,011	66.4	2,922	11,262
10 50-10 99	688	6,939	33.5	84	5,095	67.5	772	12,034
11 00-11 49	1,039	7,978	38.5	359	5,454	72.3	1,398	13,432
11 50-11 99	730	8,708	41.9	56	5,510	73.0	786	14,218
12 00-12 49	2,254	10,962	52.9	701	6,211	82.3	2,955	17,173
12 50-12 99	549	11,511	55.5	53	6,264	83.0	602	17,775
13 00-13 49	933	12,444	60.0	135	6,399	84.8	1,068	18,843
13 50-13 99	302	12,746	61.4	54	6,453	85.5	356	19,199
14 00-14 49	1,487	14,233	69.1	244	6,697	88.7	1,731	20,930
14 50-14 99	296	14,529	70.1	19	6,716	89.0	315	21,245
15 00-15 49	1,417	15,946	76.9	289	7,005	92.8	1,706	22,951
15 50-15 99	186	16,132	77.8	16	7,021	93.0	202	23,153
16 00-16 49	802	16,934	81.7	81	7,102	94.1	883	24,036
16 50-16 99	188	17,122	82.6	20	7,122	94.4	208	24,244
17 00-17 49	476	17,598	84.9	63	7,185	95.2	539	24,783
17 50-17 99	126	17,724	85.5	10	7,195	95.3	136	24,919
18 00-18 49	781	18,505	89.2	95	7,290	96.6	876	25,795
18 50-18 99	84	18,589	89.6	8	7,298	96.7	92	25,887
19 00-19 49	174	18,763	90.5	14	7,312	96.9	188	26,075
19 50-19 99	48	18,811	90.7	8	7,320	97.0	56	26,131
20 00-20 99	620	19,431	93.7	86	7,406	98.1	706	26,837
21 00-21 99	122	19,553	94.3	17	7,423	98.4	139	26,976
22 00-22 99	249	19,802	95.5	17	7,440	98.6	266	27,242
23 00-23 99	76	19,878	95.9	9	7,449	98.7	85	27,327
24 00-24 99	66	19,944	96.2	5	7,454	98.8	71	27,398
25 00-25 99	240	20,184	97.3	27	7,481	99.1	267	27,665
26 00-26 99	26	20,210	97.5	2	7,483	99.2	28	27,693
27 00-27 99	40	20,250	97.6	5	7,488	99.2	45	27,738
28 00-28 99	50	20,300	97.9	6	7,494	99.3	56	27,794
29 00-29 99	8	20,308	97.9	1	7,495	99.3	9	27,803
30 or over	428	20,736	100.0	48	7,543	100.0	476	28,279

* As reported by 202 establishments.

WEEKLY EARNINGS OF WOMEN

19

SENTATIVE MERCANTILE ESTABLISHMENTS
in New York City and 118 up-state)

FULL-TIME EARNINGS*										Grades of weekly earnings
NEW YORK CITY			UP-STATE			TOTAL				
Num- ber in the grade	Receiving grade or less		Num- ber in the grade	Receiving grade or less		Num- ber in the grade	Receiving grade or less			
	Num- ber	Per cent		Num- ber	Per cent		Num- ber	Per cent		
2	2	.....	2	2	.....	4	4	.....	Less than \$3
1	3	.....	5	7	0.1	6	10	.....	\$3 00-\$3 49
.....	3	.....	3	10	0.2	3	13	0.1	3 50- 3 99
.....	3	.....	13	23	0.4	13	26	0.1	4 00- 4 49
1	4	.....	13	36	0.6	14	40	0.2	4 50- 4 99
14	18	0.1	67	103	1.7	81	121	0.5	5 00- 5 49	
3	21	0.1	49	152	2.4	52	173	0.7	5 50- 5 99	
43	64	0.4	310	462	7.4	353	526	2.3	6 00- 6 49	
33	97	0.6	101	563	9.1	134	660	2.8	6 50- 6 99	
206	303	1.8	503	1,066	17.2	709	1,369	5.9	7 00- 7 49	
71	374	2.2	127	1,193	19.3	198	1,567	6.8	7 50- 7 99	
507	881	5.2	828	2,021	32.7	1,335	2,902	12.5	8 00- 8 49	
121	1,002	5.9	120	2,150	34.7	250	3,152	13.6	8 50- 8 99	
1,110	2,112	12.4	741	2,891	46.7	1,851	5,003	21.6	9 00- 9 49	
270	2,382	14.0	81	2,972	48.0	351	5,354	23.1	9 50- 9 99	
1,665	4,047	23.8	885	3,857	62.3	2,550	7,904	34.1	10 00-10 49	
533	4,580	26.9	71	3,928	63.4	604	8,508	36.7	10 50-10 99	
937	5,517	32.4	307	4,235	68.4	1,244	9,752	42.0	11 00-11 49	
506	6,022	35.4	51	4,286	69.3	556	10,308	44.4	11 50-11 99	
2,153	8,175	48.0	669	4,955	80.1	2,822	13,130	56.6	12 00-12 49	
413	8,588	50.4	33	4,988	80.6	446	13,576	58.5	12 50-12 99	
805	9,393	55.2	124	5,112	82.6	929	14,505	62.5	13 00-13 49	
213	9,606	56.4	44	5,156	83.3	257	14,762	63.6	13 50-13 99	
1,433	11,039	64.9	228	5,384	87.0	1,661	16,423	70.8	14 00-14 49	
229	11,268	66.2	27	5,411	87.4	256	16,679	71.9	14 50-14 99	
1,338	12,606	74.1	276	5,687	91.9	1,614	18,293	78.8	15 00-15 49	
135	12,741	74.9	12	5,699	92.1	147	18,440	79.4	15 50-15 99	
775	13,516	79.4	78	5,777	93.3	853	19,293	83.1	16 00-16 49	
119	13,635	80.1	18	5,795	93.6	137	19,430	83.7	16 50-16 99	
455	14,090	82.8	60	5,855	94.6	515	19,945	86.0	17 00-17 49	
64	14,154	83.2	10	5,865	94.8	74	20,019	86.3	17 50-17 99	
756	14,910	87.6	86	5,951	96.2	842	20,861	89.9	18 00-18 49	
72	14,982	88.1	7	5,958	96.3	79	20,940	90.2	18 50-18 99	
156	15,138	89.0	14	5,972	96.4	170	21,110	91.0	19 00-19 49	
27	15,165	89.1	8	5,980	96.6	35	21,145	91.1	19 50-19 99	
603	15,768	92.7	81	6,061	97.9	684	21,829	94.1	20 00-20 99	
114	15,882	93.3	17	6,078	98.2	131	21,960	94.6	21 00-21 99	
241	16,123	94.8	15	6,093	98.4	256	22,216	95.7	22 00-22 99	
69	16,192	95.2	6	6,099	98.5	75	22,201	96.1	23 00-23 99	
57	16,249	95.5	5	6,104	98.6	62	22,353	96.3	24 00-24 99	
235	16,484	96.9	26	6,130	99.0	261	22,614	97.4	25 00-25 99	
25	16,509	97.0	2	6,132	99.1	27	22,641	97.6	26 00-26 99	
35	16,544	97.2	5	6,137	99.2	40	22,681	97.8	27 00-27 99	
49	16,593	97.5	5	6,142	99.2	54	22,735	98.0	28 00-28 99	
6	16,599	97.6	1	6,143	99.3	7	22,742	98.0	29 00-29 99	
415	17,014	100.0	46	6,189	100.0	461	23,203	100.0	30 or over	

COMPARISON OF WEEKLY EARNINGS OF WOMEN IN 1913-14

Grades of weekly earnings	PAPER BOX MAKING				SHIRT AND COLLAR MAKING			
	1913-14		1918-19		1913-14		1918-19	
	Num- ber in the grade	Cum- ulative per- centage	Num- ber in the grade	Cum- ulative per- centage	Num- ber in the grade	Cum- ulative per- centage	Num- ber in the grade	Cum- ulative per- centage
Less than \$3	180	2.6	126	2.8	480	5.5	409	2.9
\$3 00- 3 49	153	4.8	25	3.3	301	8.9	131	3.8
3 50- 3 99	201	7.7	25	3.9	334	12.7	152	4.9
4 00- 4 49	344	12.7	28	4.5	492	18.3	180	6.2
4 50- 4 99	429	18.9	45	5.5	504	24.1	194	7.5
5 00- 5 49	655	28.4	62	6.9	685	31.9	255	9.3
5 50- 5 99	524	36.0	74	8.5	583	38.5	251	11.1
6 00- 6 49	640	45.2	97	10.7	723	46.8	379	13.8
6 50- 6 99	428	51.4	81	12.4	509	52.6	344	16.2
7 00- 7 49	499	58.7	123	15.2	642	59.9	518	19.9
7 50- 7 99	387	64.3	146	18.4	484	65.4	459	23.1
8 00- 8 99	821	76.1	328	25.7	903	75.7	1,031	30.4
9 00- 9 99	672	85.9	456	35.8	653	83.1	1,118	38.3
10 00-10 99	449	92.4	543	47.8	510	88.9	1,297	47.4
11 00-11 99	236	95.8	513	59.2	283	92.2	1,461	57.7
12 00-12 99	172	98.3	455	69.3	254	95.1	1,144	65.8
13 00-13 99	56	99.1	354	77.1	162	96.9	941	72.5
14 00-14 99	29	99.5	262	82.9	110	98.2	808	78.2
15 00-15 99	11	99.7	267	88.9	80	99.1	696	83.1
16 00-17 99	17	99.9	301	95.5	51	99.7	1,011	90.2
18 00-19 99	3	99.9	115	98.1	21	99.9	658	94.9
20 00-24 99	2	99.9	79	99.8	8	99.9	539	98.7
25 00-29 99	1	100.0	7	99.9	1	100.0	136	99.6
30 or over...	.....	.....	1	100.0	.....	.....	52	100.0
Total....	6,909	.....	4,513	.....	8,773	.....	14,164	.....

WEEKLY EARNINGS OF WOMEN

21

AND 1918-19 IN REPRESENTATIVE ESTABLISHMENTS

CONFECTIONERY MAKING				MERCANTILE ESTABLISHMENTS				Grades of weekly earnings
1913-14		1918-19		1913-14		1918-19		
Number in the grade	Cumulative per- centage	Number in the grade	Cumulative per- centage	Number in the grade	Cumulative per- centage	Number in the grade	Cumulative per- centage	
270	5.3	302	5.4	424	1.4	9	0.0	Less than \$3
165	8.4	108	7.4	471	3.0	41	0.2	\$3 00- 3 40
180	12.0	59	8.5	671	5.2	35	0.3	3 50- 3 99
344	18.7	160	11.4	1,600	10.5	77	0.6	4 00- 4 49
494	28.3	101	13.3	1,085	14.2	107	0.9	4 50- 4 99
743	42.8	111	15.3	2,285	21.8	293	2.0	5 00- 5 49
511	52.8	100	17.1	1,076	25.4	189	2.6	5 50- 5 99
506	62.6	154	19.9	3,513	37.1	638	4.9	6 00- 6 49
326	69.0	135	22.4	989	40.4	457	6.5	6 50- 6 99
307	75.0	198	26.0	3,333	51.4	968	9.9	7 00- 7 49
248	79.8	126	28.3	838	54.2	540	11.9	7 50- 7 99
387	87.4	473	36.9	3,486	65.9	2,269	19.9	8 00- 8 99
265	92.5	797	51.4	2,396	73.8	2,717	29.5	9 00- 9 99
191	96.3	732	64.7	2,130	80.9	3,694	42.5	10 00-10 99
82	97.9	418	72.3	993	84.2	2,184	50.3	11 00-11 99
50	98.8	433	80.2	1,388	88.9	3,557	62.8	12 00-12 99
14	99.1	279	85.3	517	90.6	1,424	67.9	13 00-13 99
13	99.4	205	89.0	633	92.7	2,046	75.1	14 00-14 99
8	99.5	168	92.1	632	94.8	1,908	81.9	15 00-15 99
11	99.7	196	95.6	499	96.4	1,766	88.1	16 00-17 99
9	99.9	127	97.9	347	97.6	1,212	92.4	18 00-19 99
4	99.9	93	99.6	378	98.9	1,267	96.9	20 00-24 99
1	100.0	15	99.9	171	99.4	405	98.3	25 00-29 99
.....	.....	5	100.0	164	100.0	476	100.0	30 or over
5,129	5,495	30,019	28,279	Total

STATE OF NEW YORK
DEPARTMENT OF LABOR
SPECIAL BULLETIN

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THE INDUSTRIAL COMMISSION
JOHN MITCHELL, Chairman
EDWARD P. LYON JAMES M. LYNCH
FRANCES PERKINS HENRY D. SAYER
WILLIAM S. COFFEE, Secretary

No. 93
MARCH, 1919

**THE INDUSTRIAL REPLACEMENT
OF MEN BY WOMEN
IN THE
STATE OF NEW YORK**

Prepared by
THE BUREAU OF WOMEN IN INDUSTRY



General Electric Company.
AN ELECTRIC WELDER.

ILLUSTRATIONS

An Electric Welder.....	Frontispiece
Women Operators on Ohio Milling Machines.....	11
Woman Operator on Plain Milling Machine.....	14
Women Operatives on Splining Machines.....	19
Women Operatives on Punch Presses.....	24
Women Operatives on Vertical Milling Machines.....	39

TABLE OF CONTENTS

	PAGE
Foreword	1
Replacement in the United States and Great Britain	3
Dilution of Labor.....	4
Scope of Replacement in New York State.....	5
Local Variations.....	8
Processes on which Women Replaced Men.....	8
Industries and Processes.....	9
Reason for Subdivision of Process.....	16
The Future of Women Machinists.....	17
Industrial Education.....	18
Wages of Women Replacing Men.....	20
Method of Computing Wages.....	20
Comparison of Wages of Women Replacing Men with Cost of Subsistence.....	22
Comparison of Women's Wages with those of Men They Have Replaced.....	23
Comparison of Women's Wages with their Productive Efficiency.....	25
The Permanence of Women Replacing Men.....	32
Reasons for Dismissing Women Replacing Men.....	32
Proportion of Women Replacing Men Retained.....	33
Causes of Failure to Make Good by Women Replacing Men.....	37
Administrative Difficulty.....	37
Failure of Women on Heavy Work.....	40
Heavy Work in Core Rooms.....	41
Various Efforts to Limit Weights to be Lifted by Women.....	42
Trades Unions and Women Replacing Men.....	43
Appendix	47
I Excerpts from Letters of Employers of Women who have Replaced Men.....	48
II Excerpts from Letters of Employers Using Women Coremakers.....	50
III Sources of Material.....	53
IV Tables	61

STATISTICAL TABLES

	PAGE
Table I Showing Amount of Replacement in New York State By Geographical Section.....	6
Table II Showing Amount of Wages Paid to Women Receiving Equal Pay.....	23
Table III Showing Relation of Wages of Women Replacing Men to Men's Wages on the Same Work	25
Table IV Showing Wages of Women Producing More Than Men.....	28
Table V Showing Wages of Women Who Produce Less Than Men.....	29
Table VI Showing Reasons Given By 16 Plants For Discontinuing All Women Replacing Men During the War.....	34
Table VII Showing Reasons Given by 35 Plants for Discontinuing Part of Women Replacing Men During the War.....	35
Table VIII Showing Reasons Given by 51 Plants for Discontinuing All or Part of Women Replacing Men During the War.....	36
Table IX Showing the Relative Amount of Replacement in Three Sections of New York State before and after the Armistice.....	40
Table X Showing Total Working Force, Number of Replacements during War and Number and Per cent of Women Retained after Armistice in 117 Plants and in 27 Localities of New York State	62
Table XI Showing by \$1.00 Wage Group Modal Weekly Earnings of Women Replacing Men during the War with Number of Women and Number of Plants in each Wage Group.....	63

Table XII Showing Modal Earnings of Women Replacing Men, by \$2.00 Wage Groups, with Number of Plants and Number of Women in Each Group.....	64
Table XIII Showing Earnings of Women Replacing Men during War by \$2.00 Wage Group, with Number of Plants and Number of Women in Each Group.....	65
Table XIV Showing Difference in Wages between Men and Women on the Same Work and for Same Period of Time, by \$1.00 Wage Groups, before and after the Armistice with Per Cent of Women Retained in Each Group.....	66
Table XV Cumulative—Showing Difference in Earnings of Men and Women on Same Job for Same Period of Time.....	67
Table XVI Showing Permanence of Replacement after the Armistice.....	68

FOREWORD.

The phrase "women in industry" was used so often during the war that it becomes the part of wisdom to remind ourselves that women are not new in industry. As a matter of fact, women have always been an integral part of the factory system. Three hundred thousand women turned the wheels of production in New York State. Some industries are even known as women's industries because their hands hold the tools and operate the machines. Women are the backbone of garment making, knit goods manufacture, candy making and the paper trades. They fill the ranks of the unskilled and semi-skilled in large plants with standardized products and in small low grade workshops in large cities. In common with all workers in unskilled and repetitive production of goods they have been unhonored and unsung. Unhonored, that is, until the war came; unsung, until their performance in the making of war material caused employers, government and brother workers alike to recognize a new phase in industrial development. The women who took men's places and did men's work have served all women in industry by opening for discussion old and new problems of women's working life.

The story of the woman who took the place of a man gone to war, and, untrained, produced more 3-inch shells than he, trained, had ever delivered, has been told with variations adjusted to every plant on war production. That woman has been the pride of aircraft and machine gun plants, naval and optical shops, Liberty motor and army truck factories. Every plant has had at least one of her; some departments have been full of her kind.

Were it safe to assume that the brilliant performance of one woman worker out of twenty was an index

to the productive capacity of the other nineteen, the problems of replacement would be simple. The processes of industry would be rearranged in order to place the most competent new worker at the most suitable job, and production would proceed merrily along. As matters stand to date, however, the facts concerning the capacity of women who have replaced men are not known. We know only that they have taken men's places during a period of great stress. The significant questions concerning their precise degree of success on certain processes in terms of production and steadiness remain to be answered. The scientific apportionment of women's wages in relation to their output and the wages of men they replaced remains to be made. The effect of the unrestricted introduction of unskilled labor into the ranks of the skilled has not been estimated. The possibility of women's permanence in their new work has not been considered nor its causes analyzed. Administrative problems in shop arrangement and trade union policy limiting the success of women have not been clarified or solved.

Because the unknowns are greater than the knowns, the Bureau of Women in Industry has made this preliminary study not for the purpose of saying the last and most authoritative word on the subject of replacement, but in order to clear the ground for further and more detailed examination. The time will soon come when the women who have caused a stir by taking men's places will have been accepted and absorbed into the industrial process as if they had always been there. Their adventurous spirit will have been merged in the humdrum routine of the 300,000 who have always worked in the factories of New York State. It will then be impossible to make a clear cut effort to equalize men's and women's opportunities in the same work.

Women have replaced men not to compete but to co-operate. If, by chance, their performance is better or not so good in any branch of work, it is as workers that they should be judged. Their usefulness to industry should be determined and recompensed in accord-

ance with their production and general efficiency as these are limited by plant working conditions and the wisdom with which the individual woman worker is chosen for the job.

The Bureau of Women in Industry has no desire to do more than present the surface facts of replacement. It is hoped that they will speak for themselves without interpretation.

REPLACEMENT IN THE UNITED STATES AND GREAT BRITAIN.

The extent and character of replacement of course was governed in every country by the length of the war period. This one factor alone determined the difference which exists between replacement as it occurred in Great Britain and replacement as it occurred in the United States. In both countries there was the same sudden demand for enormous quantities of war material complicated by the departure of skilled male labor to war. Great Britain had four years in which to solve the problem, however, and this country, only 18 months. Four years gave Great Britain time in which to build new factories, planned and equipped for women; to shift women workers from plant to plant in order to obtain for them the most suitable work; and more important, to build machinery and rearrange processes so that the most productive combination of male and female labor could be made. In the United States, on the other hand, the same demand pushed women into the plants and into men's places without any change in machine or rearrangement in process. In countless factories where the employment of women was new, the war was over before women's rest rooms and sanitary service was begun. In other plants it was a matter of months before an overhead lever could be made six inches longer and the strain put upon a short woman eliminated. In both countries women literally took men's places without shutting off power, but in England industrial manage-

The Influence
of a
Long War.

ment had time to go further and rearrange processes and rebuild machines.

Dilution and
Replacement.

This difference between the experience of Great Britain and the United States illustrates the distinction between two words which have been ushered into the vocabulary of industrial managers and workers since the war. These words are "replacement" and "dilution." Both occur in industry as a result of an emergency such as the war, when an increase of the existing labor supply must be instantly secured. Dilution implies the thinning out or spreading of the functions of skilled workmen among those that are less skilled with or without division of process or change in machine. Replacement, on the other hand, is a specific form of dilution in which the less skilled, usually a woman, takes the place of the more skilled, usually a man, without division of process or change in machine.

Two exceptions to this definition of replacement appeared in the United States. One was in the munition centers, created by the European demand for shells before America's entry into the war. In such plants a rough parallel of English development could be observed in its successive stages. First, the hasty direct replacement of men by women, second, the subdivision of the original process, assigning usually the heavy work and tool setting to men and the machine operation to women, third, the building of new machines to meet the problems of standardization.

Replacement
in Aeroplane
Construction.

The other exception took place in aeroplane construction. Strictly speaking women did not replace men in the building of aircraft because aircraft had never been built before the war in sufficient numbers to develop a body of technical knowledge or a group of aircraft mechanics. Men were quite as new to the work as women. The only sense in which women can be said to have replaced men in aeroplane shops is in the sense that while men had never operated machine tools for the purpose of building aeroplanes women had never operated them at all.

In New York State dilution has occurred in its elemen-

tary form of replacement. Where exceptions to this rule have taken place they are instructive of what would have been the case had we remained at war a longer time, or what may be the case in after years when women are more widely used industrially. Division of process has taken place in only a few plants, through substitution of power machinery for tools, and the use of porters to do heavy lifting.

Replacement
in the State
of New York

In one case noted, a certain department had always used men to operate hand machines because the process was both heavy and continuous and women had been unable to stand the strain involved. When it became impossible during the war to secure men, electric power machines were introduced and women substituted for men.

In foundries employing women coremakers it is the custom to have porters carry the cores to the furnace. This does not result in an increased number of employees but in merely a higher degree of specialization. Porters do all lifting while women devote their entire time to actual making of cores.

Porters are also used in the aeroplane industry to turn and move half finished parts on which women work. In other industries they frequently carry heavy boxes of material to and from machines which women are operating. Here also a greater degree of specialization is the result rather than an actual increase in number of employees.

SCOPE OF REPLACEMENT IN THE STATE OF NEW YORK.

This study has covered 26 communities and 117 plants in the state, and 13,643 women replacing men. These women work in three industrial sections—Western New York, including Buffalo, Lockport, Niagara Falls, North Tonawanda, Olean, Jamestown, Dunkirk and Watertown; Central New York, including Schenectady, Watervliet, Ithaca, Ilion, Elmira, Utica, Syracuse, Seneca Falls, Rochester, Little Falls, and Johnson City; and

New York City, including Hastings, Staten Island, Long Island City, Brooklyn, Poughkeepsie and Yonkers.

TABLE I SHOWING AMOUNT OF REPLACEMENT IN NEW YORK STATE BY GEOGRAPHICAL SECTION.

Section of New York State	Plants		Total Number of Women on Working Force	Total Women Replacing Men	
	Number	Per cent.		Number	Per cent. Women Employed
Western New York..	37	31.6	6211	5672	41.6
Central New York ..	38	32.4	14322	4747	34.8
New York City and Vicinity	42	35.8	5211	3224	23.6
Total	117	100.0	25744	13643	100.0

The amount and character of replacement was dictated not only by the pressure of war contracts but also by local plant and labor conditions. Different sections of the State show interesting variations. According to the natural progress of replacement women filled first those vacancies where the work was light, less skilled and repetitive, on such metal cutting machines for instance as lathes, stamping machines and gear shapers. Heavy or skilled work was attempted only after considerable time had elapsed, or in response to unusual conditions such as existed in Western New York. In both Buffalo and Niagara Falls the male labor supply had been chronically inadequate.

Consequently when the government placed contracts in Buffalo for aeroplanes and motor trucks, women were called out in large numbers and placed in every conceivable process. Two schools were installed to prepare them for penetration into the ranks of the most skilled men. In Niagara Falls, the chemical plants were in a similar difficulty and placed women on work of an exceedingly heavy character. They became yard laborers, with pick and shovel, brick layers' helpers and furnace stokers.

Local
Variations.

Plants were chosen for inspection in which replacement was known to have occurred, or in which it was indicated by product and character of work done. As a result, industries were represented in the following proportion:

Metals and Their Products.....	25	Plants
Iron and Steel (heavy metals).....	18	"
Lumber & Re-manufactures.....	13	"
Electrical Supplies	12	"
Instruments	9	"
Ammunition	8	"
Chemicals	7	"
Aeroplanes & Hydroplanes.....	6	"
Vehicles for land transportation.....	4	"
Leather and Its Products.....	3	"
Optical goods	3	"
Fire extinguishers	2	"
Buttons	2	"
Paper and Painting.....	1	"
Food and Kindred Products.....	1	"
Railroad Repair Shop.....	1	"
Miscellaneous	2	"
<hr/>		
Total	117	"

It was not by chance that 25 plants were inspected in Metals and Their Products, and only one in Food and Kindred Products. It is probable that replacement tended to be greater in industries which employed few women before the war than in industries which employed many. Further the introduction of women was no such venture in industry where work was light as in the chemical plants where isolated, arduous, heavy labor promised little chance of equal production or success.

Those communities have enjoyed the greatest ultimate success in replacement where the predominating industry

has offered work of a light nature and was one in which untrained women could be easily absorbed. Such a town was Rochester where in optical and instrument making, women could perform light machine and bench work with a minimum of training; or Schenectady where much machine work on small electrical fittings had always been done. It is probably safe to add that replacement has come easier to employer and women in those towns where women's industries had been located and some body of knowledge concerning the methods of handling the problems of women workers was already in existence. In Utica, for instance, the esprit de corps of hundreds of women textile operators was at the command of a machine gun plant when it opened its doors. In Rochester, where factory work is either vocation or avocation of two-thirds of the young women, a disciplined group of workers was ready for use on new work. It is not surprising that replacement took place sooner and with greater ease in these towns than in such communities as Jamestown where there are no women's industries.

PROCESSES ON WHICH WOMEN REPLACED MEN.

It would be far simpler to discuss the subject of processes from a negative point of view, enumerating only those in which women have not been substituted for men. As any list of processes on which women have replaced men will show, there are few types of work on which women have not been tried with more or less success. An English engineer at the end of two years of war claimed that he could build a battleship from keel to aerial entirely by woman power. A New York maker of automobiles planned during the war to place women in every department from the drafting room to the assembling shop.

Women have replaced men:

- (1) where the material to be handled was not too

heavy or could be lifted by a boy or man serving several workers.

- (2) where the machine could be operated without physical strain.
- (3) where the machine could be reset and cleaned or process readjusted by a woman or by a man serving several women.
- (4) where training could be reduced to a minimum by the production of a standardized product or the subdivision of a process.

In the following list are enumerated the processes on which replacement has occurred.

Buttons.—2 plants. Turning, sawing and coloring.

**Industries
and
Processes.**

Paper and Painting.—1 plant. Feeding, pressing, engraving.

Metals and their Products.—25 plants. Assembling, inspecting, bench work, helpers, packing, shipping, scraping strips, stringing for plating, operating punch presses, drills, lathes, milling machines, screw machines, acetylene welding.

Leather and Its Products.—3 plants. Finishing, measuring, seasoning, cutting, sewing machines.

Electrical Supplies.—12 plants. Bench work, inspection, assembly, machine operation.

Food and Kindred Products.—1 plant. Packing cartons on revolving platform as boxes are delivered from moving belt, yard work.

Optical Goods.—3 plants. Operating diamond drills, automatic and hand grindstones, polishing and grinding lenses.

Instruments.—9 plants. Repairing watches, polishing, drilling, riveting, jewelry lathe, pinion machine, milling machine.

Chemicals.—7 plants. Stenciling, wiping cans, laboratory assistants, sanitary squad, yard work, sorting stones on moving belt, cleaning carbons, lathe operators, nailing machine.

Iron and Steel (heavy metal).—18 plants. Coremaking, re-threading bolts and nuts, sand chute operators.

Railroad Repair Shops.—1 plant. Boiler makers' helpers, crane operators, hammer operators, yard work, machinists.

Ammunition.—8 plants. Bench work, inspection, assembly, hand millers, drill press operators, punch press operators, weighers, examiners, boxing and shipping.

Fire Extinguishers.—2 plants. Gear cutting machine, soldering, soda and acid inspecting.

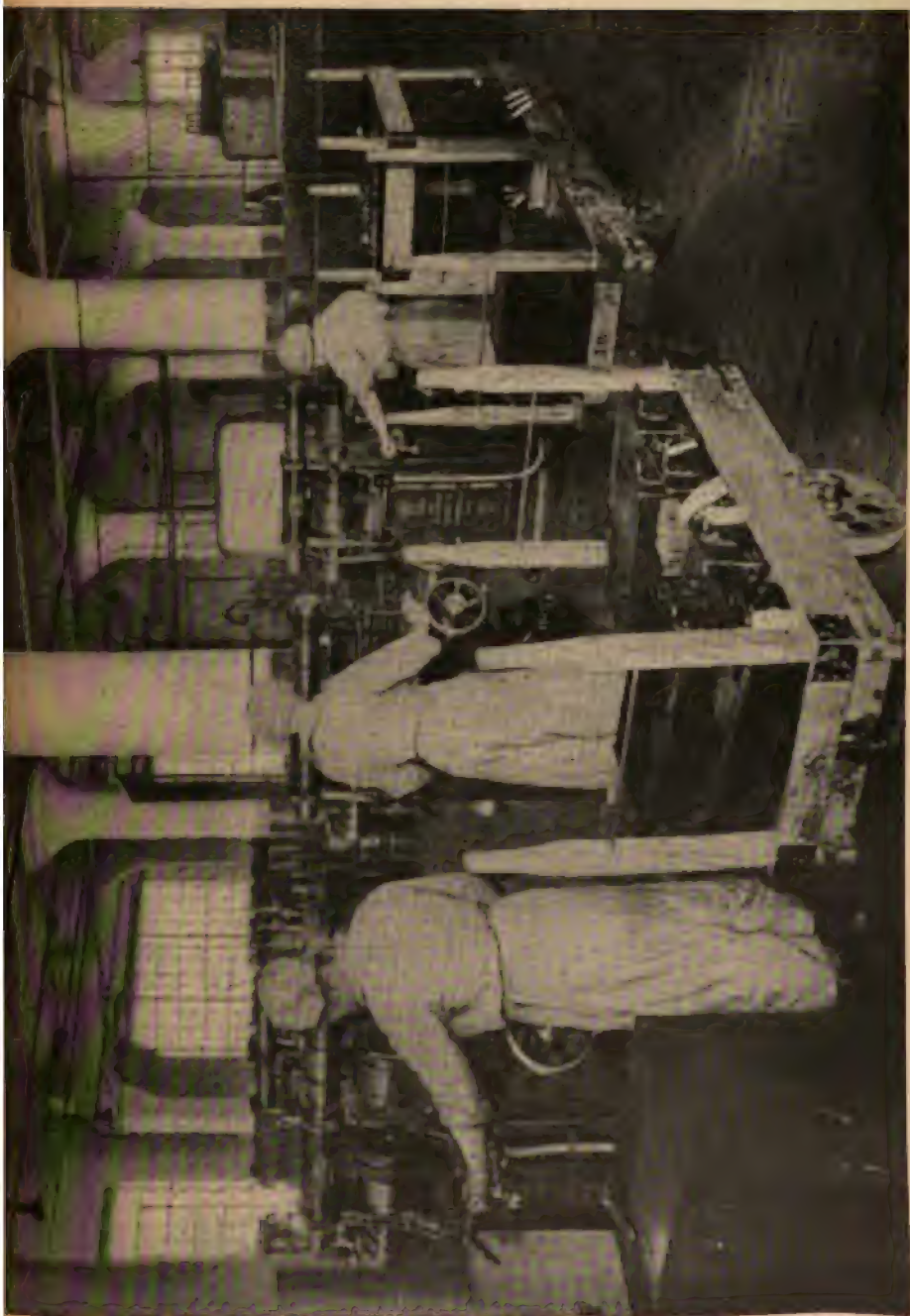
Lumber and Remanufactures.—13 plants. Hand and machine sandpapering, wood assembly, bending brake, joiners' helpers, electric welding, finishing, lacquering, dipping, light cabinet work, glueing, varnishing, veneer helpers, boring machines, cane webbing, shapers, trimmers, cork cutting machine, stock clerks.

Vehicles for Land Transportation.—4 plants. Inspection, assembly, machine operating, upholstery.

Aeroplanes and Hydroplanes.—6 plants.

COVERING DEPARTMENT (in Assembling Dept.)

- a. Sewing machine—operators sew together lengths of linen out of which covering is made.
- b. Tacking and stretching linen on wing frames; wings laid on trestles four feet from the



WOMEN OPERATIVES ON OHIO MILLING MACHINES.

General Electric Company.

floor. A small tack hammer used by two or more women who perform the operation. Women stand.

- c. Hand sewing of linen on wing frames after stretching and tacking. Base ball stitch used; tacks then taken out with hammer. Women can be seated.
- d. Eyeletting; brass eyelets are clamped together through the linen by means of small hand die and punch.
- e. Small section of linen cut and doped on part of wooden frames. Girls walk around frames.
- f. Winding strips of linen on metal frame of wings.
- g. Cutting linen winding strips with shears. Girls seated at table.
- h. Tacking linen to ribs of wings which are stood on edge, a woman standing on each side of the wing. Needles are thrust through from one side to the other. Porters turn all wing frames, though they are light enough to be turned by the women themselves.

DOPE AND PAINT ROOM.

- a. Varnishing and painting small parts of wing.
- b. Frayed linen strips are pasted along edges of covered wing, then brushed with three coats of dope, and rubbed with thumb.

WING CONSTRUCTION AND ODDS AND ENDS DEPARTMENT.

Fuselage Division.

- a. Sandpapering wooden wing parts.
- b. Drilling holes in wooden part of pontoons.

- c. Nailing strips of wood on wing parts.
- d. Nailing strips of copper to edge of wing float.
- e. Assembling wire braces on wing float.

1—Operator slips end of wire into a vise, slips pearls over the ends and hammers wire end over in order to hold them firm. Ends of wire clipped off.

2—Next operator solders loose ends and pearls with electric soldering iron.

Woodwork Department.

- a. Constructing lower engine section of wing; one or two women operators place the glue and nail veneer on beam and leader and then set in the web.
- b. Planing small wooden parts.
- c. Veneering.
- d. Webbing.

MACHINE SHOP.

- a. Acetylene welding. Torch in right hand, solder in left; object to be soldered clamped in front of operator.
- b. Assembling pulleys.
- c. Assembling turn-buckles.
- d. Inspecting turn-buckles.
- e. Filing metal parts.
- f. Acetylene brazing.



Tank Department.

- 1 Riveting seams of gas tanks. Two operators used; one holds iron block under rivet, the other wields hammer.
- 2 Power drilling with electric drill.
- 3 Soldering in head of tank.
- 4 Emery wheel.
- 5 Bottom cutting machine. Square piece of metal put in machine, which cuts edges to make circle. Girl turns machine by hand.
- 6 Marking circular metal sheets with compass to form pattern of tank heads.
- 7 Operator of baffle bending machine. Edges of tank heads turned in.
- 8 Operating small drill presses.

MISCELLANEOUS.

Girls and women are working on the almost completed hulls:

- 1 Installing telephones.
- 2 Upholstering seats.
- 3 Winding webbing of machines.
- 4 Painting.
- 5 Adjusting carriage.

On account of constant shifting during and after the war, it was impossible to ascertain the number of women in a given process at any given time. Women were employed on power and non-power processes in about equal proportion, and after the Armistice no well defined line upon the ment can be traced toward dismissing either, extent to preference to the other. Women have been fourfolded.

, International

Association of Machinists, "A machinist is a man who can, with the aid of tools, with or without drawings, make, repair, erect, assemble, or dismantle machinery, or parts thereof. Such a man may be admitted to membership in the association." The definition further includes,—"All men engaged in the manufacture of metal model novelties where hand labor or machine labor is used as above outlined, all jig workers, mouldmakers, and all metal pattern makers employed in machine shops."

Women have not, of course, become toolmakers except in a few rare cases. Nor have they entered the class of what is known as "all round machinists." Their skill stops short at the point where tools must be reset, machines dismantled and blue-prints read. With a few exceptions they fall into the group which the War Labor Board in making its awards classifies as specialists, or workmen who can operate one or more single purpose machines, but who are not equipped to make the adjustments necessary on general purpose machines.

Most of the processes undertaken by the first women supplanting men were such as required no previous industrial experience. As time went on training schools became necessary adjuncts to the large plants. Of the 117 plants included in the study seven were found training women in schools. Two plants employed more than 5,000 women and one other would have fallen in the same class had the Armistice not been signed before its maximum working force was reached. The four other plants employed from 242 to 515 women workers. In six additional plants the future policy will definitely include training for an increasing number of women workers. The organization and theory of industrial education upon which these schools were founded is one of the most important topics being discussed in the current post-war period. During the war their aim was to turn out specialists as quickly as possible. Since the war the opinion has been growing that women when showing ability should be trained for the most skilled trades.



WOMEN OPERATIVES ON SPLINING MACHINES.

General Electric Company.

Opinion differs, however, as to the best method for training women workers. Several industrial managers maintain that better results are obtained by placing the untrained women in the shop to be instructed by special instructors. Such procedure associates them from the first with experienced rather than inexperienced workers. The practical advantage of this more informal training has been long appreciated by telegraphers, among whom the office trained operator has a certain advantage over the school trained one because of the local color she has absorbed during her period of learning. Other managers say that a preliminary training in a vestibule school saves the time of foremen and fellow workers who are otherwise constantly called upon to stop their own machines to help the "green hand." This is a matter which can be settled only by the process of trial and error in each trade. To all employers it has been clear that if women are to enter the machine or other skilled trades they must be given a special training to make up for what they missed as children and young girls. The average boy learns to handle simple tools as the average girl learns to play with dolls, which gives him a technical advantage when they enter the shop side by side.

WAGES OF WOMEN REPLACING MEN.

Wage rates of women replacing men were computed in two ways, depending on whether they were on a time or piece basis. When on *time*, the investigators secured the hourly rate paid to the majority of women who had completed training and were on production but who were not workers of long experience. This rate was multiplied by the number of hours worked per week and compared with the men's rate on the same work for the same number of hours. When on *piece*, the usual weekly earnings of the same class of men and women workers was recorded, allowance being made for the additional hours worked by men.

Method of
Computing
Wage Rates.

A conservative estimate was desired without extremes of women's wages and the rates of men whom they replaced. For that reason and in spite of the fact that such procedure placed the wage situation in its rosiest light, the employers' statement of wage rates was sought and accepted. When a conflict occurred between an employer's statement and the awards of the War Labor Board, the award was accepted unless evidence indicated (as it did in one or two cases) that the employer had not accepted the award. Bonuses were not considered or included in the computation of weekly earnings of either men or women, because they were regarded as temporary expedients for stimulating production, subject to cancellation at any time, and they were in fact widely canceled with the cessation of war production.

In choosing, as typical, women who had completed training and gone on production but who were not workers of long experience it was hoped that confusion between the rate paid to learners and the earnings of women with several years of experience in the same plant might be avoided. When comparisons were made with men's rates, that group of men was chosen corresponding in training and experience with the women.

The whole story of women's wage status in patriotic service is told when two comparisons are made:

1. the comparison of her flat wage rate with the government estimate of the cost of subsistence for a woman who has no one but herself to support;
2. the comparison of her wage rate with the rate received by the male worker she replaces.

A glance at the flat wage received by women who have replaced men confirms what all but the most sanguine have feared, namely, that the war with its new opportunities has not improved women's wage status as much as had been hoped. The newspapers have turned the lime-light of publicity upon those exceptional women who have

Comparison
of Wages
of Women
Replacing
Men with
Cost of
Subsistence.

earned \$20-\$25 a week. They have omitted to mention that army of munition workers, machine gun makers, aircraft workers, as well as the undramatic rank and file of women who replaced men in optical and electrical work, coremaking and yard labor. These women have filled their jobs and made good but their wages do not reflect their success.

The widely reported women who drew the \$20-\$25 a week pay envelopes number 190. The women who received less than \$12 a week number 1,531, and those receiving less than \$14 a week number 7,933. What is true of the number of women receiving high and low wages is true also of plants paying them. Of 117 plants,

29 plants pay under \$12 a week

69 plants pay under \$14 a week

3 plants pay over \$20 a week

Only 29% of the plants studied paid more than \$14 a week in spite of the fact that in Schenectady the War Labor Board awarded a \$15 a week minimum to General Electric women employees and the Minimum Wage Board of the District of Columbia fixed \$16 a week as the minimum upon which a woman can live who has only herself to support.

Such being the situation those 190 women in 3 plants receiving over \$20 a week, may be considered exceptions. They have no significance except as they point with emphasis to that large group of women who have taken men's places in a period of national stress, and have been rewarded with less than will provide not only for social efficiency but also for mere subsistence.

Two-thirds of the women who replace men in the State of New York receive less than \$15 a week. Their wages hover around a mode of \$13 a week with a group of 1,531 women receiving less than \$12 a week. Although some women leaving peace employment at \$8-\$10 a week have bettered themselves by taking over men's work, for a great many of them, it was a change of work without an increase in pay.

If the actual wages received by women in men's places are surprising when compared with the cost of subsistence, the wages of women compared with the wages of the men whom they have replaced afford field for reflection.

Of 78 plants offering the comparative wages of men and women on the same work, 16 or 20% pay women the same rate paid the men whom they replace. Of all women replacing men nine per cent receive equal pay. It is to be noted, however, that the higher the pay of the man replaced the smaller the chance of the woman replacing him to receive it. The highest paid men received \$22.00, \$24.00, \$28.80, \$34.50 and \$35.00 a week. The women who took their places did so at a reduction of \$10.00, \$12.00, \$17.70, \$19.50 and \$14.88 a week, respectively. The majority of men replaced at equal wages received between \$12.00 and \$15.00 a week, a wage which is an extremely low wage for men, but approaches the average wage paid to women throughout the State and is less than it costs a woman supporting no one but herself to live.

Comparison
of Women's
Wages with
those of
Men They
Have Re-
placed.

TABLE II SHOWING AMOUNT OF WAGES PAID TO WOMEN RECEIVING EQUAL PAY.

Wage Group	Number Plants	Number Women
\$8-\$ 8.99 a week.....	1	9
\$9-\$ 9.99 a week.....	..	.....
\$10-\$10.99 a week.....	.	.....
\$11-\$11.99 a week.....	...	.....
\$12-\$12.99 a week.....	4	404
\$13-\$13.99 a week.....	2	72
\$14-\$14.99 a week.....	2	130
\$15-\$15.99 a week.....	4	214
\$16-\$16.99 a week.....	2	148
\$17-\$17.99 a week.....	...	.....
\$18-\$18.99 a week.....	1	75
Total	16	1052



Among women taking men's places and receiving a smaller wage, discrimination begins at less than one dollar and rises to \$19 a week. Over one-half the women receive \$4 per week or more less than men, 33% receive \$6 per week or more less than men, while 3% receive \$10 or more less than men.

Over one-half or 6,477 receive between 65% and 75% of what the same firms pay the men employed on the same work. 39 plants out of 87 (over 50%) pay women less than 75% of the men's wages. The complete story is told in the following table:

TABLE III SHOWING RELATION OF WAGES OF WOMEN REPLACING MEN TO MEN'S WAGES ON THE SAME WORK.

Women Replac- ing Men														
309	or	2.6	Per	Cent	receive	50	Per	Cent	and less	of men's wage	in	5	plants	
100	"	.7	"	"	"	51-55	"	"	"	"	"	5	"	
125	"	.9	"	"	"	56-60	"	"	"	"	"	3	"	
777	"	6.5	"	"	"	61-65	"	"	"	"	"	6	"	
3,047	"	26.4	"	"	"	66-70	"	"	"	"	"	5	"	
3,430	"	29.8	"	"	"	71-75	"	"	"	"	"	15	"	
800	"	6.9	"	"	"	76-80	"	"	"	"	"	8	"	
812	"	7.0	"	"	"	81-85	"	"	"	"	"	6	"	
242	"	2.0	"	"	"	86-90	"	"	"	"	"	4	"	
781	"	6.8	"	"	"	91-95	"	"	"	"	"	3	"	
15	"	.1	"	"	"	96-99	"	"	"	"	"	1	"	
1,062	"	9.2	"	"	"	equal wage with men						16	"	
20	"	.2	"	"	"	more than men						1	"	
11,510	"	100.0	"	"									78	"
* 2133 No record												39	"	

An effort to relate women's wages to their industrial efficiency is disappointing. Logically, it would seem safe to assume from an isolated statement of wage rates such as the foregoing that women were receiving less than men in the same work for one of two reasons. First, because though possible expedients in an emergency, they were impossible substitutes when men could again be secured; or, second, that although satisfactory at the rate of wages paid, they would be an economic loss at the higher men's rate. Both alternatives hang upon the relative production of men and women workers. The

Comparison
of Women's
Wages with
Their
Productive
Efficiency

question of productive capacity, whether of men or women is difficult to determine without the aid of scientific analysis of the process, the posture of the worker, his industrial training and physical fitness, his adaptability to routine, the number of hours worked in relation to the index of fatigue and so on. These of course could not be obtained for the present study. It was practicable, however, to secure such production records as were available and to canvass employers' opinions. Records were usually offered by employers who, through a liberal policy in experimentation and wage, had obtained marked success with women replacing men, or by those who placed women on extremely heavy work, only to be disappointed by their production. Among the first was a manufacturer of small tools and instruments whose policy in regard to replacement has been that of trying out women at an equal wage with men wherever weight of material did not forbid. The comparative production of men and women in that plant is as follows:

Assembly Bench.

Total tools assembled in 21 days:

Woman A	15,854	Man A	13,281
Woman B	10,927	Man B	10,516
Woman C	9,749		
Average for men—11,898½			
Average for women—12,176¾			

Power Mill.

Average number tools produced per hour:

Woman A	48	Man A	55½
Woman B	67	Man B	60
Woman C	60	Man C	68
Woman D	58	Man D	49
Woman E	58		
Woman F	37		

Average for women 56.6 per hour
Average for men 58 per hour

Punch Press.

Total pieces produced per hour:

Man A	310
Woman A	467

Machine Tool.

Average per hour by woman on 2 machines—59½ pieces.

Average per hour by man on 3 machines—72 pieces.

In another plant the comparative efficiency of men and women was recorded with 100% adopted as an arbitrary standard. The result was as follows:

	Women	Men
Milling Machines	97.1	93.5
Broaching Machines	95.5	95.5
Punch Presses	92.3	97.4

Employers' opinions submitted themselves to arrangement in two groups. In the first are those employers who found women replacing men satisfactory,—satisfactoriness being defined as a composite quality made up of productive capacity, steadiness, reliability, mechanical aptitude, and all those other characteristics innate and acquired which are considered necessary in the good workman.

In the second are those who had dismissed all women replacing men.

When a count was made of all employers who claimed that the women with whom they had replaced men were so satisfactory that men would not necessarily be reinstated when they were again available, it was found that the total represented 80% of the plants. In other words, only 16 out of 117 plants employing 10% of the women reported them so unsatisfactory that they were dismissed without promise of future employment in these plants.

On the other hand, when the records and wage rates were examined in plants where it was maintained without question that women *produced more than men* a relation could be traced between women's wage rates and the habit of paying low wages to women, but not between women's wage rates and their productive efficiency.

The following table explains the status of women who are known to have produced more than the men whose places they took:

TABLE IV SHOWING WAGES OF WOMEN PRODUCING MORE THAN MEN.

Amount per Week Received Less than Men	Number of Women Affected	Per cent. of Men's Wages Received by Women Who Produce More than Men
11.00	10	48.8
8.50	7	51.3
7.94	14	64.6
5.25	200	71.6
2.36	35	73.9
4.95	750	75.4
3.60	120	76.9
4.95	36	76.5
3.57	28	81.2
2.70	28	87.7
1.08	15	96.4
	1013	

Eleven employers are emphatic in stating that women in their plants produce more than the men they replace. That great store was set by these women is proved by the fact that seven out of eleven managements retained every woman replacing a man, while an eighth is dismissing about half of them only because of a cancellation in contract. *Yet in no case does a woman producing more than a man receive as much as a man doing the same work*

in the same plant. All of them receive less than the wage paid to workers who are not so desirable. Most of them receive 75% of the men's wages and 10 women receive 50% of men's wages.

If any one cherish a lingering doubt that wages somehow or other are an index of women's industrial performance, let him study the figures bearing on the wages of women who produce less than men.

TABLE V SHOWING WAGES OF WOMEN WHO PRODUCE LESS THAN MEN.

Amount per Week Received Less than Men	Number of Women Affected	Per cent. of Men's Wages Received by Women Who Produce Less than Men
12.00	35	50.0
10.00	5	54.5
8.00	15	56.0
8.16	90	62.0
7.56	60	64.5
5.10	47	66.0
5.40	6	71.4
4.00	36	75.0
4.62	229	79.6
2.16	30	83.4
2.20	20	84.4
1.65	180	86.5
1.50	14	88.0
	767	

Again a difference of wage exists, but *women producing less than men are penalized in earnings no more than are women producing more than men.* It makes little difference whether a woman produces more or less than a man. The wage rate received does not vary with her production.

It requires neither art nor science to see that women

are giving equal and sometimes greater satisfaction than men in most work in which replacement has taken place. It requires both, however, to divine the logical process by which it is often said that women's wage rates when replacing men represent their value to industry because

(1) In 16 plants where women receive equal pay for presumably equal work, 10 report that their production is satisfactory, 6 that it is unsatisfactory.

(2) In 11 plants where women produce more than men, not one woman receives as much as a man doing the same work in the same plant and most women receive less than 75% of the men's wage.

(3) In 13 plants where women are reported to produce less than men, the difference between the men's rate and women's rate is neither greater nor less than where they produce more.

Assuming that men's wage rates are computed on basis of production, an interesting comparison can be made of actual wages of women producing more than men on the same work and their presumptive wages were they paid also on a basis of production.

A plant which has installed a profit sharing system reckons women's production as 20% greater than men's. The men receive \$21.60 per week, the women \$7.10 less. The women should receive \$25.60 instead of \$14.50 per week.

In a foundry where women are used as inspectors, they handle twice as many pieces as men, but receive \$4.59 a week less. Were their wages reckoned on the men's average for the same work, they would receive \$39.42 a week instead of \$15.12. Executives in this plant approve theoretically of "equal pay for equal work" but fear that were it granted labor conditions in the community would be upset.

In another plant where women are used on machine tools and give 10% better production than men their wage should be raised from \$12.48 to \$17.42.

The arbitrary distinction made between the wages paid to men and women on the same work is illustrated by the wage scale prevailing in a government plant. The scale was set before the women undertook the work and in no sense represents their production or general efficiency.

Processes	Daily Wage Rates			
	Initial		Regular	
	Men	Women	Men	Women
Milling	2.40	1.60	3.04	2.56
Drilling	3.04	1.60	3.60	2.56
Edge grinding	1.60	1.60	2.24	2.24
Inspecting	2.40	1.60	4.00	2.24
Centering	3.20	1.92	3.54	2.56
Glass grinding	1.92	1.28	3.60	2.24
Automatic polishing	1.92	1.44	3.60	2.24
Assembling	2.40	1.28	3.20	2.24

THE PERMANENCE OF WOMEN REPLACING MEN.

The replacement of men by women has from the first been a mystery, not only to those who thought they never could do it, but also to those who thought if they could, they never would stay with it. The surprise of foremen and managers at women's dexterity and adaptability only equaled their certainty that after the emergency was over, the problem of women in men's places would solve itself by their automatic reabsorption into the home. In this simple faith they were joined by Trade Union organizations most affected by the entrance of women into new occupations, who not only said women would return to their homes, but that they would have to return to their homes. During the war not an employer in New York State was to be found who openly, at least, contemplated retaining the women he had taken the pains to select and train into his shops. The day after the armistice was signed, however, there were unmistakable signs that not only were women to be kept in the places they were filling but they were to be trained to fill others requiring greater skill and initiative. Certain large plants in this and adjacent states had plans already laid for a system of vestibule schools where first class women machinists could be produced.

It is far more difficult to secure a statement from an employer of his reason for retaining women in men's places than of his reason for dropping them. It may be that this is true because in the first case he has pursued a negative course, taking no action, while in the second he has had to make a decision and fire the women. When asked why women are being retained in his plant, the most usual reply is "Why not? They are entirely satisfactory." The underlying reason may or may not come out later in the interview. When it does emerge, it requires very little analysis to see that women are staying at their new posts primarily because they permit manufacture at less cost per unit of production, and with less

friction between management and workers. Some women produce more than men at an equal wage; some as much as men at a smaller wage; and some less than men at a wage so much smaller that their employment is still profitable. Women are by habit industrially acquiescent, pliable and submissive to routine. They are to a large degree unorganized. In any case the employer's advantage is secure.

The power of the economic factor in replacement cannot be overlooked. Such statements as these are often heard:

"Greater production at lower wages."

"No man would take it." (Referring to women's pay envelope.)

"Fifty cent (an hour) men can be replaced by twenty-five cent women."

"Better work at lower wages."

"They produce more and demand less."

Other less obvious factors enter into the plans of industrial management and not infrequently the reason for keeping women is couched in the laconic phrase "To fight the Union" or in a more complex situation, one employment manager said "We are keeping women in B Department, although their production is most unsatisfactory" (the work was too heavy for them) "in order to keep the men from getting too cocky."

There is no doubt, judging from these statements, that, wages and general satisfactoriness remaining equal, women will continue in work formerly done by men.

This prophecy is borne out by two facts, first, that of all plants employing women in men's places over one-half are going to retain every woman so employed; second, that 82% are going to retain all or part of the women so employed. Furthermore, out of 13,000 or more women in 117 plants, only 2,000 have lost their new jobs through possible shortcomings of their own.

A detailed study of the reasons given for discharg-

ing women who have been holding men's jobs during the war throws even more light on the question of their success than the reasons for retaining them. Plants discontinuing women in men's places fall into two groups:

- (1) Those discontinuing *all* women replacing men.
- (2) Those discontinuing *part* of the women replacing men.

TABLE VI SHOWING REASONS GIVEN BY 16 PLANTS FOR
DISCONTINUING ALL WOMEN REPLACING
MEN DURING THE WAR.

Reason	No. of Plants	No. of Women
Cancellation Government contract	8	3,195
Work too heavy	3	200
Women expected too much attention from men	1	8
To take care of returning soldiers and sailors	1	8
Unsatisfactory production	2	93
Small size of shop.....	1	5
Total	16	3,509

Of 16 plants discharging all women replacing men, 8 were shut down because of the cancellation of government contracts, an action which affected 3,195 of 3,509 women, but had no relation to the women's efficiency or satisfactoriness. Only 8% of the women in these plants were discharged for cause other than shutting down of the plants.

TABLE VII SHOWING REASONS GIVEN BY 35 PLANTS FOR
DISCONTINUING PART OF WOMEN REPLACING
MEN DURING THE WAR.

Reason	No. of Plants	No. of Women
Work too heavy	7	240
Friction with foreman, or other work- ers, discipline	3	1,549
Less production. Less steady	4	60
Slow picking up mechanical knowl- edge	1	70
Government contract canceled	9	1,003
To take back returned soldiers and sailors	1	5
Labor law difficulty	2	52
No reason	8	283
Totals	35	3,262

Thirty-five plants discharged a portion of the women replacing men after the signing of the Armistice. Of the 3,262 discharged, almost one-third were let off as a result of cancellation of government contract. The largest group discontinued numbered 1,549 who because of friction with the foreman were said to have "failed in discipline." It is worthy of note that 1,000 of these women were in one plant, which was the only one in the community failing to make a success of the women employed. In one plant women were discharged because of slowness in picking up mechanical knowledge. This trait is often mentioned by foremen and superintendents as characteristic of womankind in general, but in only one plant is it given as a reason for dismissal. It may be pertinent to add that most foremen in discussing this weakness do not ascribe it to an absence in women of the power to attain mechanical knowledge, but to an absence of any or effective training. Consider the difference in

background between two children, a boy and a girl, in this one respect. The boy is instructed in the elements of mechanics at an early age, the girl, never.

The following summary table of reasons for discontinuing women throws them into the final causal relationship, and permits recapitulation of important points.

TABLE VIII SHOWING REASONS GIVEN BY 51 PLANTS FOR DISCONTINUING ALL OR PART OF WOMEN REPLACING MEN DURING THE WAR.

REASON	No. Plants	%	No. Women	%
Work too heavy.....	10	19.7	440	6.5
Government contracts reduced or canceled.....	17	33.2	4,198	62.0
Administrative friction—discipline, etc.—small shop.....	5	9.8	1,562	23.0
Labor law regulations.....	2	3.9	52	.8
Unsatisfactory production and less steady.....	6	11.8	153	2.3
To take back soldiers and sailors.....	2	3.9	13	.2
Lack of mechanical knowledge.....	1	2.0	70	1.1
No reason.....	8	15.7	283	4.2
Total.....	51	100.0	6,771	100.0

Some 6,000 or 49.5% of all women employed in men's places were dropped.

62 plants (52%) continued all women employed to replace men.

97 plants (82%) continued all or part of women employed to replace men.

16 plants (13%) continued no women to replace men.

4 plants (3%) were undetermined as to policy.

The causes for dismissal of women replacing men fall into two classes:

Causes of Failure to Make Good by Women Replacing Men.

1. Those to be traced to failure on the part of women workers themselves;
2. Those over which the women workers themselves had no control.

Of the 6,771 women who were discharged only 2,225 or 32.9% who replaced men failed because of their own physical, mechanical, or temperamental shortcomings. In 23% (almost wholly in one plant) administrative difficulties were encountered; in 6.5% of the cases the work was too heavy; in .2%, women were dismissed to take back returning soldiers; in 2.3%, production was unsatisfactory; in 1.1%, mechanical ability was lacking. The first two causes for dismissal deserve further discussion.

Administrative difficulty as a reason of failure in replacing men with women covers a greater diversity of causes than the phrase indicates. In one plant it means "friction with foremen," in a second, "women expected too much attention from men," in a third, "women failed in discipline," in a fourth, "the shop was too small to permit the standardization of product" or "to warrant the expense of new sanitary equipment called for by the Labor Law when women are employed."

Administrative Difficulty in Handling Women.

The problem of securing an open-minded attitude toward women on the part of foremen is very real. Men who know the machine trade thoroughly, having spent four years in apprenticeship, and who have the usual masculine contempt for feminine mechanical ability, are very prone to decide in advance that women can not do the job and by their attitude discourage and frighten "green workers." Such an attitude can be avoided often by the superintendent or manager calling foremen together and getting them interested in the project in advance. In one or two instances girls have been removed from a department simply because it was impossible to secure the co-operation of the foreman.

Another angle of this same attitude was shown by one firm when a difference in government contract necessitated a cut in wages. Knowing the cut had to come the firm took pains to go to all its men employes and explain the reason for the action with the result that the change was accepted without loss of time. A different policy was used with the women. On pay day a notice was posted announcing the cut. A week's strike followed, and a most important government contract for essential war equipment was delayed because of a tactical blunder.

Still another administrative problem occurs in the small shop where a great variety of work must be done. There is no reason to assume that women can not become really expert machinists, but it is certainly true that there has not been time yet to develop many such. The small shop therefore takes the all-round man in preference to the specialist woman.

Very frequently, in fact, almost always, employment managers, superintendents, and foremen have definite theories about women and their habits of thought and action, which influence their opinion of the work they are able to do, or the money they ought to earn. For example, one man was convinced that the policy of equal pay for equal work was a grave injustice to men because for recreation women had their sewing at home, while men had to go out and spend money. Another objected to women because they were hysterical, although upon further questioning he could not remember that any of the women in his employ had displayed such a tendency.

In other small shops or plants where the number of women can never be large, their introduction calls for physical changes in the buildings. The Industrial Code is very definite in its rules for the comfort of women workers. There must be separate toilets provided, adequate in number, wash rooms, dressing rooms, couches and chairs. All of this requires planning and thought, and considerable expenditure of money. In the case of the small shop it is often an open question whether the investment would be worth while. During the war



women were sometimes taken on in the emergency without all legal standards being met. When the inspectors came they issued orders and, in a few instances, employers have preferred to let their women go rather than to comply with them.

The figures of replacement as they bear on the permanence of women in new work show in every correlation the significance of women's failure to make good where the process has involved heavy lifting.

TABLE IX SHOWING THE RELATIVE AMOUNT OF REPLACEMENT IN THREE SECTIONS OF NEW YORK STATE BEFORE AND AFTER THE ARMISTICE.

Section of the State	No. Plants	Per Cent Women Replacing Men	
		Before Armistice	After Armistice
Western New York	37	41.6	21.5
Central New York.....	38	34.6	44.3
New York City and Vicinity	42	23.5	34.3
Total	117	100.0	100.0

As the foregoing table indicates, the relative proportion of replacement in the three sections of New York State increased after the Armistice in the case of Central New York and in the vicinity of New York City by 10%, while in Western New York where heavy work tended to be most necessary during the war, replacement decreased by 20%.

In a sense it seems hardly just to insist that the inability of women workers to stand up under the strain of heavy lifting is a shortcoming for which they are to be held responsible. Personnel departments seem rather to have erred in judgment in fitting physique to job. Some men would have been unable to perform indefinitely the type of work on which women ultimately broke down. It

is true, however, that taking women's new work, process by process, the only failure incident to inadaptability to the work itself occurred when women were called upon to lift heavy material more or less continuously.

In 10 of 51 plants discontinuing some of their women replacing men 440 women (6.5%) were unable to compete on equal terms with men because the work required was shoveling coal and coke, handling lumber, trucking bags of food stuffs or other material from dock to storehouse or from storehouse to cars. In most cases women were summoned to this type of work only after every male or mechanical expedient had been exhausted. However, in the chemical plants of Niagara Falls replacement occurred early in the war because of the peculiarly hazardous conditions of work and bad housing which affected the labor supply. In other localities the emergency was delayed.

Several plants which have tried out women on heavy work were ready with comparative figures to prove that they were less productive than men.

In one company where the work called for the trucking of freight from dock to storehouse and the tiering of sacks of coffee to the height of nine feet, women were considered only 25% as efficient as the best men. The average delivery of sacks by the men obtainable before the draft was 800 per day, while the average delivery by the third or fourth grade men exempt from the draft and accessible for employment during the war was 200 per day. The women were the competitors of the residual men.

Another industry requiring similar work rated five women as equal to two men. It was estimated that even when women were paid at the rate of 15¢ less per hour than men economy dictated the employment of men.

5 women @ 27¢ an hour amounted to \$1.35.

2 men @ 41¢ an hour amounted to \$.82.

In yard work, shoveling of sand, coal, metal scrap into wheel barrows, sorting of brick, cleaning of electrodes,

stoking furnaces, and such work, one plant reckoned 6 women as equal to 4 men. In a plant where large truck loads of leather were handled women delivered 60% as much goods as men.

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ms.

Women in the core rooms of foundries have proved themselves efficient on small cores. A few foundry men, however, have been discouraged by their work on large cores, but in several instances porters have been used to wheel sand and carry cores to the ovens. The result has been a saving in time for women at the bench and an increase in production which more than paid for the additional labor. In one core room in the central part of the state this subdivision of labor has been extended to the small core room where 30 women coremakers are assisted by 2 men wheeling sand, 2 wheeling plaster and 6 carrying cores. Increased production has paid for the 10 additional workers and more.

The dissatisfaction expressed by employers who have replaced men by women on such work is not localized to New York State. It is true wherever women have led either a sedentary industrial life or only a comparatively active domestic one. Quite apart from their inferior physical strength they are therefore more liable than men to strain from muscular effort.

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The adjustment of weight to worker has always been a difficult matter. Scientific management places a definite limit of 10 lbs. including shovel when maximum production is desired from men. The New York State Labor Code forbids the employment of women in core rooms where the cores to be carried weigh more than 25 lbs. In Germany, before the war, an effort was made to eliminate possible strain by prohibiting the employment of women in such work as removal of rubbish, getting, loading and conveying raw material, conveying of bricks or coal to furnaces in wheel barrows and stoking of furnaces. The French have set limits upon the number of pounds to be drawn or pushed by women on barrows or trucks. When

on rails 1,320 lbs. (including truck) may be pushed; on barrows 100 lbs. With these pre-war safeguards in mind, no wonder can be felt that women have failed to make good in New York State when called upon to push truck loads weighing from 200 to 2,000 pounds over rough flooring; to act as assistant bricklayers by wheeling barrow loads of brick; to stoke furnaces with shovel loads of coal weighing 25-30 lbs. thrown to the back of the furnace seven to ten feet distant; to load box cars by shoveling from the ground to above shoulder level.

From the woman worker's point of view and barring permanent injury, temporary work of a heavy character can cause only temporary fatigue. From the point of view of industrial management efficient production can be secured only through a stable labor force physically fit. In placing women at work beyond their strength both of these rules are violated. As a result of heavy work the less robust women leave voluntarily or are dismissed for bad time-keeping; the more robust remain at work but show the effect of fatigue in decreased production.

TRADES UNIONS AND WOMEN REPLACING MEN.

The great majority of women who replaced men during the war are unorganized. This is largely due to the fact that the Trade Union men were convinced that the women who entered new occupations as an emergency would not remain when the emergency was past.

The general attitude of labor men is that if women receive the same wages as men for the same work they will not oppose them, but they will unalterably oppose their entrance into new occupations as underbidders. Another general view among machinists is that women have replaced boys and in very rare instances only have replaced skilled machinists. Therefore, there have been differences of opinion as to whether or not they are eligible to the Machinists Union. One of the locals of this union that accepted women members was still of the opinion that no women should be employed in the

machine industry while there were any skilled men unemployed.

Although women are not receiving equal pay with men in the shops where they are partly organized (except in a very few instances) the Union is continuing organization work among them so that they may be in a position to demand equal pay for equal work. The Union standard rate of pay for a woman working in a machine shop is 65¢ an hour, giving her the same rating as a specialist. The claim so often made by employers that they cannot pay the same wages to women as to men because women cannot repair or set up their own machines is not considered by the Union a legitimate excuse for paying women lower wages because the majority of machine shops have repair men who attend to the machines for men as well as for women.

About ten locals of the International Association of Machinists throughout the state have admitted women as members, several of them having a large number of women, the rest ranging from 50 to 200. A local was formed in Brooklyn composed entirely of women, with a large membership. A few locals made an attempt to organize women but were not successful. One local refused to accept women as members because they would have had to change their constitution and their membership was divided as to the advisability of so doing, regardless of the fact that women were working in a railroad shop in this locality and were receiving the same rate of pay as the men.

No trade union organization was found among the women in any of the trades except the machinists where they replaced men.

At first the view point of a great many labor men toward the entrance of women into new occupations was skeptical and inclined to be antagonistic. It is encouraging to note that now most of them are realizing that in a great many cases women are in the trade to stay and it is necessary therefore, to deal with them as fel-

lowworkers, to organize them in their Trades Unions, then there will be no sex competition and men and women in the trade will work hand in hand for the betterment of the conditions under which they work.

The following statement was made by New York District No. 15 of the International Association of Machinists:

“For patriotic reasons, we permitted the dilution of the trade by the introduction of women, believing that the national interests could be best served by so doing. As soon as this was done, we realized the fact that some employers were exploiting women by paying as small a wage as possible. Believing that this was not justice to the women who for divers reasons, had entered the machine industry, we decided to demand what we have always contended is just, that is, equal pay for equivalent work, and in some instances have been successful in securing this.

“It is not our intention to drive women out of the industry, providing they desire to remain, but we do intend to insist that wherever they may be employed they ought to receive at least as much as men. Of course, we feel safe in saying that the capacity of the usefulness of the women in machine shops is limited, for the reason that women are not naturally built to do work which requires standing on their feet for any great length of time, nor are they physically built to do heavy lifting, and hence we do not believe that they will be able to expand industrially in the machine shop at least for the above stated reasons.

“The employment of women in small factories will not be universally in vogue, because it will necessitate the installation of additional comfort and dressing rooms and a Matron to see to the physical welfare of the women thus employed.”

The official opinion was summarized as follows:

“1. We have no objection to women working in the machine industry, PROVIDED, they receive equal pay for similar work.

“2. The necessity for the introduction of women in the machine industry, having passed (that is the cessation of hostilities) many shops, who during the World crisis employed women, will discontinue to do so.

“3. The industrial expansion of women is limited, owing to their physical inability to perform the more exacting and strenuous work that is required in certain branches of the machinists' trade.

“4. The employment of women, if continued, will be restricted to the large manufacturing shops, because it will not be a financial paying proposition to the small shops.”

If organized and eligible, women replacing men would fall under the jurisdiction of the following trade union organizations:

Foundry Employe's Union.
 Boilermakers' Union.
 Metal Polishers.
 International Association of Machinists.
 Jewelry Workers.
 United Leather Workers.
 Carpenters' Union.
 Upholsterers' Union.
 Piano, Organ Makers' Union.
 Sheet Metal Workers.
 International Brotherhood of Roofers

APPENDIX.

I. LETTERS FROM EMPLOYERS OF WOMEN WHO HAVE
REPLACED MEN

II. LETTERS FROM EMPLOYERS USING WOMEN COREMAKERS

EXCERPTS FROM LETTERS OF FIRMS IN NEW YORK STATE EMPLOYING WOMEN TO REPLACE MEN DURING THE WAR.

"The women we employ which are few owing to the kind of work we are engaged in, were to replace boys and not men. Their work is principally assembling and packing pliers which is very light work and we think they are more satisfactory than boys."

"We find them (women) very desirable as inspectors, being naturally more careful and painstaking than young men. We believe that this is due to the fact that young men are naturally active and to be tied down to inactive work, requiring close attention, is not congenial."

"Women have done very well on the operation of light machines but have less mechanical ability than men and require far more supervision and assistance. We believe that in time a number of women might be trained to sufficient mechanical ability to do as well as men."

"We wish to state we will probably employ from seven to ten girls in our plant all the time, but a large majority of them proved unsatisfactory, and cost us more by one-third than what we could have hired men for, but we used them during the time when men were not procurable."

"Women are more desirable than men on unvaried work because they produce more and demand less wages."

"As the result of the signing of the Armistice and the cancelling of all Government orders we have been obliged to leave off about one-half of our working force although we haven't reduced the hours or the rate of pay as yet."

"We expect to get into commercial business in the near future and in view of the fact that we received such good service from the female employees we will consider them in hiring our new help."

"In the positions where we have used women on jobs that were essentially men's occupations before the induction of the large number of these men into the service we have found that the female help has been very valuable. The work has covered a great variety and range of occupations, such as woodworking, painting, machine operating, hand sewing, power machine sewing, hand nailing, aeroplane assembly work, time keeping, tracers, inspectors and in fact any other minor occupations where we have previously used men.

"As proof of the success that women have been in industry let me point out to you that at the time of the cancellation of our orders due to the signing of the Armistice we laid off a great number of men, but in the final analysis we retained about the same relative proportion of our females to the total number of males employed as was formerly the case. In other words we have had about 25% female employees during the time that we have used them on these various occupations and at the present time our force of women is about 25% of the men employed. This in itself is indicative of the fact that they have performed their work in a very satisfactory and efficient manner, otherwise all of our female employees would have been discharged or laid off long before the general lay-off, which occurred during the past month.

"I am very firm in the belief that women have found their place in industry and now that the war is over there is no real reason why they should withdraw and take up pursuits that were followed previous to their induction into industry. It is true that there are many occupations that they might readily be considered not qualified to handle, but these are confined more especially to the heavy and laborious positions that are more manual labor than otherwise.

"On machine operating or specialized woodworking jobs, assembling or inspecting or other mechanical operations I believe that women are thoroughly qualified to handle the work and to my mind can see no reason why they will not be retained in the after-war period."

"Wherever we have introduced women in departments where the work was formerly done entirely by men, it has in all cases been necessary to re-classify the work, giving the men all the heavy work and special work and the women the light and simple work. For this reason the earnings of the women are less than those of the men. In most departments we have a combination day rate and piece rate, the day rate of the women being less than the men and the piece rate in all cases being the same.

"For example, in the wheel shaving department, the men are paid 19¢ per hour and their piece rate in addition; the women are paid 17¢ per hour and the same piece rate in addition. As a result of this the weekly earnings of the men average \$31.00 and of the women \$25.00 to \$26.00.

"In the specialty disc department the day rate of the men is 35¢ and the women 22¢ per hour. The weekly earnings average—men \$23.00, women \$17.00. The men do the heavy pieces and the women do the light pieces.

"In the sifting department we have given the women the day shift and the men the night shift. The rate for women is 33¢; weekly earnings \$18.65. The rate for men is 35¢, weekly earnings \$22.75."

EXCERPTS FROM LETTERS OF FIRMS IN NEW YORK STATE USING WOMEN COREMAKERS.

"These women have been employed within the past two or three months and they are giving entire satisfaction. They average in age from 18 to 40 years, are steady workers, more so than the men, prompt in attendance and efficient on the class of work on which they have been used up to date."

"Believe union control of quite a number of foundries militates against the use of women coremakers. A great many firms would also have to make certain changes in their plants and equipment to permit of their use, which would be done, however, very easily in most cases."

"We introduced female coremakers because we were having trouble on account of coremakers (men and boys) continually laying off and being careless in their work.

"The girls and women we employed have done efficient work, are most steady and as a rule turn out more work than the men."

"We put women workers in our coreroom on our light work primarily on account of the scarcity of boys for the work.

"Since we have put women in again their work is thoroughly satisfactory. They are showing a better production than the boys and are putting the work up in better shape. We have kept the rates the same and the women are averaging fifteen to twenty per cent better on their rates than the boys as soon as they become familiar with the work. On our product we use a great number of small cores with light gang core boxes and the girls are thoroughly satisfactory."

"Female coremakers are used only on the small, light class of work where the skill of experienced coremakers is not required.

"These cores were formerly made by boys and young men, whose lack of attendance was objectionable, and by introducing female help we not only secured more steady attendance, but also more rapid work.

"This work is piece work and we pay the female coremakers the same piece price that the boys and young men received."

"We put in women coremakers on account of the general inefficiency of boys, whom we largely employed before. The boys were more or less volatile and since putting in the women on the light cores we have not had so much trouble. We employ them only on light cores and on these can make no criticism. We do not make a differential in price between the male and female workers.

The production of the females on light cores is equal to the production of the males."

"Some 25 years since we introduced female core-makers into our works, making light cores, such as we use in our malleable iron work. Prior to that time most of our light work was done by boys.

"Our experience has proven that women are very adaptable for this work, much more efficient than boys or young men, and that their work in general over this period of years has been entirely satisfactory and pleasant work to the women so employed, and has given us greater efficiency and better production than we could have obtained otherwise."

APPENDIX III

SOURCES OF MATERIAL

SOURCES OF MATERIAL

Selection of Plants

For the purposes of this study plants were selected where replacement was known to have occurred. Lists were secured from:

United States Employment Service

Boards of Trade

Trades Unions

Files of New York State Committee on Women
in Industry, Council of National Defense.

National Founders' Association

Merchants' Association of New York

Questionnaires

Three groups of questionnaires were sent out to:

1. United States Employment Service
2. Employers
3. Trades Unions

From the answers to these questionnaires 117 firms were selected to be inspected for detailed information. These plants were situated in 26 communities of the state and represent 17 industries.

BUREAU OF WOMEN IN INDUSTRY**NEW YORK STATE INDUSTRIAL COMMISSION**

To the U. S. Employment Service:

Please give us the following information in regard to plants in your file or of which you have knowledge:

- 1. What plants replaced men by women during the war?**

Firm	Product	No. Women	Processes.
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- 2. Which of these plants are continuing to use women?
Give reasons if possible.**

- 3. Which are discontinuing use of women? Give reasons
if possible.**

4. Have you any information regarding comparative wages of men and women on same jobs? Give illustrations.
5. Have you any information concerning comparative production per hour of men and women where replacement has occurred? Do you know of plants where such records have been kept?
6. What effect has the Armistice had on
 - a. Number of calls for women workers?
In what types of work has there been increase and decrease?
 - b. Number of women applicants for work?
In what types of work has there been increase and decrease?
7. Into what peace industries are the women released from war industries being absorbed? With what change in wages? Give illustrations.
8. To what extent have women replacing men been organized into trades unions?
9. From what sources were the women who replaced men drawn? Other factories, professions, occupations or homes?
10. List of chief industries in community.

BUREAU OF WOMEN IN INDUSTRY

NEW YORK STATE INDUSTRIAL COMMISSION.

To Trades Unions Organizations:

- 1.—What plants in or near your community replaced men with women during the war?
- 2.—On what kind of work?
- 3.—Did the women receive same pay as men or less?
- 4.—Where did these women who took men's places come from? Other factories, their homes, or other occupations such as offices and stores?
- 5.—What locals in your towns have women members?
- 6.—What is the policy of the local labor body toward continuing women in what have been men's places?
- 7.—Do you think women who are discharged or drop out of war industries will go into peace industries? If so, which ones?
- 8.—Have the women who left war industries for peace industries been able to maintain previous rate of wages? If not, how much have they been reduced?

BUREAU OF WOMEN IN INDUSTRY
NEW YORK STATE INDUSTRIAL COMMISSION

To Employers:

1. How many women replaced men in your plant during the war?.....
2. On what processes?.....
3. How many women have replaced men since the war?.....
4. On what processes?.....
5. How have you trained them? At the machine or bench? In a vestibule school?.....
6. How did they compare with men they replaced in
 - a) production per hour.....
 - b) steadiness
 - c) wages (hourly or weekly rate) Men.....
 Women
 - d) working hours.....
7. Are you planning to retain women when men are again available?.....
 If so, in what processes and in what numbers?

 If not, why?

8. Total Working Force During War At Present
 Men
 Women
9. Product

SCHEDULE FOR INSPECTION.

Firm _____ Person Interviewed _____
 Address _____ Working Force _____ Number _____
 Product _____ Men _____
 _____ Women _____
 Investigator _____ Date of Visit _____

REPLACEMENT

	Before Armistice					After Armistice				
1. Pro- cesses	No. of Wom'n	Wages				No. of Wom'n	Wages			
		Initial W'kly		Modal W'kly			Initial W'kly		Modal W'kly	
		Men	Wom'n	Men	Wom'n		Men	Wom'n	Men	Wom'n

2. Production
3. Reason for continuing or discontinuing women
4. Changed operations mechanical or otherwise to adapt
job to women
5. Total weekly hours
6. Training

APPENDIX IV

TABLES

Table X—Showing Total Working Force, Number of Replacements During War and Number and Per Cent of Women Retained After Armistice in 117 Plants and in 26 Localities of New York State

Place	No. Plants	Working Force			Total Replacement	Total No. Women Retained After Armistice	Per cent Retained of Total Number Replaced
		Men	Women	Total			
Buffalo.....	9	24,233	4,919	29,152	4,744	869	18.4
Lockport.....	2	496	122	618	103	6	5.8
Niagara Falls.....	7	5,245	574	5,819	360	220	61.2
N. Tonawanda....	3	720	87	807	77	42	54.6
Olean.....	4	1,524	175	1,699	114	65	57.1
Jamestown.....	7	1,500	227	1,727	227	194	85.5
Dunkirk.....	4	912	81	993	32	10	31.3
Watertown.....	1	263	26	289	15	6	4.0
Endicott-Johnson City.....	2	6,575	2,580	9,155	200	20	10.0
Little Falls.....	1	298	40	338	30	30	100.0
Rochester.....	15	11,445	5,459	16,904	1,126	826	73.4
Seneca Falls.....	1	717	121	838	25	13	52.0
Syracuse.....	6	1,976	453	2,429	368	262	71.5
Utica.....	2	5,100	730	5,830	730	730	100.0
Elmira.....	4	4,897	675	5,572	557	327	58.7
Ilion.....	3	10,850	1,550	12,400	935	460	49.3
Ithaca.....	2	713	336	1,049	325	0	.0
Watervliet.....	1	4,795	229	5,024	229	0	.0
Schenectady.....	1	20,850	2,149	22,999	222	222	100.0
Hastings.....	1	2,100	212	2,312	88	0	.0
Staten Island.....	1	93	24	117	24	24	100.0
Long Island City..	11	8,803	1,743	10,546	1,297	697	53.7
New York City ...	15	2,600	1,025	3,625	602	562	93.4
Brooklyn.....	10	10,723	1,846	12,569	852	668	78.4
Poughkeepsie.....	3	1,788	241	2,029	241	200	83.0
Yonkers.....	1	600	120	720	120	120	100.0
Totals.....	117	129,816	25,744	155,560	13,643	6,573	48.2

Table XI—Showing by \$1.00 Wage Group Modal Weekly Earnings of Women Replacing Men During the War With Number of Women and Number of Plants in Each Wage Group

Weekly Wage Group	Plants		Women	
	Number	Per Cent of Total Plants	Number	Per Cent of Total Women Replacing Men
\$6-\$6.99.....	1	.9	15	.1
7- 7.99.....	1	.9	42	.3
8- 8.99.....	2	1.7	21	.2
9- 9.99.....	9	7.7	534	3.9
10-10.99.....	11	9.4	685	5.0
11-11.99.....	5	4.3	234	1.7
12-12.99.....	25	21.3	2,421	17.8
13-13.99.....	15	12.8	3,981	29.1
14-14.99.....	10	8.5	2,158	15.8
15-15.99.....	8	6.9	510	3.7
16-16.99.....	6	5.1	1,758	12.9
17-17.99.....	1	.9	229	1.7
18-18.99.....	6	5.1	166	1.2
19-19.99.....	1	.9	20	.1
20-20.99.....	0	.0	0	.0
21-21.99.....	1	.9	15	.1
22-22.99.....	1	.9	25	.2
23-23.99.....	0	.0	0	.0
24-24.99.....	0	.0	0	.0
25-25.99.....	0	.0	0	.0
26-26.99.....	1	.9	150	1.1
No Records.....	13	11.1	679	4.9
Total.....	117	100.0	13,643	100.0

Table XII—Showing Modal Earnings of Women Replacing Men, by \$2.00 Wage Groups, With Number of Plants and Number of Women in Each Group

Weekly Wage Group	Plants		Women	
	Number	Per Cent Total Plants	Number	Per Cent Total Women
\$6-\$7.99.....	2	1.9	57	.4
8- 9.99.....	11	9.4	555	4.1
10-11.99.....	16	13.6	919	6.7
12-13.99.....	40	34.2	6,402	47.0
14-15.99.....	18	15.4	2,668	19.4
16-17.99.....	7	5.9	1,987	14.5
18-19.99.....	7	5.9	186	1.3
20-21.99.....	1	.9	15	.1
22-23.99.....	1	.9	25	.2
24-25.99.....	0	.0	0	.0
26-27.99.....	1	.9	150	1.1
No Record.....	13	11.1	679	4.9
Total.....	117	100.0	13,643	100.0

Cumulative Table XIII—Showing Earnings of Women Replacing Men During War by \$2.00 Wage Group, With Number of Plants and Number of Women in Each Group

Weekly Wage Group	Before Armistice			
	Plants	Per Cent of Total Plants	Women	Per Cent of Total Plants
Less than \$8.00.....	2	1.7	57	.4
Less than 10.00.....	13	11.1	612	4.5
Less than 12.00.....	29	24.7	1,531	11.2
Less than 14.00.....	69	58.9	7,933	58.0
Less than 16.00.....	87	74.2	10,601	77.7
Less than 18.00.....	94	80.0	12,588	92.2
Less than 20.00.....	101	86.2	12,774	93.5
Less than 22.00.....	102	87.1	12,789	93.6
Less than 24.00.....	103	88.0	12,814	93.8
Less than 26.00.....	103	88.0	12,814	93.8
Less than 28.00.....	104	89.0	12,964	95.0
No Record.....	117	100.0	13,643	100.0

Table XIV—Showing Difference in Wages Between Men and Women on Same Work and for Same Period of Time, by \$1.00 Groups, Before and After Armistice With Per Cent of Women Retained in Each Group

Weekly Wage Difference	Before Armistice				After Armistice				PerCent of Women Replacing Men Retained in Each Wage Group
	Plants		Women		Plants		Women		
	No.	PerCent of Total Plants	No.	PerCent of Total Women Replacing Men	No.	PerCent of Total Plants Retain-ing Women	No.	Per Cent of Total Number of Women Replacing Men Retained	
Less than Men									
\$19.00—\$19.99	1	1.3	222	1.9	1	1.5	222	4.2	100.0
18.00— 18.99	1	1.3	19	.2	1	1.5	19	.4	100.0
16.00— 16.99	2	2.6	29	.3	2	3.0	29	.6	100.0
12.00— 12.99	1	1.3	35	.3	1	1.5	35	.7	100.0
11.00— 11.99	1	1.3	10	.1	1	1.5	10	.2	100.0
10.00— 10.99	1	1.3	5	.0	0	.0	0	.0	.0
9.00— 9.99	2	2.6	82	.7	2	3.0	63	1.2	76.7
8.00— 8.99	6	7.7	435	3.8	6	8.9	195	3.7	44.7
7.00— 7.99	3	3.9	374	3.3	1	1.5	14	.3	37.4
6.00— 6.99	3	3.9	2,608	22.7	1	1.5	100	1.9	38.3
5.00— 5.99	6	7.7	1,378	12.0	6	8.9	714	13.4	51.7
4.00— 4.99	13	16.7	2,674	23.2	12	17.7	1,353	25.4	51.5
3.00— 3.99	9	11.5	579	5.0	8	11.8	454	8.5	78.5
2.00— 2.99	6	7.7	998	8.7	6	8.9	973	18.3	97.8
1.00— 1.99	5	6.4	865	7.5	3	4.5	141	2.6	16.3
0 - .99	1	1.3	125	1.1	1	1.5	125	2.3	100.0
Equal Wages.	16	20.5	1,052	9.1	15	22.1	862	16.2	85.2
Greater than Men	1	1.3	20	.2	1	1.5	20	.4	100.0
	*78	100.0	*11,510	100.0	68	100.0	5,329	100.0	
*Insufficient wage data.	39		2,133						

Cumulative Table XV—Showing Difference in Earnings of Men and Women on Same Job for Same Period of Time

Weekly Wage Difference	Plants		Women	
	Number	Per Cent	Number	Per Cent
Men receive more than women.....				
\$19.00.	1	1.3	222	1.9
18.00.	2	2.6	241	2.1
16.00.	4	5.1	270	2.3
12.00.	5	6.4	305	2.6
11.00.	6	7.7	315	2.7
10.00.	7	8.9	320	2.9
9.00.	9	11.5	402	3.4
8.00.	15	19.3	837	7.4
7.00.	18	23.1	1,211	10.5
6.00.	21	26.9	3,819	33.0
5.00.	27	34.6	5,197	45.1
4.00.	49	51.2	7,871	68.3
3.00.	49	62.7	8,450	73.4
2.00.	55	70.6	9,448	82.0
1.00.	60	77.2	10,313	89.6
.00.	61	78.2	10,438	90.6
Equal wages	77	98.7	11,490	99.8
Women receiving more than boys...	*78	100.0	*11,510	100.0
*Insufficient wage data.....	*39		*2,133	

TABLE XVI SHOWING PERMANENCE OF REPLACEMENT
AFTER THE ARMISTICE.

62 or 52.1% plants retained				all	women replacing men		
1	"	.8%	"	"	90-99%	"	"
2	"	1.7%	"	"	80-89%	"	"
4	"	3.5%	"	"	70-79%	"	"
2	"	1.8%	"	"	60-69%	"	"
6	"	5.3%	"	"	50-59%	"	"
7	"	6.0%	"	"	40-49%	"	"
8	"	6.7%	"	"	30-39%	"	"
3	"	2.3%	"	"	20-29%	"	"
1	"	.8%	"	"	10-19%	"	"
1	"	.8%	"	"	1- 9%	"	"
16	"	13.7%	"	"	no women		
4	"	3.7%	"	Policy undetermined			
<hr/>							
117		100.0%					

REPORT PREPARED BY
BUREAU OF WOMEN IN INDUSTRY

NELLE SWARTZ, Chief
MARGARET T. HODGEN
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STATE OF NEW YORK
DEPARTMENT OF LABOR
SPECIAL BULLETIN

Issued Under the Direction of
THE INDUSTRIAL COMMISSION

JOHN MITCHELL, Chairman	
EDWARD P. LYON	HENRY D. SAYER
JAMES M. LYNCH	FRANCES PERKINS

No. 94
JUNE, 1919

NEW YORK LABOR LAWS
ENACTED IN 1919

Prepared by
THE BUREAU OF STATISTICS AND INFORMATION

LABOR LAWS of 1919

CHAPTER	SUBJECT	PAGE
	Messages of the Governor concerning labor.....	14
22	State commission on pensions — continuation of.....	25
64	Farm labor agents.....	23
85	Bureau of Women in Industry.....	26
155	Additional public employment offices.....	27
196	Veterans in Department of Public Buildings — retirement of.....	28
206	Earnings of prisoners — funds available for.....	28
207	Prison employees — retirement of.....	29
228	Boilers — inspection of	30
236	Manufacture of highway signs and motor vehicle number plates in State prisons	31
278	Executions against earnings of municipal or county employees — garnishee law	32
332	Segregation of certain female prisoners.....	34
402	Mercantile establishment — definition of.....	34
403	Factory and mercantile inspectors — salaries of.....	35
404	Industrial Aid Bureaus — establishment of by municipal corporations	36
420	Convict labor — employment on public highways.....	37
458	Workmen's compensation — town, village, city and county employees.	39
472	Motor vehicle operators — licensing of.....	40
498	Workmen's compensation — disposition of accrued compensation when injured employee dies	43
531	Part time or continuation schools.....	44
544	Elevators — employment of women in.....	51
545	Scaffolding — inspection of	54
546	Mercantile law — enforcement of in third class cities.....	56
582	Women in newspaper offices — exception made in regard to hours of labor	57
583	Women on street, surface, electric, subway or elevated railroads — employment of	58
591	Bureau of Employment — appropriations	60
602	Civilian employees of New York State — increased salaries.....	64
603	Civilian employees of New York State — extension of period to receive increased salaries	66
629	Workmen's compensation — compensation agreements.....	66
635	Prisoners — appropriation for employment on State and county highways	70
638	State hospital employees — salaries.....	71
640	Armory employees — salaries	72

LABOR LEGISLATION IN 1919

GENERAL REVIEW

In this Bulletin are reproduced the text of all amendments made by the Legislature of 1919 to the Labor Law and the Workmen's Compensation Law. The text of certain other statutes relating to labor are also reprinted. Changes in existing statutes are indicated by italic type in the case of additional matter; by enclosure in brackets in the case of omissions. Statutes containing new matter only are printed in Roman type throughout. Preceding the text of the laws are the recommendations of the Governor as to social legislation, labor and workmen's compensation in his annual and special messages to the Legislature.

Of the thirty-one laws reproduced in this Bulletin, nine amend the Labor Law proper, and three amend the Workmen's Compensation Law. The others deal with labor in one way or another.

ADMINISTRATION OF LABOR LAW

Three statutes relative to administration of the Labor Law were enacted. One amends the definition of mercantile establishments; another extends the jurisdiction of the Industrial Commission as to the enforcement of the mercantile provisions of the Labor Law; the third provides for promotion and increase in salaries of factory and mercantile inspectors.

Definition of Mercantile Establishment. The term "mercantile establishment" as defined in the Labor Law is amended by Chapter 402 so as to exclude from the jurisdiction of the Industrial Commission establishments operated by owners or proprietors only and having no employees.

Enforcement of Mercantile Law in Third Class Cities. By Chapter 546 the enforcement of the mercantile provisions of the Labor Law in all cities is laid upon the Industrial Commission. Formerly, enforcement in cities of the third class was the duty of local health departments.

Salaries of Inspectors. Chapter 403 provides that the salaries of the three grades of mercantile inspectors, and of the first four

grades of factory inspectors shall be dependent upon length of service. The salaries of the mercantile inspectors and of the supervising factory inspectors are increased.

WORKMEN'S COMPENSATION

Three of the bills of 1919 affecting workmen's compensation became laws. They relate to: (a) Determination and payment of compensation, particularly with reference to agreements between employer and employee; (b) Disposition of accrued compensation if the injured employee entitled thereto dies; and (c) Raising of funds by counties to pay compensation of injured town, village, city and county employees.

Determination and Payment of Compensation. Chapter 629 amends §§ 20, 20-a and 25 of the Workmen's Compensation Law. It effects the following changes:

1. The employee may present his claim either to the Commission or to his employer.
2. In case he presents it to his employer, they must report an agreement to the Commission within ten days after it is made.
3. The Commission must hold a hearing upon an agreement within sixty days after receiving report of it.
4. Employer or carrier must, in agreement cases, make the periodic payments at intervals of not more than two weeks.
5. Employer or carrier must notify the Commission of its last regular payment in a compensation case, whether agreement or other, within sixteen days after such payment is made.
6. Either employer or carrier may pay the periodic installments to the injured employee, a conformation to practice under the law previously to this amendment, the practice having been for the carrier to make direct payments in most instances.
7. In every compensation case, agreement or other, the employer or carrier lapsing in periodic payments for sixteen days without notifying the Commission must pay beneficiaries ten per cent of the unpaid compensation additional.
8. In every compensation case, agreement or other, the employer or carrier failing to notify the Commission of its last regular payment within sixteen days after such payment has been made must pay one hundred dollars to the Commission, one-half

for the benefit of the previous-disability fund and one-half for the Commission's expenses.

Additional changes are: (1) elimination of a superfluous provision for arbitration committees to take evidence and (2) insertion of provisions permitting the Commission to request employers or carriers to deposit moneys with it as their agent for payment of compensation and (3) requiring the Commission to commute payments to lump sums according to the present value tables of section twenty-seven.

The law appropriates moneys for carrying out its provisions and makes positions and salaries created under it temporary. It is the result of a special investigation of agreements for compensation between employers and their injured employees ordered by the Governor. The investigator's report is in the Monthly Bulletin of the State Industrial Commission, vol. 4, pp. 124-127, 138. The law became effective May 14, 1919.

Disposition of Accrued Compensation When the Injured Employee Dies. Chapter 498 amends § 33 of the Workmen's Compensation Law by adding thereto a provision that disability compensation, in case of death of an injured employee to whom not to exceed two hundred and fifty dollars is due, shall be paid directly to the surviving wife, husband, child, children, or dependents, the practice hitherto having been to pay all such accrued compensation to the next of kin. The law became effective May 9, 1919.

Raising of Compensation Funds by Counties. Chapter 458 adds a fourth subdivision to § 50 of the Workmen's Compensation Law and inserts a new section to be § 35. Under it, county boards may provide by taxation for payment of compensation to injured town, village, city and county employees and county treasurers may in emergency borrow funds for such payment. The law became effective May 5, 1919.

BUREAU OF EMPLOYMENT

Two measures granting appropriations for the Bureau of Employment, in addition to the amount named in the regular annual appropriation, were enacted. These measures are designed to meet the curtailment of the United States employ-

ment service in this State. Another statute was enacted relative to the establishment by municipal corporations of industrial aid bureaus for the relief of unemployment, and a fourth provides funds for the employment by the Industrial Commission of farm labor agents.

Appropriations for Bureau of Employment. Chapter 155, effective April 7, appropriates \$50,000 for the maintenance until July 1 of the employment offices and facilities formerly under the direction of the United States employment service. Chapter 591 appropriates \$184,000, effective July 1, to continue these offices and services for eight months, or until March 1, 1920. It is expected that the Federal Congress will make sufficient appropriation to continue the service for the remainder of the fiscal year, or until July 1, 1920.

Industrial Aid Bureaus. Chapter 404 permits the establishment by municipal corporations, including counties, towns, villages and cities, of industrial aid bureaus. Such a bureau, when established, must list all unemployed persons within its boundaries and assist them in obtaining employment. The bureau may also furnish necessary temporary relief, including shelter, food, fuel and clothing, to the unemployed and their dependents until remunerative employment is obtained. The expense of operating such a bureau shall be a charge on the annual tax levy.

Farm Labor Agents. Chapter 64 repealed the statute enacted in 1917 which created the State Food Commission. The repealing act, however, transfers to the State Industrial Commission an unexpended balance of \$20,000 for the employment of farm labor agents who are "to recruit competent farm hands during the season of nineteen hundred and nineteen."

WOMAN LABOR

Four measures relating to the employment of women became laws. One of these creates in the Industrial Commission a Bureau of Women in Industry; the others relate respectively to the employment of women in the following occupations: night work as writers and reporters in newspaper offices; on subway, surface and elevated railroads; and in the operation of elevators.

Bureau of Women in Industry. By Chapter 85, the Bureau

of Women in Industry is created. An appropriation of \$10,900 is made providing salaries for a Chief, five investigators and a stenographer for one year. This statute is in continuation of action taken in the summer of 1918 when, by resolution of the State Industrial Commission, this Bureau was established and financed from outside sources until the present appropriation became available on March 20 of this year.

Women in Newspaper Offices. A specific exemption from the present prohibition of work before 7 A. M. or after 10 P. M., as well as from the limitation of the six-day week, is granted to females employed as "writers or reporters" in newspaper offices by Chapter 582.

Employment of Women in Transportation. Chapter 583 prohibits the employment at any time of females under twenty-one years of age in connection with the operation of subway, surface or elevated railroads. Females over twenty-one may be so employed for not to exceed six days a week and nine hours a day, but not between the hours of 10 P. M. and 6 A. M. The daily hours include the entire time between reporting for duty and the time when the employee is released for the day; in other words "split tricks" are forbidden and the daily hours must be consecutive, except for one hour allowed for meals. Provisions for drinking water, washing facilities, dressing rooms and water closets are included. Printed notices of the hours of labor shall be posted, and a time book kept containing the names, addresses and time of beginning and ending the day's work of all female employees. This time book is to be exhibited on demand of the Industrial Commission or its subordinates.

Employment in Elevators. By Chapter 544 a new article — 12-A — is added to the Labor Law regulating employment of women in elevators. The employment of females under eighteen years of age in the operation of elevators is flatly prohibited, not only in factories but "in any building or place within the state." A six-day week and nine-hour day is the maximum working time for women over eighteen. Operation of elevators between 10 P. M. and 7 A. M. is prohibited, except that work may begin at 6 A. M. if other women in the industry may legally be employed at that hour. This prohibition of night work does not

apply, however, to the operation of elevators in hotels by women over twenty-one years of age. Provisions are included for seats in elevators, three-quarters of an hour for the noon meal, washing facilities and water closets, and the posting of hours of work.

In addition to the above regulation of the employment of women in elevators, the provisions of the one day of rest in seven statute are made applicable to all elevator employees, males as well as females.

SAFETY

Two statutes were enacted dealing with safety, one relating to the inspection of scaffolding and construction work, the other to the inspection of boilers.

Scaffolding and Construction Work. Chapter 545 extends the duty of the Industrial Commission as to the inspection, upon complaint, of scaffolding used in building construction. Such inspection, formerly required in cities only, is, by the amendment, rendered obligatory throughout the State. Similarly, the provisions as to the completion of floors during the progress of building construction are extended to the entire State. The amendment also makes mandatory, instead of discretionary, upon the Industrial Commission to issue an order against any violator, not only of the above provisions but of any provision of Article 2 of the Labor Law.

Inspection of Boilers. Under the present statute boilers used for factory purposes which carry a pressure of ten pounds or more are subject to inspection by the Industrial Commission. By Chapter 228 all boilers, whether used for factory purposes or otherwise, which carry a pressure of fifteen pounds are subject to inspection. The amendment exempts boilers subject to inspection by the Public Service Commission, the Superintendent of Public Works and the United States government. Cities, which maintain a boiler inspection force, are, by the amendment, required to enforce the boiler code adopted by the Industrial Commission.

INCREASED PAY FOR PUBLIC EMPLOYEES

Four statutes were enacted in 1919, increasing the salaries of State employees. Two of these relate to State employees gen-

erally; one to employees in State hospitals; and the fourth to employees in State armories.

Civilian Employees of the State. Chapter 603, effective immediately, continues the 10 per cent additional compensation to all civilian employees of the State receiving less than \$1,500 per year which was granted last year. Chapter 556, Laws of 1918, provided that this increase should continue "during the continuance of the existing war." Chapter 603 continues this increase until the end of the "fiscal year in which peace shall be declared."

Chapter 602, effective July 1, repeals Chapter 556, Laws of 1918, and substitutes therefor, to be paid throughout the fiscal year beginning July 1, 10 per cent increase to all State employees receiving less than \$1,400 per year, and a flat increase of \$100 to employees receiving from \$1,400 to \$2,500 per year, except that no salary may be increased beyond \$2,500 by the operation of the act.

State Hospital Employees. By Chapter 638 a general upward revision of salaries of employees in State hospitals is made as an amendment to Section 50 of the Insanity Law.

State Armory Employees. Chapter 640 increases the pay of employees in State armories as an amendment to Section 189 of the Military Law.

RETIREMENT PENSIONS FOR STATE EMPLOYEES

Three measures were enacted relating to retirement pensions for employees in State and municipal service. One concerns a general system applicable to all State and municipal employees; one amends the statute concerning the retirement system for State prison and reformatory employees and the third amends the Public Buildings Law in relation to the retirement of Civil War veterans. Other statutes, relative to retirement systems in various city departments in Greater New York, were enacted but none of these latter are reprinted in this Bulletin.

Commission on General Pension System. A State Commission was appointed in 1918 to inquire into the subject of retirement pensions for State and municipal officers and employees with special reference to the financial problem involved. This

Commission was to have reported to the Legislature of 1919, but, by Chapter 22, the time for making the report is extended to February 1 of next year.

Retirement of Prison Employees. The existing retirement system for guards in State prisons and reformatories and employees in the State prison department is amended by Chapter 207 so as to permit retirement upon pension of such employees after twenty-five years of service instead of thirty years as at present.

Retirement of Veterans in State Department of Public Buildings. Chapter 196 permits five years of service in other forms of State service to count as two of the required five years of service in the State Department of Public Buildings in order to be eligible for retirement upon pension.

CONVICT LABOR

Four statutes were enacted in 1919 relative to the employment of prisoners. Two of these concern construction work on highways and two deal with employment inside the institutions.

Employment Upon Highways. Chapter 420 permits the employment of State prisoners upon highways under the jurisdiction of county or town authorities, such county or town to pay not to exceed one dollar per day for each prisoner so employed into the prison highway labor fund.

Appropriation for Highway Employment. Chapter 635 appropriates \$25,000 for the employment of prison labor in the construction of State and county highways, and for the purchase of the necessary implements and equipment.

Manufacture of Street Signs and Auto Number Plates in State Prisons. An appropriation of \$75,000 is made by Chapter 236 for the establishment by the State Superintendent of Prisons of manufacturing plants for the making of street and highway signs, number plates for motor vehicles, badges for chauffeurs and other similar devices.

Earnings of Prisoners. Chapter 206, amending the Prison Law, provides that when the earnings from the industries of any prison are insufficient for the payment to prisoners of the amount allowed by law to be earned by them, moneys may be transferred from the funds of other prisons to provide for such payments.

INDUSTRIAL EDUCATION

Continuation Schools in Factories. Chapter 531, amendatory of the Education Law, provides that part-time or continuation schools shall be established in cities and in school districts, having a population of 5,000 or more, and in which there are 20 or more minors between 14 and 18 years of age who are not in regular attendance upon school instruction. These schools may be established in factories or mercantile establishments and shall be a part of the public school system. Industrial history, economics and the law relating to the industries taught are among the required subjects of instruction. Parents and guardians shall cause minors to attend such schools, and employers are required to permit the attendance of minors in their employ.

MISCELLANEOUS

One statute amends the Garnishee Law in relation to executions against municipal and county employees; another concerns the disposition of females under arrest or conviction in connection with industrial disputes; a third relates to the licensing of motor vehicle operators.

Executions Against Earnings of Municipal or County Employees. Chapter 278 amends Section 1391 of the Code of Civil Procedure (the Garnishee Law). Resignation or dismissal from service of any municipal or county employee shall have the effect of automatically lapsing any execution against his earnings even though he be later reinstated or re-employed, unless such reinstatement or re-employment occurs within ninety days.

Segregation of Female Prisoners. By Chapter 332 it is required that females, when arrested or convicted in New York City in connection with industrial disputes, be segregated from the other inmates of any prison in which they may be confined.

Licensing of Motor Vehicle Operators. Chapter 472 permits persons eighteen years of age and over, who reside outside New York City but within the State, to operate a motor vehicle in New York City for ten days in any one year without a license. Changes are made as to qualifications and fees for a license.

RECOMMENDATIONS OF GOVERNOR SMITH

RECONSTRUCTION COMMISSION*

As an effective means of assistance in the solution of these [reconstruction] problems, I shall immediately appoint a Reconstruction Commission. That we may be well advised as to the best means of meeting these problems, I propose to call to my aid men and women of the State who, willing to give their time and service during the war, will, I am quite sure, be equally willing to aid the State in this period of reconstruction and readjustment. This commission can call to its aid advisory councils throughout the State. To their aid I shall summon the universities of the State with their expert staffs, the State departments and the voluntary social and civil organizations with their special knowledge of particular problems. In this way we will be able to co-ordinate the functioning of the State departments on these important problems and be advised as to legislation necessary for their solution. In appointing the commission, I shall recommend specific matters to their attention, and from time to time I shall recommend to your Honorable Body such matters as they deem proper subjects for legislation.

During this period of reconstruction we must not forget that New York State is now the commercial center of the world, and that the great business interests of this State have made their sacrifices because of war. Irresponsible and wanton attacks on business are a blow to capital and labor alike. The prosperity of the working man depends in large part upon the prosperity of the employer. In framing laws and in administering government, it is therefore of prime importance that legitimate business should be safeguarded, promoted and encouraged, to the end that we maintain our financial, commercial and industrial supremacy.

SOCIAL LEGISLATION*

Of particular importance to the State is the necessity of adequate protection for workers, especially the women and children. We should strive constantly to better their conditions. For just as we have maintained in the realm of international relations that right and not might should prevail, so in our economic life the weak and helpless should be protected against exploitation and oppression and given the opportunity to enjoy those material and spiritual blessings which alone make life worth living. Such beneficent measures are dictated not alone by sentiments of humanity and fair play, but the welfare of the State demands them and they must be adopted if we are to continue and develop as a nation of sound and virile men and women.

I recommend the passage of legislation to lift labor out of the category of commodities or articles of commerce.

CHILD LABOR*

When and wherever children are permitted to work, they should be surrounded with adequate protection as to hours and tasks which they may be permitted to undertake. No children should be allowed in any occupation

* In Annual Message.

injurious to health, and the provision requiring physical examination of children should be extended to all employments in which they are engaged.

MINIMUM WAGE COMMISSION*

I recommend the establishment of a Minimum Wage Commission of three members, who shall serve without compensation. Appointments to the Commission shall be so made that the views of employers, employees and the public, will be properly reflected. Acting through wage boards appointed for a given industry the Commission should have the power to fix the living wage to be paid to women and minors. Such a law was recommended in this State a number of years ago after a careful investigation by an official Legislative Commission. A similar law is in successful operation in other countries and in many states in our own country. The justice and necessity of a law of this kind are manifest. It is just as cruel to underpay a woman as to overwork her, and just as harmful and wasteful from the standpoint of the State.

If you believe that the future mothers of this State are a resource that we should conserve, you will give this legislation your most earnest and careful consideration.

EXTENSION OF THE LABOR LAW*

The Labor Law should be extended to protect women who have entered new industries because of the war. I refer particularly to the employment of women on our surface, subway and elevated railroads, and in the operation of elevators. Such employment is to-day unregulated, and the women do not receive the protection and safeguard that the law throws around their work in industrial pursuits generally.

HEALTH AND MATERNITY INSURANCE*

Nothing is so devastating in the life of the worker's family as sickness. The incapacity of the wage earner because of illness is one of the underlying causes of poverty. Now the worker and his family bear this burden alone. The enactment of a Health Insurance Law which I strongly urge, will remedy this unfair condition. Moreover, it will result in greater precautions being taken to prevent illness and disease, and to eliminate the consequent waste to the State therefrom. It will lead to the adoption of wider measures of public health and hygiene, and it will operate to conserve human life. The large percentage of physical disability disclosed by the draft, shows how deeply concerned the State is in this matter. Proper provision also should be made for Maternity Insurance in the interest of posterity and of the race. Other countries are far ahead of us in this respect, and their experience has demonstrated the practical value and economic soundness of these principles.

WORKMEN'S COMPENSATION LAW*

The provision of the State Constitution under which the Compensation Law was enacted, authorized a statute for the payment of compensation resulting from "injuries." The intent of this constitutional provision has been limited by defining "injuries" in the Compensation Law as meaning "accidental injuries." This limitation deprives the Commission from juris-

* In Annual Message.

diction to award compensation for disability resulting from occupational diseases and occupational injuries.

I recommend that the law be amended in keeping with the constitutional provision, to the end that occupational diseases and injuries may be subject to its provisions. This will entail a very small increase in cost in comparison with the resulting benefit.

I am making an investigation to determine the cost of workmen's compensation to the industries of the State as compared with the amount actually received by injured workmen and their dependents. I am also inquiring into the working of the law itself, and I will at a later date address a communication to your Honorable Body.

APPOINTMENT OF RECONSTRUCTION COMMISSION *

It is immediately necessary that the Commission examine carefully the housing conditions of the State. There exists among various voluntary agencies a large volume of information on the subject of present conditions, and I have no doubt that these agencies and many others interested in the housing problem will be able to offer constructive recommendations that will give relief. I ask the Commission to make every endeavor to secure the fullest information, and after carefully studying it to recommend either legislative or executive action. The war made apparent how fundamental adequate housing is in relation to labor supply. I am particularly anxious that we find a solution of our housing difficulties that look to the future and that a program may be initiated that will make for the permanent welfare of the State.

Employment is an important subject for the attention of the Commission. The State needs the services of every man and woman in the right place at the right time. Coordination of State resources with Federal, municipal and private resources is most important. The Commission should immediately be informed of any serious conditions of unemployment, and I request the public to bring to the Commission any information on this subject. From such knowledge and information I will be able to advise the Legislature of any action that may be necessary to meet any grave emergency.

Should any great labor crisis arise, due to the period of readjustment, although I hope that the productivity of the State will not be interfered with in any such way, I ask the Commission to find the best method of dealing effectively with such an emergency.

I also ask immediate consideration of the suggestion of the Secretary of Labor that necessary public works be speeded up to meet unemployment conditions, having in mind that they should be begun and finished in the order of their importance to the whole community.

* In Message of January 20. The Reconstruction Commission, as named by Governor Smith, consisted of thirty-six members, including five women, representing civic, business, labor and manufacturing interests. A legislative appropriation requested by the Governor to defray the expenses of the Commission having been refused by the Legislature, the Commission was financed by private contributions.

STATE EMPLOYMENT BUREAUS*

I am in receipt of a preliminary report from the State Reconstruction Commission, which reads as follows:

"At your direction the Reconstruction Commission is preparing a report recommending action on the business and unemployment situation in the State. Pending the submission of this comprehensive report, we are compelled to call to your attention the need for immediate action by the State to provide some substitute for the Federal employment system which is being greatly curtailed, effective March 22nd.

"The present expenditures of the U. S. Employment Service in the State are at the rate of about \$1,000,000 per year, or approximately \$85,000 per month. Effective March 22nd, the available funds of the Service in the State are to be reduced to \$10,000 a month. No further funds can be obtained until Congress is convened in special session, and it may be taken for granted that when Congress does convene, no funds will be appropriated for the Service for the then remaining portion of the present fiscal year. As a result, the Service proposes to close fifty of the fifty-four offices now maintained by it in the State, retaining two offices in New York City, one at Syracuse and one at Buffalo. These four offices, in conjunction with the five offices now maintained by the State will provide the State with but nine public employment offices, at one of the most critical periods of industrial stagnation and unemployment in the history of the State.

"It is the deliberate judgment of your Commission that this provision is wholly inadequate to meet the situation which confronts the State. The unemployment situation in the State at the present time, while not alarming, is steadily growing worse. There is no sign of the resumption of normal business activities on a larger scale, and public works which can do much to relieve the situation are not yet under way.

"New York City and New York State have only just approached the real crisis in their employment conditions. The return of the local men who have been in service has but recently begun. The City and the State have until now been struggling with the problem of returned men from other parts of the country, who have attempted to secure positions in the attractive City of New York. The 27th Division is here, and the 77th Division is expected in a few weeks, so that the replacement problem is acute for the first time in our own State and in its municipalities, and the men of these Divisions have rightfully raised the demand of 'Local jobs for local men.' Employment, owing to complicated causes, is not plentiful.

"The figures obtainable show that, while the replacement of soldiers in positions is proceeding with very excellent results, the displacement of civilians is assuming serious proportions.

"Nor is there any need for the Commission to call attention to the prevailing atmosphere of social unrest, which gives to the current unemployment problem a significance even more serious than it would ordinarily possess. The State would indeed be remiss in its duty if at this time, by standing idle while the great employment system built up by the Government during the war is threatened with sudden extinction, it gave color to the

* Message of March 20.

specious exhortations of those who attack our form of government and assert its failure to protect the interests of the common people.

"When the Federal Service was established some six months ago, the Free Employment Agencies, City, State, and Volunteer, were called upon to abandon their work and throw in their private resources with the Federal System. This they did, realizing the magnitude of the problem, and being anxious to co-operate with the Government to the fullest extent possible.

"One of the great benefits of the war has been its lessons of co-operation. All kinds of agencies have learned to work together in the stress of a great war, and in some measure this is the first crisis in this State that calls upon them to co-operate to lessen the strain of a primary problem of reconstruction.

"The Federal Service having been disrupted by the failure of the Congressional appropriation, the New York State Service never adequately supported at best, having heeded the request of the Federal Service to merge its identity, and now suffering by the sudden disorganization consequent upon the loss of support from the Federal System and being therefore unable as at present financed to meet the needs of the situation, and the volunteer agencies requiring and welcoming immediate co-ordination as never before, we therefore beg to advise you that it is necessary to proceed energetically to provide for an adjustment of the employment problem along the following lines:

"FIRST: We recommend that the fullest co-operative relationship be maintained with the Federal Service, as it will be constituted under the new arrangement, and in the future, under whatever new appropriation Congress may make that will enable them to assume increased responsibility.

"SECOND: That the State proceed immediately to strengthen and enlarge the State system of Employment Agencies. You will remember that you referred to this Commission for report the request of the State Industrial Commission for enlarged appropriations looking to the improvement of the State Employment Service.

"The Commission accordingly recommends that you urge upon the Legislature the necessity for immediately appropriating the sum of \$50,000 to be expended during the remainder of the present fiscal year, by the State Industrial Commission, for public employment offices.

"If the appropriation recommended is granted, the total State funds available for public employment offices for the remainder of the fiscal year will be approximately \$70,000; while the Federal funds will be approximately \$30,000. It seems indisputable to your Commission that the most effective utilization of the limited Federal funds available, would be accomplished if the U. S. Employment Service should turn over the funds available for work in New York State to the Industrial Commission to be administered by the latter, in conjunction with its own funds, under such restrictions as may be agreed upon between the State and Federal services. Unless this is done the Commission believes that a large portion of the limited Federal funds will be expended upon disproportionate overhead charges.

"It is unnecessary to point out the urgency of the present recommendation. The funds recommended should be made immediately available, so that such of the existing Federal offices as the State Industrial Commission may decide to retain in operation may be transferred to State control, without any

interruption in their business. Should delay in granting the appropriation herein urged result in the closure of these offices for even a few days, their subsequent efficiency will be greatly impaired.

"The act making the appropriation herein recommended should also authorize the Industrial Commission to accept aid, either in the form of funds or of facilities for personal services, from any city of the State in which it may establish an employment office. Since only a limited number of cities and towns can be covered by the appropriation recommended it is obviously fair that special consideration should be given to those cities in which the local demand for an office is sufficiently strong to find expression in an offer of financial or equivalent aid.

"THIRD: That you immediately call upon mayors of cities to encourage municipalities to support existing free employment agencies and to open where needed additional municipal agencies for the placement of both soldiers and civilians, but in strict co-ordination with the State and Federal Service, so that there shall be a standardized method of handling the problem of employment and distribution of labor, and no duplication of effort.

"FOURTH: That you call upon all volunteer agencies, both upon those created for war purposes and those permanently functioning social organizations which have facilities for creating employment agencies, or which have operated them hitherto, immediately to resume these functions, but again in the strictest co-operation with the State and Federal Service. The most simple arrangement for municipal and volunteer agencies to follow will be to accept the leadership of the State Employment Service, which, in turn, would arrange for the necessary co-operation with the Federal System.

"FIFTH: That organized labor throughout the State be called upon to lend its co-operation to the fullest extent to the co-ordinated plan herein suggested and that it be called into conference and consultation.

"We would suggest that you summon to a conference mayors of cities, representatives of labor, agricultural and commercial interests, and representatives of all agencies, Federal, State, municipal, and volunteer, for the purpose of stimulating co-operation and bringing about a complete co-ordination with the State and Federal systems. We would suggest as early a date as you can conveniently arrange for such a conference.

"(Signed) ABRAHAM I. ELKUS,

"Chairman New York State Reconstruction Commission.

"(Signed) JOHN G. AGAR,

"Chairman, Committee on Unemployment."

I recommend to your Honorable Body that legislation, making immediately available \$50,000 for the employment bureaus of the State Industrial Commission, be enacted.

(Signed) ALFRED E. SMITH.

MINIMUM WAGES FOR WOMEN AND CHILDREN IN INDUSTRY *

I am unwilling to believe that your Honorable Body is prepared to adjourn without at least debating the constructive measures I proposed in my First Annual Message.

Let me urgently request you to give your consideration to the bill creating

* Message of April 8.

wage boards to fix minimum wages for women and children in industry. At the very least the measure should be brought upon the floor for discussion, and I therefore ask you to bear with me while I attempt to clear up a few popular misconceptions as to what a minimum or living wage is, and what it really does.

When we speak of a legal or minimum wage, we do not mean that wages should be fixed or regulated by law, or that the principle of competition in the fixing of wages should be abandoned; or, as it has been otherwise expressed, a living wage does not interfere with collective or even individual bargaining but it establishes the rule that no contract shall be made which to the women workers means the giving away of everything that makes life worth living and results in injury to the whole of society.

A minimum or living wage means the minimum standard below which wages should not be allowed to fall in the low-paid industries, and it has generally been defined as the amount necessary to maintain the woman worker in health and decent comfort. Nor does the minimum wage have the effect of compelling the employer to employ the woman at a certain wage, or of compelling a woman to work for that wage. In its essence, the legal or minimum wage is prohibitory, not compulsory in character. The State, in effect, says that to employ women at a wage that is insufficient to sustain them is a public menace, and therefore that danger is prohibited, just as is prohibited the erection of a factory building without proper fire escape exits or sanitary arrangements.

There is a popular impression that in fixing the minimum wage, the Legislature passes a law saying that no woman shall be employed at less than a certain sum per day or per week. That is not the kind of minimum wage law contemplated by the pending bill or was it ever recommended by any agency in this State. The minimum wage we have under consideration is the determination by a commission with the assistance of wage boards made up of representatives of employers, employees and the public, of the sum necessary to maintain women and minor workers in health and decent comfort in any given industry in any given locality.

Remove from your mind any idea you may have that this legislation is sought as a matter of favor to any class of people in our State and look at it from the broad viewpoint, that its enactment is sought in the interest of the State itself. Wages that are so low as not to enable women to sustain themselves involve danger not only to the women themselves, but to the State, danger to health, danger to moral standards, danger to society and the race.

When less than a living wage is received, how is the difference made up, for made up it must be in some form. The woman worker pays in reduced health. The employer pays in greatly reduced efficiency. The whole working class to which the woman belongs pays as the result of an unfair and below-the-belt competition. The State pays through its public and private charities, its hospitals, reformatories and other eleemosynary institutions. Heredity pays in the form of poorly nurtured and delinquent offspring; and the nation pays in the impairment and impoverishment of its capital resources.

I remember a witness before the State Factory Investigating Commission summed it all up in these words: "To pay a girl what is below a living wage, is like running a thoroughbred horse without shoes. In order to econo-

mize a few dollars at one end of the line we incur a cost that runs up to hundreds of dollars."

Send for the testimony adduced before the State Factory Investigating Commission, and before you dispose of this proposition, read for yourselves what low wages mean in the way of insufficient food, lack of proper nourishment, poor housing facilities and utter lack of recreation. See if you can read as I have from this testimony, that the underpaid workers live in large part upon their reserve of vitality, of physical stamina and moral courage. See if you cannot read from it that thousands of our girls and women are annually drawing on the bank account of their vitality and will continue to do so until nature notifies them that the account is overdrawn, and they frequently die from tuberculosis or some other disease that they could have escaped had they been adequately fed, adequately clothed and properly housed.

So much for the effect upon health. What effect has the receipt of less than a living wage on moral standards? Dr. Howard Kelly, the eminent gynecologist, in an address before the International Congress on Hygiene and Demography held in Washington in 1912, said:

"We draw nearer to the true source (of prostitution) when we discover that many girls are driven to a life of shame by low wages paid * * * in many of our sweat shops and in our stores and factories, where the faces of the poor are ground off by the rich * * *. We are reaping the harvest of the distressing social surroundings of the disinherited poor, robbed of their inalienable birthright to an opportunity to make an honest living, to live a good life happily in healthy homes, to enjoy a daily modicum of recreation, and to provide comfortably for the necessities of age."

That is strong language, even from so competent an observer as Dr. Kelly, and I would hesitate to go quite so far. Excessive low wages may not be the direct or primary cause of a life of shame, but indirectly it is inevitably one of the most important contributing factors. As one of the witnesses before the Factory Investigating Commission said, "I do not think the problem ever presents itself to a girl, 'Shall I sell myself in order to make more than \$6.00 a week? But the absence of amusement, the barrenness and ugliness of life, the worry combined with unemployment does tend powerfully in that direction. Low wages puts too severe a strain upon the moral strength of the individual."

I have too high an opinion of working women to think that they turn readily to such a life because of low wages. As investigation after investigation has shown, the wonder of it is how good they remain under temptation, but it is an unfair premium to put upon goodness.

The inevitable tendency of less than a living wage is to place a heavy burden of dependency upon the State and its municipalities. This fact is strikingly borne out in a statement made to the Commission by the Commissioner of Charities of the City of New York, in which he says:

"We have, from year to year, steadily increasing numbers of dependent persons in my department, not suddenly this year more than last, but steadily increasing every year.

"Much of this dependence is unquestionably due to underpay, particularly of women and girls. The consequences of underpay are so obvious as hardly to need enumerating, such as underfeeding, comfortless, unwholesome dwelling accommodations, insufficient clothing. Pneumonia running into tuberculosis has been a wholesale incident of winter and spring among wage earners ever since Colonel Waring pointed it out years ago.

"The burden of all the consequences of underpay finally gets upon the city. We have the hospitals to maintain, including the tuberculosis sanatoria and clinics, and the wards for the insane and the melancholy, besides all these patients in the general wards, the primary cause of whose presence in the hospitals is debility. No one disputes that poverty is a continuing predisposing cause of all this chronic and acute illness. What we need to do is to try to stop all that part of it which is due to underpay."

Of particular concern to the State are its women workers. Owing to their defenceless economic condition they are rarely able to hold off from making a bad bargain, nor is there any prospect that these workers will be able to strengthen their position.

But it is said the question of wages should be left as a commercial proposition to be regulated by the law of supply and demand. The answer is that we have been doing just that for over a hundred years and the report of the Factory Commission shows how utterly inadequate that is. The results have been highly injurious to social welfare and there are no natural forces to remedy the evil unless the State will, in self-respect, step in. Our whole social progress during the last fifty years has been obtained by limiting and regulating this so-called economic law of supply and demand.

The manufacturer conserves his machines because they belong to him and when they are worn out he must buy new ones, and he sets aside a part of his profits every year to cover their depreciation, so that when the old ones are worn out funds are at hand for new ones. The case of purchasing labor on the other hand, is like renting a machine without financial responsibility for the condition in which it is returned. The employer in sweated industries for example has little selfish motives in maintaining the future efficiency of his "human machines" since they do not belong to him, and when they have been exploited to the limit they can be thrown upon the scrap heap and be replaced by others. Society, however, must meet the "depreciation charges" in the form of charities and institutions for the care of defectives and criminals. The social expense of such exploitation is often a continuing one, since the victims are not only those who have been themselves exploited, but often also their children.

The minimum wage allows fair-minded employers to do justice to their employees, whereas, at the present time, because of the unfair competition to which they are subjected, it is utterly impossible, however good their intention to do that justice.

In passing this bill you are taking no novel step. Every modern industrial state, whether under a democratic or autocratic form of government, has found it necessary to establish standards of safety, sanitation and working hours, and in other ways to interfere with the contractual relations between

employers and employees. These codes of labor laws have been enacted to protect the health and well-being of wage earners who make up a large part of the citizenship of the State. The wisdom of this policy is no longer seriously questioned, whether it be based on humanitarian sentiments or on the more scientific ground of conserving the human resources of the State.

There are three main factors affecting employment: (1) To provide a safe and sanitary place to work; (2) to prevent excessive employment; (3) to secure to the worker if she is in a class that is unable to do any collective bargaining, a wage sufficient to enable her to maintain herself in health and comfort. The State has provided for the first two. I now ask that the Legislature provide for the third.

Underpayment is just as much a cause of physical deterioration and disease as overwork or unsanitary conditions of work. It is just as cruel to underpay a woman as to overwork her, and just as wasteful from the standpoint of the State.

To say that a woman shall not contract to work for less than a living wage, is to go no further than to say that she shall not contract to work more than nine or ten hours a day, or under certain unwholesome conditions which may affect her as a mother of future citizens. Indeed, it is much easier to trace a social connection between working for a wage inadequate to maintain a decent standard of living and working more than nine or ten hours a day. There is not an argument advanced today against the minimum wage that was not advanced a hundred years ago against the first labor laws. In the debates on the first child labor law, the first law limiting the hours of labor of women and the first laws providing for proper safety and sanitary conditions, you will find just the same social, political and economic objections that are today being urged against a living wage for women and minors.

We began by limiting child labor, at the outset limiting it first to twelve hours, and then to eleven, and then to ten, and nine hours; and then when we found that enough was not accomplished in regulating child labor, we had to pass a law to limit the hours of labor for women. There again, a generation, considerably more than a generation, was required to reduce the hours of labor for women; and at the same time we found we had to provide, in addition to the reduction of the hours of labor, specific times in which women might obtain rest; and then we had to enact all the provisions in regard to sanitation and safety in factories. We found that even this was not sufficient, and, in the interest of the community, we had to protect the wage-earners in a great many other ways. We have had to protect them in the different States of the Union, in many different ways, which have been held constitutional by the Supreme Court of the United States, such as the fortnightly payments provided in your own law, and upheld in *Williams v. Erie R. R.*; the anti-truck laws by which employers who give store orders must stand ready to cash those orders at par; the coal-screen laws, under which coal must be weighed and measured before screening, in order to fix the compensation; the employers' liability laws, and recently by workmen's compensation laws.

It has already been proved that the proper administration of a minimum wage law is entirely practical and has a tendency not merely to raise the standard of wages in the industry, but to place the industry itself upon a

more wholesome and less precarious basis. The enactment of a minimum wage law would be no new and untried step.

In 1904, the first minimum wage legislation was enacted in New Zealand. Similar legislation was enacted by New South Wales in 1901, by Western Australia in 1902 and by the Australian Commonwealth in 1904. These laws were designed primarily for the settlement of industrial disputes, but the court created by the law was also given power to fix minimum rates of wages and with that feature alone we are concerned. In 1896, the first act providing for special boards to fix minimum wages in any trade was enacted in Victoria. This act of legislation was later followed by South Australia in 1900, by Queensland in 1908, and by Tasmania in 1910. In England, minimum wage boards were established in four industries in 1910, and extended in 1913 to four other larger and more important ones, the whole coal mining industry of England and Wales having also been brought under this legislation. The success of the boards in Australia is shown by their continuous increase from five boards in 1896 to 143 boards in 1913.

In this country, state commissions have determined minimum wage rates in Oregon, Massachusetts and Minnesota, and are preparing to do so in California, Colorado, Nebraska and Wisconsin. Commissions of inquiry on the subject have reported in Ohio, Indiana, Louisiana and Connecticut. The movement for such legislation is therefore beyond the state of mere agitation or discussion. Its usefulness and practicability is proven in various parts of the world.

I shall not take up your time to go into the various economic objections that have been urged against the adoption of a minimum wage and the answers thereto. They are discussed fully in the fourth report of the Factory Commission, copies of which you will find in your own library.

If you will pass this legislation and send it to me, we will both be entitled to equal credit for removing one of the greatest industrial evils of our day.

TEXT OF LABOR LAWS OF 1919

[Arranged in chronological order of enactment as indicated by chapter numbers. In the case of acts which make changes in the existing law, new matter introduced is printed in italic type and old matter omitted is enclosed in brackets. Acts containing new matter only are in Roman type throughout.]

Chapter 22.

An Act to amend chapter four hundred and fourteen of the laws of nineteen hundred and eighteen, entitled "An act to create a state commission to inquire into the subject of retirement pensions, allowances and annuities for state and municipal officers and employees, and making an appropriation therefor," generally.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter four hundred and fourteen of the laws of nineteen hundred and eighteen, entitled "An act to create a commission to inquire into the subject of retirement pensions, allowances and annuities for state and municipal officers and employees, and making an appropriation therefor," is hereby amended by inserting therein a new section, to be section one-a, to read as follows:

§ 1-a. *Eligibility.* A member of the commission shall not be disqualified from holding any other office, state or municipal, nor forfeit the same by reason of his appointment under this act, notwithstanding the provisions of any city charter.

§ 2. Section five of such act is hereby amended to read as follows:

§ 5. Report to governor and legislature. The commission shall on or before February first, nineteen hundred and [nineteen] *twenty*, report the result of its inquiry to the governor and legislature, including such proposed legislation as it may deem advisable.

§ 3. This act shall take effect immediately.

Approved February 26.

Chapter 64.

An Act to repeal chapter eight hundred and thirteen of the laws of nineteen hundred and seventeen, entitled "An act to define the policy of the state of New York in relation to the production, supply and control of the distribution of the necessities of life, to insure an adequate supply thereof at a reasonable price, to prevent unreasonable profits by reason of speculation, to extend such policy in aid of the national government in providing for the national security and defense, to amend the farms and markets law in relation to markets in cities, and to transfer the powers and duties conferred on a commission by chapters two hundred and five and five hundred and six of the laws of nineteen hundred and seventeen to the commission created by this act," except the provision thereof expressly amendatory of the farms and markets law, and transferring

certain functions of the state food commission to other departments, together with funds for the exercise of such functions.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

* * * * *

§ 4. The state food commission, having, by statute, authority to provide for the employment of emergency farm labor agents to recruit competent farm hands during the season of nineteen hundred and nineteen, the sum of twenty thousand dollars of the unexpended balance of appropriations made to carry out the provisions of chapter eight hundred and thirteen of the laws of nineteen hundred and seventeen, shall be available for expenditure by the state industrial commission for such purpose, payable by the state treasurer on the order of the latter commission, after audit by and upon the warrant of the comptroller; but such moneys shall not be available for the payment of liabilities incurred after October first, nineteen hundred and nineteen.

* * * * *

§ 8. The unexpended balance of appropriations made for carrying out the provisions of the act are hereby repealed, or of any reappropriation thereof, except the amounts made available by this act, for expenditure by the farms and markets council and the state industrial commission, shall cease to be available after such repeal takes effect, or after the previous abolition of the state food commission by the governor, except for the payment of liabilities incurred on or before such abolition or repeal takes effect. The unexpended balance, if any, of the revolving fund provided for by the act hereby repealed, after the payment of liabilities chargeable against the same, shall revert to the general fund of the state treasury.

§ 9. Notwithstanding such repeal, the provisions of the act repealed shall be deemed in force so far as they provide for or authorize the functions exercised by the bureau of food production, transferred by this act to the department of farms and markets, or the employment of emergency farm labor agents to recruit competent farm hands during the season of nineteen hundred and nineteen.

§ 10. Sections one and two of this act shall take effect June thirtieth, nineteen hundred and nineteen; but in all other respects this act shall take effect immediately.

Approved March 19.

Chapter 85.

An Act to amend the labor law, in relation to creating in the department of labor the bureau of women in industry, and making appropriations for salaries of employees in such bureau.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section forty-two of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as last amended by chapter six hundred and seventy-four of the laws of nineteen hundred and fifteen, is hereby amended to read as follows:

§ 42. Bureaus. The department of labor shall have the following bureaus: inspection; statistics and information; mediation and arbitration; industries and immigration; employment; workmen's compensation; *women in industry*; and such other bureaus as the commission may deem necessary, *subject to appropriation by the legislature*. Each bureau and division of the department and the persons in charge thereof shall be subject to the supervision and direction of the commission and of any commissioner duly designated to supervise the work of such bureau, and in addition to their respective duties as prescribed by this chapter shall perform such other duties as may be assigned to them by the commission.

§ 2. The following sums, or so much thereof as may be necessary for the purpose of the appropriation, are hereby appropriated, respectively, for salaries of employees in the bureau of women in industry, of the department of labor:

Chief	\$2,500 00
Five investigators, at \$1,500.00 each.....	7,500 00
Stenographer	900 00

The amount specified or appropriated for any such salary shall be the salary for the position indicated for one year. The moneys appropriated shall be paid out by the state treasurer on the warrant and audit of the comptroller, upon vouchers approved by the state industrial commission.

§ 3. This act shall take effect immediately.

Approved March 20.

Chapter 155.

An Act authorizing the industrial commission to establish and maintain additional employment offices and branches to meet the emergency created by the curtailment of the United States employment service in this state, making an appropriation therefor, and authorizing the commission to accept funds and personal service from sources other than the state.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The sum of fifty thousand dollars (\$50,000), or so much thereof as may be needed, is hereby appropriated to the state industrial commission for the establishment, and maintenance during the current fiscal year, of such additional employment offices and branch offices as the commission may deem needed to meet the emergency created by the curtailment of the United States employment service in this state.

§ 2. In addition to the money appropriated by this act the industrial commission is hereby authorized to accept and receive for such purposes money, facilities and personal service from the authorities of the United States, from any city government, from voluntary organizations or from private sources. The commission shall account with the state comptroller for all money so received and shall file with him vouchers for all expenditures made therefrom, which shall be examined and audited by him.

§ 3. This act shall take effect immediately.

Approved April 7.

Chapter 196.

An Act to amend the public buildings law, in relation to period of service of veterans previous to retirement.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision eight of section three of chapter forty-eight of the laws of nineteen hundred and nine, entitled "An act relating to public buildings, constituting chapter forty-four of the consolidated laws," as added by chapter one hundred and forty-two of the laws of nineteen hundred and eighteen, is hereby amended to read as follows:

8. Have power, in their discretion, to retire any employee in the department of public buildings who is an honorably discharged soldier, sailor or marine of the army or navy of the United States in the late civil war, and who shall have been employed for a continuous period of five years or more in such department or for a continuous period of three years or more in such department, after at least five years of previous service in another state office, department or institution, and who shall have reached the age of seventy years. Such retirement may be upon the application of such veteran, or the trustees may take such action on their own motion. Upon being retired pursuant to this act such person shall be paid in the same manner that the salary or wages of his former position were customarily paid to him an annual sum equal in amount to one-half the salary or wage paid to him in the last year of his employment, provided, however, that the amount so paid to such retired veteran shall not exceed the sum of one thousand dollars per annum.

§ 2. This act shall take effect immediately.

Approved April 11.

Chapter 206.

An Act to amend the prison law, in relation to funds available for earnings of prisoners.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one hundred and eighty-five of chapter forty-seven of the laws of nineteen hundred and nine, entitled "An act relating to prisons, constituting chapter forty-three of the consolidated laws," as last amended by chapter two hundred and eighty-eight of the laws of nineteen hundred and fifteen, is hereby amended to read as follows:

§ 185. Earnings of prisoners. Every prisoner confined in the state prisons, reformatories and penitentiaries, and every prisoner serving sentence in the county jails, may, in the discretion of the managing authority of said institution, receive compensation from the earnings of the institution in which he is confined, such compensation to be graded by such managing authority for the time such prisoner may work, but in no case shall the compensation allowed to such convicts exceed in amount ten per centum of the earnings of the institution in which they are confined; provided, however, that any compensation in excess of one and one-half cents per day shall be based upon

an amount of work or labor performed by him at his option in excess of a given amount fixed for him to perform for the benefit of the state, or political subdivision thereof, and in such case his compensation may, in the discretion of such managing authority, be a sum equal to the value of the additional work or labor so performed or to the value of the product or portion thereof produced by such additional work or labor, except that his total compensation shall not in any case exceed the amount of twenty cents a day. The difference in the rate of compensation shall be based both on the pecuniary value of the work performed, and also on the willingness, industry and good conduct of such prisoner; provided, that whenever any prisoner shall forfeit his good time for misconduct or violation of the rules or regulations of the prison, reformatory, penitentiary or county jail, he shall forfeit out of the compensation allowed under this section such an amount as may be determined by the managing authority of any such institution, not to exceed twenty-five cents for each day of good time so forfeited. The managing authority of any such institution may institute and maintain a uniform system of fines, to be imposed at his discretion, in place of his other penalties and punishments, to be deducted from such compensation standing to the credit of any prisoner, for misconduct by such prisoner.

If, at any time, the earnings from the industries of a prison are insufficient to provide for the payment hereafter of one and one-half cents per day to each prisoner, the superintendent of state prisons may transfer to such prison necessary moneys to provide for such payments, from moneys, if any, in the capital fund or funds of another state prison or prisons in excess of the needs of the latter institution or institutions; but the amount so transferred to a prison shall not exceed a sum which, together with its own moneys available for payments to prisoners, will provide for the payment of one and one-half cents per day to each prisoner, computed on the basis of its population.

§ 2. This act shall take effect immediately.

Approved April 11.

Chapter 207.

An Act to amend the prison law, in relation to retirement.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section four hundred and ten of chapter forty-seven of the laws of nineteen hundred and nine, entitled "An act relating to prisons, constituting chapter forty-three of the consolidated laws," as added by chapter seven hundred and twelve of the laws of nineteen hundred and seventeen and amended by chapter eighty-nine of the laws of nineteen hundred and eighteen, is hereby amended to read as follows:

§ 410. When guards and other employees may be retired. A guard or other employee in a state prison or reformatory, or an employee in the prison department, who shall have served a term of employment of [thirty] twenty-five years, which employment, in the case of a guard or employee in a state prison or reformatory, was either wholly in such prison or reformatory or partly therein and partly in another prison or reformatory or in a state hospital or penitentiary, or which employment, in the case of an

employee of the prison department, was either wholly in such department, or partly therein and partly as a guard or other employee in a prison, reformatory, hospital or penitentiary, or in one or more of them, and which, in the case of any such guard or employee in a state prison or reformatory or employee in the prison department, was either in one consecutive term or in two or more terms which shall together amount to a total period of employment of [thirty] *twenty-five* years, may, if unable to perform his regular duties in a manner satisfactory to the superintendent of prisons or superintendent of reformatories, as the case may be, be retired as hereinafter provided at one-half the salary paid to him for the year immediately preceding such retirement. *Any such guard or employee who shall have reached the age of seventy years, who shall have served a term of employment of not less than fifteen years, may, if unable to perform his regular duties in a manner satisfactory to the superintendent of prisons or the superintendent of reformatories, as the case may be, be retired as hereinafter provided, and be paid such proportion of one-half of the salary paid to him for the year immediately preceding such retirement, as the number of years served bears to the full term of twenty-five years.* Such payment shall in no case exceed one thousand dollars per annum and shall be payable out of moneys appropriated by the state for the salary of such guard or employee, and shall not be revoked, diminished or subject to the claims of creditors. Such guard or employee may be retired when such action shall be in the interest of the state in the following manner: A guard or employee in a state prison or an employee in the prison department, by the superintendent of prisons, a guard or employee in a state reformatory, by the board of managers of such reformatory, on the recommendation of the superintendent of reformatories.

Within the meaning of this section, an employee of the prison department means any person employed under the superintendent of state prisons.

§ 2. This act shall take effect immediately.

Approved April 11.

Chapter 228.

An Act to amend the labor law, in relation to the inspection of boilers.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section ninety-one of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as added by chapter three hundred and forty-seven of the laws of nineteen hundred and fifteen, is hereby amended to read as follows:

§ 91. Boiler inspection. The commission[er of labor] shall cause to be inspected *at least once each year*, all boilers used for generating steam or heat [for factory purposes] which carry a steam pressure of [ten pounds or] *more than fifteen pounds* to the square inch, except where a certificate is filed with such commission[er, or shall have been heretofore filed with the state fire marshal under the provisions of former section three hundred and fifty-seven of the insurance law,] by a duly authorized insurance company, in conformity with the rules [or] *and* regulations of the [officer with whom such certificate shall have been filed] *commission*, and certifying that upon

such inspection such boilers have been found to *comply with the rules and regulations adopted by the commission* and to be in a safe condition. Every such insurance company shall report to the commission[er] all boilers insured by them coming within the provisions of this section including those rejected, together with the reasons therefor. A fee of five dollars shall be charged the owner or lessee of each boiler *internally inspected and two dollars for each external inspection made* by the inspector of the [department of labor] *commission* but not more than the sum of [ten] *seven* dollars shall be collected for the inspection of any one boiler for any year. Such fee shall be payable within thirty days from the date of such inspection. If a certificate of inspection[, heretofore filed in the office of the state fire marshal, or hereafter] filed in the office of the commission[er of labor] shows a boiler to be in need of repairs or in an unsafe or dangerous condition, the commission[er of labor] shall order such repairs to be made to such boiler as in [his] *its* judgment may be necessary and [he] *it* shall order the use of such boiler discontinued until such repairs are made or such dangerous and unsafe conditions remedied. Such order shall be served upon the owner or lessee of the boiler, personally or by mail, and any owner or lessee failing to comply with such order within a time to be specified therein, which shall be not less than ten days from the service of the order if served personally and not less than fifteen days from the mailing thereof if served by mail, shall be liable to a penalty of fifty dollars for each day's neglect thereafter. Every owner or lessee of any such boiler who shall use or allow a boiler to be used by any one in his employ after receiving notice that such boiler is in an unsafe or dangerous condition shall be subject to a penalty of not to exceed five dollars for each day on which such boiler is used after [the] receipt of such notice. Owners and lessees of boilers shall attach to such boilers the numbers assigned by the commission[er of labor] under a penalty of five dollars for each day's failure so to do after such numbers have been assigned.

The provisions of this section shall not apply to cities in which boilers are regularly inspected by competent inspectors acting under the authority of local laws or ordinances. *Said cities shall enforce the boiler code as adopted by the commission.*

Boilers subject to inspection by the public service commission, inspectors of steam vessels under the state superintendent of public works and United States government are exempted.

§ 2. This act shall take effect immediately.

Approved April 15.

Chapter 236.

An Act to provide for the manufacture of street and highway signs and motor vehicle number plates, and similar devices, in state prisons, and making an appropriation therefor.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The superintendent of state prisons, as soon as practicable, shall establish in such state prisons as he shall deem best adapted for the purpose, the industry of manufacturing street and highway signs and similar articles for use by the state and municipalities, and also number plates for

motor vehicles, badges for chauffeurs and similar accessories for motor vehicles or the operation thereof; and he shall install the necessary machinery, tools and apparatus for such industry, within the amount appropriated by this act. The sum of seventy-five thousand dollars (\$75,000), or so much thereof as may be necessary, is hereby appropriated for carrying out the provisions of this act. The moneys appropriated shall be paid out by the state treasurer on the warrant of the comptroller to the order of the superintendent of state prisons. The provisions of the prison law relating to the purchase of machinery, tools and apparatus for prison industries shall apply to the establishment of the industry provided for by this act; and the operation of such industry, when established, shall be governed by the provisions of such law relating to other prison industries.

§ 2. This act shall take effect immediately.

Approved April 15.

Chapter 278.

An Act to amend the code of civil procedure, in relation to exemptions and executions.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section thirteen hundred and ninety-one of the code of civil procedure is hereby amended to read as follows:

§ 1391. *Additional exemptions of personal property; executions against wages and other increment.* In addition to the exemptions, allowed by the last section, necessary household furniture, working tools and team, professional instruments, furniture and library, not exceeding in value two hundred and fifty dollars, together with the necessary food for the team, for ninety days, are exempt from levy and sale by virtue of an execution, when owned by a person, being a householder, or having a family for which he provides, except where the execution is issued upon a judgment, recovered wholly upon one or more demands, either for work performed in the family as a domestic or for the purchase money of one or more articles, exempt as prescribed in this or the last section. Where a judgment has been recovered and where an execution issued upon said judgment has been returned wholly or partly unsatisfied, and where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor or shall thereafter become due and owing to him, to the amount of twelve dollars or more per week, the judgment creditor may apply to the court in which said judgment was recovered or the court having jurisdiction of the same without notice to the judgment debtor and upon satisfactory proof of such facts by affidavits or otherwise, the court, if a court not of record, a judge or justice thereof, must issue, or if a court of record, a judge or justice, must grant an order directing that an execution issue against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor, and on presentation of such execution by the officer to whom delivered for collection to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing, or may thereafter become due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the

wages, earnings, debts, salary, income from trust funds or profits, due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or until modified as hereinafter provided, but only one execution against the wages, debts, earnings, salary, income from trust funds or profits of said judgment debtor shall be satisfied at one time and where more than one execution has been issued or shall be issued pursuant to the provisions of this section against the same judgment debtor, they shall be satisfied in the order of priority in which such executions are presented to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing. It shall be the duty of any person or corporation, municipal or otherwise, to whom said execution shall be presented, and who shall at such time be indebted to the judgment debtor named in such execution, or who shall become indebted to such judgment debtor in the future, and while said execution shall remain a lien upon said indebtedness to pay over to the officer presenting the same, such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied, and such payment shall be a bar to any action therefor by any such judgment debtor. If such person or corporation, municipal or otherwise, to whom said execution shall be presented shall fail, or refuse to pay over to said officer presenting said execution, the percentage of said indebtedness, he shall be liable to an action therefor by the judgment creditor named in such execution, and the amount so recovered by such judgment creditor shall be applied towards the payment of said execution. Either party may apply at any time to the court from which such execution shall issue, or to any judge or justice issuing the same, or to the county judge of the county, and in any county where there is no county judge, to any justice of the city court upon such notice to the other party as such court, judge, or justice shall direct for a modification of said execution, and upon such hearing the said court, judge or justice may make such modification of said execution as shall be deemed just, and such execution as so modified shall continue in full force and effect until fully paid and satisfied, or until further modified as herein provided. This section, so far as it relates to wages and salary, due and owing or to become due and owing to the judgment debtor, shall not apply to judgments recovered more than ten years prior to September first, nineteen hundred and eight, nor to judgments heretofore or hereafter recovered upon such judgments, and any execution heretofore issued upon such judgments pursuant to an order heretofore granted under this section shall, when this act takes effect, cease to be a lien and continuing levy upon wages and salary thereafter to become due and owing to the judgment debtor. *No execution under this section shall be hereafter issued upon a judgment against an officer or employee of any city or any county of the state or of the board of education of any such city, unless it shall contain the name of the judgment debtor in full, his title or position, and the bureau, office, department or subdivision thereof in which he is employed; and if a person so employed shall resign or be dismissed while an execution issued pursuant to the provisions of this section is wholly or partly unsatisfied, and he be reinstated or re-employed, such execution shall*

lapse and no further deduction shall be made thereon unless such reinstatement or re-employment occur within ninety days after such resignation or dismissal. All executions filed in any department against the wages, debts, earnings and salary of officers or employees of any city or of any county by the state, or of the board of education of any such city within five days prior to the date on which payment of wages, debts, earnings and salary are paid shall not become a lien against the wages, debts, earnings and salary that are payable on the said payroll but shall become a lien upon the wages, debts, earnings and salary which shall become due or owing to the judgment debtor thereafter.

§ 2. This act shall take effect September first, nineteen hundred and nineteen.

Approved May 3.

Chapter 332.

An Act to amend the inferior criminal courts act of the city of New York, in relation to the segregation of certain females.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter six hundred and fifty-nine of the laws of nineteen hundred and ten, entitled "An act in relation to the inferior courts of criminal jurisdiction in the city of New York, defining their powers and jurisdiction and providing for their officers," is hereby amended by inserting therein a new section, to follow section seventy-seven-a, to be section seventy-seven-b, to read as follows:

§ 77-b. Segregation of certain females. Whenever in the city of New York any female or females are accused or convicted before a magistrate of any crime arising out of an industrial dispute, such females shall be segregated from the other inmates thereof in any jail, institution or prison to which they may be committed.

§ 2. This act shall take effect immediately.

Approved May 3.

Chapter 402.

An Act to amend the labor law, in relation to the definition of a mercantile establishment.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The paragraph defining mercantile establishment of section two of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," such section having been last amended by chapter six hundred and ninety-four of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

The term "mercantile establishment" means any place where one or more persons are employed where goods, wares or merchandise are offered for sale and shall include any building, shed or structure, or any part thereof, which is occupied in connection with such establishment. The provisions of this chapter affecting structural changes and alterations shall not apply to mer-

cantile establishments where less than six persons are employed except as otherwise prescribed by the state industrial commission in its rules.

§ 2. This act shall take effect immediately.

Approved May 5.

Chapter 403.

An Act to amend the labor law, in relation to the salaries of factory and mercantile inspectors.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section fifty-four of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as renumbered and last amended by chapter one hundred and forty-five of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

§ 54. Inspectors. 1. Factory inspectors. There [shall] *may be appointed* not [less] *more than* [one] *two* hundred and twenty-five factory inspectors, not more than [thirty] *fifty* of whom shall be women, *within the appropriation granted by the legislature*. Such inspectors shall be appointed by the commission[er of labor] and may be removed by [him] *it* at any time. The inspectors shall be divided into seven grades. Inspectors of the first grade[, of whom there shall be not more than ninety-five,] shall each receive an annual salary of one thousand two hundred dollars; inspectors of the second grade[, of whom there shall be not more than fifty,] shall each receive an annual salary of one thousand five hundred dollars; inspectors of the third grade[, of whom there shall be not more than twenty-five,] shall each receive an annual salary of one thousand eight hundred dollars; inspectors of the fourth grade[, of whom there shall be not more than ten] shall each receive an annual salary of two thousand dollars and *may* [shall] be attached to the division of industrial hygiene and act as investigators in such division; inspectors of the fifth grade, of whom there shall be not more than nine, one of whom shall be able to speak and write at least five European languages in addition to English, shall each receive an annual salary of *three* [two] thousand five hundred dollars and shall act as supervising inspectors; inspectors of the sixth grade, of whom there shall be not less than three and one of whom shall be a woman, shall act as medical inspectors and shall each receive an annual salary of two thousand five hundred dollars; inspectors of the seventh grade, of whom there shall be not less than four, shall each receive an annual salary of three thousand five hundred dollars; all of the inspectors of the sixth grade shall be physicians duly licensed to practice medicine in the state of New York. Of the inspectors of the seventh grade one shall be a physician duly licensed to practice medicine in the state of New York, and he shall be the chief medical inspector; one shall be a chemical engineer; one shall be a mechanical engineer, and an expert in ventilation and accident prevention; and one shall be a civil engineer, and *one* an expert in fire prevention [and building construction]. *Inspectors of the first grade who have served in said grade two years at the time this section as amended takes effect, or who hereafter will have served two years in said grade, shall be placed in the second grade. Inspectors of the second grade, who have*

served in said grade two years at the time this section as amended takes effect, or who hereafter will have served two years in said grade, shall be placed in the third grade. Inspectors of the third grade, who have served in said grade two years at the time this section as amended takes effect, or who hereafter will have served two years in said grade, shall be placed in the fourth grade.

2. Mercantile inspectors. The commission[er of labor] may appoint from time to time not more than twenty mercantile inspectors, not less than four of whom shall be women, and who may be removed by [him] it at any time. The mercantile inspectors shall [may] be divided into three grades [but not more than five shall be of the third grade]. Each mercantile inspector of the first grade shall receive an annual salary of [one thousand dollars] one thousand two hundred dollars; of the second grade an annual salary of [one thousand two hundred dollars] one thousand five hundred dollars; and of the third grade an annual salary of [one thousand five hundred dollars] one thousand eight hundred dollars. Inspectors of the first grade who have served in said grade two years at the time this section as amended takes effect, or who hereafter will have served two years in said grade, shall be placed in the second grade. Inspectors of the second grade, who have served in said grade two years at the time this section as amended takes effect, or who hereafter will have served two years in said grade, shall be placed in the third grade.

§ 2. The sum of twenty-two thousand eight hundred dollars (\$22,800), or so much thereof as may be needed, is hereby appropriated for carrying out the provisions of this act.

§ 3. This act shall take effect July first, nineteen hundred and nineteen.

Approved May 5.

Chapter. 404.

An Act to authorize the establishment of industrial aid bureaus by municipal corporations and the furnishing of assistance to unemployed during the war readjustment period.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Establishment of bureau; commissioners. The governing board of any municipal corporation of the state may establish therein an industrial aid bureau, under the jurisdiction of one or more commissioners, to be appointed by such authority, in such manner, for such terms and at such compensation as such governing board may determine. Such commissioners shall be known as industrial aid commissioners and may employ such assistants as may be needed to carry on the work of such bureau. Such assistants shall receive such compensation for their services as may be fixed by the governing board of such municipal corporation. Any bureau so established may be abolished by the governing board of the municipal corporation whenever in its judgment the need for such bureau no longer exists.

§ 2. Powers of industrial aid bureaus. An industrial aid bureau shall list all unemployed persons within the municipal corporation for which such bureau shall have been established and shall assist such persons in obtaining employment. It shall also have power, in case of destitution, to furnish

necessary shelter, fuel, food and clothing to such unemployed persons who have been residents of such municipal corporation for at least one year prior to receiving such aid, and to their dependents, until such time as such persons are able to obtain employment and remuneration therefor. A person receiving aid from such bureau shall not by reason thereof be deemed a poor person within the meaning of the poor law.

§ 3. Temporary loans for purposes of act. The governing board of a municipal corporation in which an industrial aid bureau shall be established pursuant to this act shall have power to raise by temporary loan such sums as may be needed to maintain such bureau, pay the compensation of commissioners and employees, and furnish the aid authorized by this act. The amount of any such loan shall be included in the next annual tax levy. The sums so authorized to be raised shall be in addition to all other sums authorized by any general or special law, and no limitation or restriction contained in any such law as to the amount of money that may be raised by taxation in such municipal corporation shall apply to such sums.

§ 4. Definitions. The term "municipal corporation," as used in this act, means a county, town, city or village. The term "governing board," means the board of supervisors of a county, the town board of a town, the common council, board of aldermen, or other similar legislative governing board, council, commission or body, of a city, or the board of trustees of a village. In a city of over one million inhabitants the term "governing board" shall mean the board of estimate and apportionment.

§ 5. This act shall take effect immediately.

Approved May 5.

Chapter 420.

An Act to amend the prison law, in relation to the employment of convicts on public highways.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one hundred and seventy-nine of chapter forty-seven of the laws of nineteen hundred and nine, entitled "An act relating to prisons, constituting chapter forty-three of the consolidated laws," as last amended by chapter three hundred and eighteen of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

§ 179. Employment of convicts on public highways. The superintendent of state prisons may employ or cause to be employed the convicts confined in the state prisons in the repair, *maintenance, construction or improvement* of [state and county] *the public highways* at any place within the state, *outside of an incorporated village or city*, upon request *or with the consent* of the state commission of highways, [the construction or improvement of state or county highways constructed or improved by any board of supervisors or town board under a contract with such commission of highways, upon request as provided in section one hundred and thirty-one of the highway law, and also in the improvement or repair of any other public highway] *in the case of state or county highways, or upon the request or with the consent of the officer having charge of such repairs, maintenance, construction or improvement, in the case of any other highway.* When

engaged in the maintenance and repair of [state or county highways] *a highway under the jurisdiction of county or town authorities*, the [department of highways shall compensate the prison department for such convict labor on a basis of actual days each convict is so employed at a price per day for such employment to be agreed upon between the superintendent of state prisons and the commissioner of highways, such price taking into consideration the efficiency of the convicts so employed and the ruling price for ordinary labor.] *county or town receiving the benefit of such labor shall pay such reasonable compensation as may be agreed upon, not exceeding one dollar per day for each prisoner.* The [department of highways] *local highway authorities of the county or town in which such labor is performed* shall report to the superintendent of state prisons, or the agent and warden of the prison from which the convicts are employed, at the end of each week, the number of days' labor each convict has performed, and the prison department shall render a bill to the [department of highways at least once each month] *county or town* covering such labor.

Upon the payment [by the department of highways] of such bill, the agent and warden of the prison rendering it shall immediately deposit the money received for such labor in a bank designated by the comptroller as the depository for the maintenance fund of such prison, to the credit of a separate fund to be called the "prison highway labor fund." A statement of such money so received and deposited shall immediately be sent by the agent and warden to the comptroller and the superintendent of state prisons, which statement shall show the date when such money was received, and shall be receipted by the proper officer of such bank and verified by the oath of the agent and warden of such prison to the effect that the sum so deposited was all the money received since the date of the last deposit, from the labor of convicts on highways as provided by this section.

The money so received and deposited by such agent and warden shall be only available for the maintenance, housing, purchase of food, transportation and guarding of such convicts, and any other necessary expense while engaged in [such] highway work, and shall be subject to the check of the agent and warden of such prison when countersigned by the comptroller in the payment of such accounts. The comptroller shall countersign such checks only when the same are drawn for the payment of vouchers properly chargeable to this fund and approved by the superintendent of state prisons.

On December thirty-first of each year the agent and warden of such prison shall draw his check in favor of the state treasurer for the balance remaining to the credit of the "prison highway labor fund" at that date and forward it to the comptroller, who shall countersign such check and deposit the same with the state treasurer to be added to the general fund.

The expense of maintenance of such convicts while employed in the improvement and repair of town highways under a special appropriation shall not exceed a rate fixed per diem per convict by the superintendent of state prisons at the beginning of the work and shall be paid by the agent and warden of the prison concerned from the special appropriation made therefor. Any expense exceeding such fixed rate shall be paid by the agent and warden of the prison concerned from the regular prison maintenance appropriation for such prison.

The agent and warden of each prison may make such rules as he may deem necessary for the proper care, custody and control of such prisoners while so employed, subject to the approval of the superintendent of state prisons; *but the work shall be performed according to the direction of the state commissioner of highways or of the local highway authorities in charge of such repairs, maintenance, construction or improvement.*

A state, county or town highway herein referred to is a state, county or town highway as defined in the highway law.

The superintendent of state prisons is hereby authorized to purchase any machinery, tools and materials necessary in such employment, except employment on a state or county highway.

§ 2. This act shall take effect immediately.

Approved May 5.

Chapter 458.

An Act to amend the workmen's compensation law, in relation to securing compensation to town and county employees by taxation.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section fifty of chapter eight hundred and sixteen of the laws of nineteen hundred and thirteen, entitled "An act in relation to assuring compensation for injuries or death of certain employees in the course of their employment and repealing certain sections of the labor law relating thereto, constituting chapter sixty-seven of the consolidated laws," as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen and last amended by chapter seven hundred and five of the laws of nineteen hundred and seventeen, is hereby amended by adding a new subdivision after subdivision three and before the last two unnumbered paragraphs of such section, to be subdivision four, to read as follows:

4. If a county, by adopting the taxation system provided in this chapter.

§ 2. Such chapter is hereby amended by adding a new section, to be section thirty-five, to read as follows:

§ 35. Compensation to town, village, city and county employees. The board of supervisors of each county of the state may provide for the payment of compensation under this chapter to town, village, city and county employees by taxation, which shall be known as the "taxation system" of paying such compensation. Whenever compensation shall be awarded under this chapter to a town, village, city or county employee, in a county which has adopted such taxation system, the county treasurer of such county forthwith shall pay such award out of any money of such county applicable thereto. If he have no such money in his possession or under his control, he shall immediately borrow upon the credit of the county by temporary loan sufficient money to pay and he shall pay such award. The money so borrowed shall be a county charge and shall be included by the board of supervisors in the next succeeding tax levy, in addition to all other sums authorized to be raised thereby, and such money shall be levied by such board on the taxable property in such county and, when raised, shall be paid

into the county treasury and used to reimburse the county for any money advanced or to pay money borrowed to pay awards under this chapter.

§ 3. This act shall take effect immediately.

Approved May 5.

Chapter 472.

An Act to amend the highway law, in relation to motor vehicles.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision two of section two hundred and eighty-two of chapter thirty of the laws of nineteen hundred and nine, entitled "An act relating to highways, constituting chapter twenty-five of the consolidated laws," as added by chapter three hundred and seventy-four of the laws of nineteen hundred and ten, such subdivision having been last amended by chapter seven hundred and sixty-nine of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

2. Restriction on operation. No person shall operate or drive a motor vehicle who is under eighteen years of age, unless such person is accompanied by a duly licensed chauffeur or the owner of the motor vehicle being operated. No person shall operate or drive a motor vehicle in a county wholly included within a city [for more than ten days in any calendar year] unless such person is a duly licensed chauffeur or operator, whether the owner of such vehicle or otherwise; *provided, however, that a person of the age of eighteen years and upwards who shall reside outside of such county and within the state may so operate or drive, except as a chauffeur, for not to exceed ten days in any year without being so licensed. The secretary of state may, however, in his discretion, grant a written permit to any person desiring to fit himself to so operate or drive a motor vehicle, within such county. Such permit shall not continue for more than ten days from its date, but may be renewed from time to time not to exceed a total of thirty consecutive days. The holder thereof shall not so operate or drive unless at all times under the immediate supervision and control of an operator or chauffeur duly licensed under this article. Such holder, operator or chauffeur shall be liable for any violation of this act or of any local ordinance, rule or regulation permitted thereunder while so operating. The secretary of state may make any suitable regulations concerning the issue and use of such permits and may demand a fee of fifty cents for each such permit or renewal thereof.*

§ 2. Subdivisions one and two of section two hundred and eighty-nine of such chapter, as added by chapter three hundred and seventy-four of the laws of nineteen hundred and ten, and last amended by chapter seven hundred and sixty-nine of the laws of nineteen hundred and seventeen, are hereby amended to read as follows:

§ 289. License of operators and chauffeurs; renewals. 1. License of operators or chauffeurs. Application for license to operate motor vehicles, as an operator or chauffeur, may be made, by mail or otherwise, to the secretary of state or his duly authorized agent upon blanks prepared under his authority in such form and with such proof of the applicant's fitness as the secretary of state shall in his discretion determine. The secretary of state shall

appoint examiners and cause examinations to be held at convenient points throughout the state as often as may be necessary. Such application, if for a chauffeur's license, shall be accompanied by a photograph of the applicant in such numbers and forms as the secretary of state shall prescribe, said photograph to be taken within thirty days prior to the filing of said application and to be accompanied by the fee provided herein. An owner of a motor vehicle or a member of his immediate family shall be granted an operator's license, subject to this article[, upon application, without examination]. Before [such] an operator's or chauffeur's [a] license is granted, the applicant [if not the owner of a motor vehicle or a member of his immediate family] shall pass such examination as to his qualifications as the secretary of state shall require. No operator's or chauffeur's license shall be issued to any person under eighteen years of age. To each person shall be assigned some distinguishing number or mark, and the license issued shall be in such form as the secretary of state shall determine; it may contain special restrictions and limitations concerning the type of motor power, horse power, design and other features of the motor vehicles which the licensee may operate; it shall contain the distinguishing number or mark assigned to the licensee, his name, place of residence and address, a brief description of the licensee for the purpose of identification and the photograph of the licensee if a chauffeur. Such distinctive number or mark shall be of a distinctly different color each year and in any year shall be of the same color as that of the number plates issued for that year. The secretary of state shall furnish to every chauffeur so licensed a suitable metal badge with the distinguishing number or mark assigned to him thereon without extra charge therefor. This badge shall thereafter be worn by such chauffeur affixed to his clothing in a conspicuous place at all times while he is operating or driving a motor vehicle upon the public highway. Said badge shall be valid only during the term of the license of the chauffeur to whom it is issued as aforesaid. Every person licensed to operate motor vehicles as aforesaid shall indorse his usual signature on the margin of the license, in the space provided for the purpose, immediately upon receipt of said license, and such license shall not be valid until so indorsed. Every application for a chauffeur's license filed under the provisions of this section shall be sworn to and shall be accompanied by a fee of five dollars[, two dollars of which shall be for his examination aforesaid and three dollars for license fee]. Every application for an operator's license shall be sworn to and be accompanied by a fee of [one] two dollars [which shall be refunded if the application be denied]. [The] A license [hereunder] granted [on or before August first, nineteen hundred and seventeen, shall take effect on that date, and licenses issued prior to January thirty-first, nineteen hundred and eighteen,] *hereunder at any time shall expire on [that date] the ensuing thirty-first day of January.* A [chauffeur's] license in force when this section, *as hereby amended,* takes effect shall be deemed a [chauffeur's] license hereunder. *Failure by an operator or chauffeur to exhibit his license to any magistrate, motor vehicle inspector, police officer, constable or other competent authority, shall be presumptive evidence that said person is not duly licensed under this article.*

2. Operators' and chauffeurs' licensed registration book. Upon the receipt of such an application, the secretary of state shall thereupon file the same in

his office, and register the applicant in a book or index which shall be kept in the same manner as the book or index for the registration of motor vehicles, and when the applicant[, if a chauffeur,] shall have passed the examination provided for in the preceding section, the number or mark assigned to such applicant together with the fact that such applicant has passed such examination shall be noted in said book or index.

§ 3. Subdivision seven of section two hundred and ninety of such chapter, as added by chapter three hundred and seventy-four of the laws of nineteen hundred and ten, and last amended by chapter seven hundred and sixty-nine of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

7. Any person making a false statement in the verified application for registration, or in an application for a license or in any proof or statement in writing in connection therewith, or who shall deceive or substitute or cause another to deceive or substitute in connection with any examination hereunder, shall be guilty of a misdemeanor [punishable by a fine of not exceeding fifty dollars].

§ 4. Section two hundred and ninety-a of such chapter, as added by chapter seven hundred and sixty-nine of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

§ 290-a. Suspension and revocation of a license of operator or chauffeur. The secretary of state may suspend or revoke any certificate of registration, or any license, issued to any person under the provisions of this article for any of the following causes: a. For a third or subsequent violation of the speed provisions of this article or ordinance or regulation made by competent local authority within one calendar year. b. Upon the conviction of the holder of a license of a felony under this act. c. Because of some physical or mental disability of the holder [arising or discovered since the original issuance of the license or its renewal], or the disability of the holder by reason of intoxication or the use of drugs. d. Because of the gross negligence of the operator whereby person or property has been injured. e. For going away without stopping and giving his name and address after causing injury to any person or damage to any vehicle. f. Operating a motor vehicle in a manner showing a reckless disregard for life or property of others. Before revoking such certificate or license, the holder thereof shall be entitled to a hearing before the secretary of state or his deputy, upon ten days' notice in writing. *The secretary of state may likewise upon notice aforesaid revoke or suspend the license of any operator or chauffeur for any of the foregoing reasons upon the recommendation of any judge or city magistrate.* [o] On the revocation of a certificate of registration or license to operate, neither the license nor the certificate shall be reissued unless upon investigation the secretary of state shall determine that the operator may again be legally permitted to operate. Upon the conviction of a person for an offense involving a third violation of section two hundred and eighty seven of this article, within one calendar year or of operating a motor vehicle while under the influence of intoxicating liquors or drugs, or of injuring a person or property by reason of gross negligence in operating, or of going away without stopping or giving his name and address after causing injury to any person or damage to any vehicle, the secretary of state may immediately revoke the license of

the person so convicted and if any person convicted of any such offense shall appeal from the decision of such trial court, the secretary of state may suspend forthwith the license of the person so convicted and appealing and may order the license delivered to him and shall not reissue the same unless such person is acquitted upon such appeal, or unless the secretary of state in his discretion shall decide that such license shall be reissued.

Whenever any license or certificate shall have been revoked under the provisions of this article no new license or certificate shall be issued unless by the secretary of state to such person until after thirty days from the date of such revocation, nor thereafter except in the discretion of the secretary of state. Notice of revocation and suspension of any license or certificate of registration shall be transmitted forthwith by the secretary of state to the chief of police of the city or prosecuting officer of the locality in which the person whose license or certificate of registration so revoked or suspended, resides.

§ 5. This act, in so far as it amends section two hundred and eighty-two of such chapter, shall take effect August first, nineteen hundred and nineteen.

§ 6. In all other respects, this act shall take effect immediately, except that the fee for an operator's license for which an application is pending when this section takes effect shall be the fee heretofore payable.

Approved May 7.

Chapter 498.

An Act to amend the workmen's compensation law, in relation to payment of compensation.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section thirty-three of chapter eight hundred and sixteen of the laws of nineteen hundred and thirteen, entitled "An act in relation to assuring compensation for injuries or death of certain employees in the course of their employment and repealing certain sections of the labor law relating thereto, constituting chapter sixty-seven of the consolidated laws," as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen, is hereby amended to read as follows:

§ 33. Assignments; exemptions. Claims for compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this chapter, and shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived. Compensation and benefits shall be paid only to employees or their dependents. *In case of the death of an injured employee to whom there was due at the time of his or her death any compensation under the provisions of this chapter, not exceeding the sum of two hundred and fifty dollars, the amount of such compensation shall be payable to the surviving wife or husband, if there be one, or, if none, to the surviving child or children of the deceased under the age of eighteen years, and if there be no surviving wife or children, then to the dependents of such deceased employee or to any of them as the commission may direct.*

§ 2. This act shall take effect immediately.

Approved May 9.

Chapter 531.

An Act to amend the education law, relative to part-time or continuation schools.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article twenty-two of chapter twenty-one of the laws of nineteen hundred and nine, entitled "An act relating to education, constituting chapter sixteen of the consolidated laws," as amended by chapter one hundred and forty of the laws of nineteen hundred and ten, chapter seven hundred and forty-seven of the laws of nineteen hundred and thirteen and chapter five hundred and sixty of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

ARTICLE 22.

GENERAL INDUSTRIAL SCHOOLS; UNIT TRADE AND TECHNICAL SCHOOLS; PART-TIME OR CONTINUATION SCHOOLS; PRACTICAL ARTS OR HOMEMAKING SCHOOLS AND SCHOOLS OF AGRICULTURE, MECHANIC ARTS AND HOMEMAKING.

Section 600. General industrial schools, *unit trade and technical schools*, [and] schools of agriculture, mechanic arts and homemaking, *evening vocational schools, practical arts or homemaking schools* and may be established in cities.

601. *Part-time or continuation schools shall be established in cities and school districts.*

[601] 602. Establishment of [such schools] *general industrial schools and unit trade and technical schools, and schools of agriculture, mechanic arts and homemaking, practical arts or homemaking schools, evening vocational schools*; directors of agriculture, mechanic arts and homemaking.

[602] 603. Appointment of an advisory board.

[603] 604. Authority of the board of education over such schools.

[604] 605. State aid for general industrial schools, *unit trade and technical schools, practical arts or homemaking schools, part-time or continuation schools*, [and] schools of agriculture, mechanic arts and homemaking *and evening vocational schools*.

[605] 606. Application of such moneys.

[606] 607. Annual estimate by board of education and appropriations by municipal and school districts.

[607] 608. Courses in schools of agriculture for training of teachers.

§ 600. General industrial schools, trade schools and schools of agriculture, mechanic arts and homemaking, may be established in cities. The board of education of any city[, and in a city not having a board of education the officer having the management and supervision of the public school system.] may establish, acquire, conduct and maintain as a part of the public school system of such city the following:

1. General industrial schools in communities of less than twenty-five thou-

and inhabitants open to pupils who have completed the elementary school course or who have attained the age of fourteen years; and

2. *Unit trade and technical schools open to pupils who have attained the age of [sixteen] fourteen years [and] or who have completed [either] the elementary school course [or a course in the above mentioned general industrial school] or who have met such other requirements as the [local school authorities] commissioner of education may have prescribed; and*

3. *Schools of agriculture, mechanic arts and homemaking, open to pupils who have completed the elementary school course or who have attained the age of fourteen, or who have met such other requirements as the local school authorities may have prescribed; and*

[4. *Part-time or continuation schools in which instruction shall be given in the trades and in industrial, agricultural and homemaking subjects, and which shall be open to pupils over fourteen years of age who are regularly and lawfully employed during a part of the day in any useful employment or service, which subjects shall be supplementary to the practical work carried on in such employment or service.*]

4. *Practical arts or homemaking schools open to pupils who have completed the elementary school course, or who have attained the age of fourteen years, or who have met such other requirements as the commissioner of education may have prescribed. Special requirements may be prescribed for courses conducted in communities of less than twenty-five thousand inhabitants.*

5. *Evening vocational schools in which instruction shall be given in the trades and industrial, agricultural and homemaking subjects, and which shall be open to pupils over sixteen years of age, who are regularly and lawfully employed during the day and which provide instruction in subjects related to the practical work carried on in such employment; but such evening vocational schools providing instruction in homemaking shall be open to all women over sixteen years of age who are employed in any capacity during the day.*

The word "school," as used in this article, shall include any department or course of instruction established and maintained in a public school for any of the purposes specified in this section.

§ 801. *Part-time or continuation schools shall be established in cities and school districts, having a population of five thousand or more inhabitants. a. The board of education of each city and of each such school district in which there are twenty or more minors above the age of fourteen years and below the age of eighteen years, who are not in regular attendance upon instruction, shall establish and maintain part-time or continuation schools or classes in which such minors shall receive instruction. Such schools or classes may be established in public school buildings, in other buildings especially adapted for their operation, in manufacturing or mercantile establishments and in factories. Such schools or classes, wherever they are established or maintained, shall be under the control and management of the board of education and shall be a part of the public school system of the city or district which maintains them. Courses of study in private or parochial part-time or continuation schools or classes which meet the requirements of the statutes and the regulations prescribed thereunder may be approved by the commissioner*

of education and, when thus approved, attendance thereon shall be accepted for that required under this article.

b. Such part-time or continuation schools or classes shall be maintained each year during the full period of time which the public schools of a city or district are in session. The sessions of such part-time or continuation schools or classes shall be on the regular school days and for as many hours between the hours of eight o'clock forenoon and five o'clock afternoon as shall be necessary to provide the required instruction for such minors who reside in said city or district.

c. The courses of study in such part-time or continuation schools or classes shall be approved by the commissioner of education and shall include among other subjects instruction in American history, the rights and obligations of citizenship, industrial history, economics, the essential features of the laws relating to the industries taught, and shall also include such other subjects as will enlarge the vocational intelligence of such minors.

d. The board of education of each city and of each such school district shall make necessary arrangements to begin to operate and maintain such part-time or continuation schools or classes, on the opening of the public schools in September, nineteen hundred and twenty, and shall annually thereafter in September open and maintain additional schools and classes so that by the opening of the public schools in September, nineteen hundred and twenty-five, a sufficient number of such schools shall have been established as to afford the required instruction under this article to those minors who are required to attend such schools or classes.

e. Each minor under the age of eighteen years, who is not in regular attendance upon a public, private or parochial school or who is regularly and lawfully employed in some occupation or service, unless such minor has completed a four-year secondary course of instruction approved by the regents of the university, shall attend a part-time or continuation school or class in the city or district in which such minor resides or may be employed. Such attendance shall be for not less than four hours per week and not more than eight hours per week for each week which such school or class is in session except that the school authorities may, subject to the approval of the commissioner of education, permit any such minor to increase the number of hours per week of required attendance and decrease the number of weeks of required attendance. Such minor who is temporarily out of regular employment or service shall attend such school not less than twenty hours per week. The attendance upon a part-time or continuation school or class shall be between the hours of eight o'clock forenoon and five o'clock afternoon.

f. The commissioner of education shall make a survey of each city or district to ascertain the industrial, commercial, economic and social needs of such city or district and the benefits and opportunities to be afforded through the establishment of such part-time or continuation schools or classes to the community and to those who are required to attend such schools or classes. The industrial commission and the commissioner of agriculture shall co-operate with the commissioner of education in making such survey.

g. The regents of the university shall establish regulations to govern and regulate the administration of such part-time or continuation schools or classes and the attendance of minors thereon. To meet local necessities the board of

education of each city or school district may establish regulations but such regulations shall not conflict with the regulations adopted by the regents.

h. The parent, guardian or other person having the custody or control of a minor who is required under the provisions of this article to attend a part-time or continuation school or class shall cause such minor to attend such school or class. A parent, guardian or other person who refuses or fails to comply with this provision of the law shall be deemed guilty of a misdemeanor and upon conviction shall be subject to a fine of not more than one hundred dollars or by imprisonment for not more than ten days, or both such fine and imprisonment at the discretion of the court. Any minor under sixteen years of age who fails to attend upon instruction as defined by this article shall be subject to the provisions of section six hundred and thirty-five of the education law, and a minor over sixteen years of age who fails to attend upon instruction as required by this act may be punished for any such violation by a fine not exceeding ten dollars, or by imprisonment for not more than ten days, or by both such fine and imprisonment.

i. Any person, firm or corporation employing a minor between the ages of fourteen years and eighteen years shall permit the attendance of such minor upon a part-time school or class whenever such part-time school or class shall have been established in the city or district where the minor resides or may be employed, and upon the termination of employment of any such minor the employer shall return within three days the employment certificate of such minor by mail to the school authorities, and a person, firm or corporation employing a minor over fourteen years of age and less than eighteen years of age contrary to the provisions of this article shall be subject to a fine of not less than twenty-five dollars and not more than one hundred dollars for each offense or by imprisonment in the city or county jail for not less than five days and not more than ten days, or by such fine and imprisonment at the discretion of the court. A person, firm or corporation, which has in its employ a minor who fails to attend a part-time or continuation school or class as required herein, shall immediately discontinue the services of such minor upon receiving from the school authorities written notice of the failure of such minor to attend such part-time or continuation school or class, and a person, firm or corporation violating this provision of law shall be subject to a fine of fifty dollars for each offense.

j. The board of education of each city or district having a population of five thousand or more inhabitants is hereby required to enforce the provisions of this law and the commissioner of education is hereby charged with the duty and vested with necessary authority to supervise the enforcement and administration of this act.

k. If the authorities of such a city or school district fail or refuse to provide the necessary funds for the establishment and maintenance of such part-time or continuation schools or classes as are required under this law, the city or district shall forfeit from the funds due such city or district from the state for school purposes an amount equal to that which is estimated by the board of education as necessary to properly operate and maintain such schools or classes. The public or state funds thus forfeited by such city or district shall be apportioned by the commissioner of education to the board of education of such city or district for the purpose of maintaining such part-time

or continuation schools or classes and the board of education of the city or district receiving such funds shall apply the same toward the maintenance of such schools or classes and in payment of the expenses incurred thereby.

§ [601] 602. Establishment of [such schools] *general industrial and unit trade and technical schools, and schools of agriculture, mechanic arts and homemaking, practical arts or homemaking schools or evening vocational schools;* directors of agriculture, mechanic arts and homemaking. The board of education of any union free school district shall also establish, acquire and maintain [such schools] *general industrial schools, unit trade and technical schools, [and] schools of agriculture, mechanic arts and homemaking, and practical arts or homemaking schools and evening vocational schools* for like purposes whenever such schools shall be authorized by a district meeting. The trustees or board of trustees of a common school district may establish a school or a course in agriculture, mechanic arts and homemaking, when authorized by a district meeting. The board of education of a city, town or union free school district, not maintaining a school of agriculture, mechanic arts and homemaking may employ a director of agriculture. The boards of education or trustees of two or more districts or towns may by joint contract employ such a director and determine in such contract as to the portion of the compensation which is to be paid by each district. The qualifications of a person employed as such director shall be prescribed by the commissioner of education, as provided by law in respect to teachers employed in public schools of the state.

§ [602] 603. Appointment of an advisory board. 1. The board of education [in a city and the officer having the management and supervision of the public school system in a city not having a board of education] shall appoint an advisory board of five members representing the local trades, industries, and occupations. In the first instance two of such members shall be appointed for a term of one year and three of such members shall be appointed for a term of two years. Thereafter as the terms of such members shall expire the vacancies caused thereby shall be filled for a full term of two years. Any other vacancy occurring on such board shall be filled by the appointing power named in this section for the remainder of the unexpired term.

2. It shall be the duty of such advisory board to counsel with and advise the board of education [or the officer having the management and supervision of the public school system in a city not having a board of education] in relation to the powers and duties vested in such board [or officer] by [section six hundred and three of] this chapter.

§ [603] 604. Authority of the board of education over such schools. The board of education in a city [and the officer having the management and supervision of the public school system in a city not having a board of education and the board of education] or in a union free school district in which city or district a general industrial school, [a] *unit trade or technical school, a school of agriculture, mechanic arts and homemaking, or practical arts or homemaking school, or a part-time or continuation school, or an evening vocational school* is established as provided in this article, is vested with the same power and authority over the management, supervision and control of such school and the teachers or instructors employed therein as such board

[or officer] now has over the schools and teachers under their charge. Such boards of education [or such officer] shall also have full power and authority:

1. To employ competent teachers or instructors.
2. To provide proper courses of study.
3. To purchase or acquire sites and grounds and to purchase, acquire, lease or construct and to repair suitable shops or buildings and to properly equip the same.
4. To purchase necessary machinery, tools, apparatus and supplies.

§ [604] 605. State aid for general industrial schools, *unit trade and technical schools*, part-time or continuation schools, *practical arts or home-making schools*, *evening vocational schools* and schools of agriculture, mechanic arts and homemaking. 1. The commissioner of education in the annual apportionment of the state school moneys shall apportion therefrom to each city and [union free] school district for each general industrial school, *unit trade and technical school*, part-time or continuation school, *practical arts or homemaking school* or evening vocational school, maintained therein for thirty-six weeks during the school year and employing one teacher whose work is devoted exclusively to such school, and having an enrolment of *such number of pupils as may be required by the commissioner of education* [at least fifteen pupils] and maintaining an organization and a course of study, and conducted in a manner approved by him, a sum equal to two-thirds of the salary paid to such teacher, but not exceeding one thousand dollars.

2. He shall also apportion in like manner to each city, union free school district or common school district for each school of agriculture, mechanic arts and homemaking, maintained therein for thirty-six weeks during the school year, and employing one teacher whose work is devoted exclusively to such school, and *such number of pupils as may be required by the commissioner of education* having an enrolment [at least fifteen pupils] and maintaining an organization and course of study and conducted in a manner approved by him, a sum equal to two-thirds of the salary paid to such teacher. Such teacher may be employed for the entire year, and during the time that the said school is not open shall be engaged in performing such educational services as may be required by the board of education or trustees, under regulations adopted by the commissioner of education. Where a contract is made with a teacher for the entire year and such teacher is employed for such period, as herein provided, the commissioner of education shall make an additional apportionment to such city or district of the sum of two hundred dollars. But the total amount apportioned in each year on account of such teacher shall not exceed one thousand dollars.

3. The commissioner of education shall also make an additional apportionment to each city and union free school district for each additional teacher employed [exclusively] in the schools mentioned in the preceding subdivisions of this section for thirty-six weeks during the school year, a sum equal to one-[third]half of the salary paid to each such additional teacher, but not exceeding one thousand dollars for each teacher.

4. The commissioner of education shall also apportion in like manner to each city, town and school district employing, or joining in the employment

of, a director of agriculture, as authorized by section six hundred and [one] *two* of this chapter, and establishing, maintaining and conducting an organization and course of instruction in such subject, approved by the commissioner of education, a sum equal to one-half of the salary paid to such director by such city, town or district, or by two or more of such towns or districts, not exceeding in each year the sum of six hundred dollars for each director employed. Where the apportionment is made on account of a director employed by two or more towns or districts, it shall be apportioned to such towns or districts in accordance with the proportionate amount paid by each of such towns or districts under the contract made with such director.

5. The commissioner of education, in his discretion, may apportion to a district or city maintaining such schools or employing such teachers for a shorter time than thirty-six weeks, or for a less time than a regular school day, an amount pro rata to the time such schools are maintained or such teachers are employed. This section shall not be construed to entitle manual training high schools or other secondary schools maintaining manual training departments, to an apportionment of funds herein provided for.

Any person employed as teacher as provided herein may serve as principal of the school in which the said industrial or trade school or course, or school or course of agriculture, mechanic arts and homemaking, is maintained.

§ [605] 606. Application of such moneys. All moneys apportioned by the commissioner of education for schools under this article shall be used exclusively for the payment of the salaries of teachers employed in such schools in the city or district to which such moneys are apportioned.

§ [606] 607. Annual estimate by board of education and appropriations by municipal and school districts. [1. The board of education of each city or the officer having the management and supervision of the public school system in a city not having a board of education shall file with the common council of such city, within thirty days after the commencement of the fiscal year of such city, a written itemized estimate of the expenditures necessary for the maintenance of its general industrial schools, *unit trade or technical schools*, schools of agriculture, mechanic arts and homemaking, part-time or continuation schools, *practical arts or homemaking schools* or evening vocational schools, and the estimated amount which the city will receive from the state school moneys applicable to the support of such schools. The common council shall give a public hearing to such persons as wish to be heard in reference thereto. The common council shall adopt such estimate and, after deducting therefrom the amount of state moneys applicable to the support of such schools, shall include the balance in the annual tax budget of such city. Such amount shall be levied, assessed and raised by tax upon the real and personal property liable to taxation in the city at the time and in the manner that other taxes for school purposes are raised. The common council shall have power by a two-thirds vote to reduce or reject any item included in such estimate.]

[2.] The board of education [in a union free] of each city and the board of education or trustees of each school district which maintains a general industrial school, *unit trade or technical school*, [a] school of agriculture, mechanic arts and home making, part-time or continuation schools, *practical arts or homemaking schools* or evening vocational schools, shall include in its estimate of expenses pursuant to the provisions of [sections three hundred

and twenty-three and three hundred and twenty-seven of] this chapter the amount that will be required to maintain such schools after applying toward the maintenance thereof the amount apportioned therefor by the commissioner of education. Such amount shall thereafter be levied, assessed and raised by tax upon the taxable property of the city or district at the time and in the manner that other taxes for school purposes are raised in such city or district.

§ [607] 608. Courses in schools of agriculture for training of teachers. The state schools of agriculture at Saint Lawrence University, at Alfred University and at Morrisville may give courses for the training of teachers in agriculture, mechanic arts, domestic science or homemaking, approved by the commissioner of education. Such schools shall be entitled to an apportionment of money as provided in section six hundred and [four] five of this chapter for schools established in union free school districts. Graduates from such approved courses may receive licenses to teach agriculture, mechanic arts and homemaking in the public schools of the state, subject to such rules and regulations as the commissioner of education may prescribe.

§ 2. Section six hundred and twenty-two of such chapter, as amended by chapter seven hundred and forty-eight of the laws of nineteen hundred and thirteen, is hereby repealed.

§ 3. This act shall take effect August first, nineteen hundred and nineteen. Approved May 10.

Chapter 544.

An Act to amend the labor law, in relation to employment in elevators.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision one of section eight-a of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as added by chapter seven hundred and forty of the laws of nineteen hundred and thirteen and amended by chapter six hundred and forty-eight of the laws of nineteen hundred and fifteen is hereby amended to read as follows:

1. Every employer of labor engaged in carrying on any factory or mercantile establishment in this state, or in operating an elevator either for freight or passengers in any building or place in this state, shall allow every person, except those specified in subdivision two, and as otherwise herein provided, employed in such factory or mercantile establishment, or in caring for, having the custody or management of or operating any such elevator, at least twenty-four consecutive hours of rest in every calendar week. No employer shall operate any factory or mercantile establishment, or any such elevator, on Sunday unless he shall have complied with subdivision three. Provided, however, that this section shall not authorize any work on Sunday not now or hereafter authorized by law.

§ 2. Subdivision two of section ninety-three of such chapter as last amended by chapter four hundred and sixty-four of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

2. No child under the age of sixteen years shall be employed or permitted to work at adjusting or assisting in adjusting any belt to any machinery,

hibited, a woman may begin work at the employment prescribed in this section not earlier than six o'clock in the morning.

§ 177. Seats for women employed in elevators. Suitable seats shall be provided and maintained for any woman employed in caring for, having the custody or management of or operating any such elevator. Such employee shall be allowed the use thereof at such times and to such extent as may be necessary for the preservation of their health.

§ 178. Time allowed for meals. Not less than forty-five minutes shall be allowed for the noon-day meal of women employed in caring for, having the custody or management of or operating any such elevator, unless the commission shall permit a shorter time. Such permit shall be kept conspicuously posted in the elevator or over or near the main or ground floor opening leading thereto. The permit may be revoked at any time. Whenever any such employee is employed or permitted to work after seven o'clock in the evening, such employee shall be allowed at least twenty minutes to obtain lunch or supper between five and seven o'clock in the evening.

§ 179. Posting notice as to number of hours employed. A printed notice, in a form which shall be furnished by the commission, stating the number of hours per day for each day of the week required of women employed in caring for, having the custody or management of or operating any such elevator, and the time when their work shall begin and end, shall be kept posted in a conspicuous place in the elevator or over or near the main or ground floor opening thereto. Such employees may begin their work after the time for beginning and stop before the time for stopping such work, but they shall not otherwise be employed, permitted or suffered to work, in such employment, except as stated in the notice. The terms of the notice shall not be changed after the beginning of labor on the first day of the week without the consent of the commission.

§ 180. Washrooms, washing facilities and water closets. There shall be provided and maintained for the use of all employees, whether men, women or children, adequate and convenient washrooms or washing facilities and a sufficient number of suitable and convenient water closets. Where the elevator is used in or in connection with a factory or mercantile establishment, the provisions of sections eighty-eight, eighty-eight-a, one hundred and sixty-eight-c and one hundred and sixty-eight-e shall apply to washrooms, washing facilities and water closets for employees mentioned in this section; and where the elevator is used in any other building or place, the provision of such sections one hundred and sixty-eight-c and one hundred and sixty-eight-e shall apply to washrooms, washing facilities and water closets for employees engaged in caring for, having the custody or management of or operating an elevator in such building or place. For the purpose of so applying the sections last referred to, the term "mercantile establishment" as therein used shall be deemed to mean and include a building in which the elevator is located or with which it connects. Where washrooms, washing facilities and water closets, not required by this chapter before this article takes effect, shall not have been heretofore provided, the time for installing and providing the same shall be fixed by the commission; but such time shall not be earlier than September first, nineteen hundred and nineteen, nor later than January first, nineteen hundred and twenty.

§ 181. Exceptions. The provisions of subdivision two of section one hundred and seventy-six shall not apply to the care, custody, management or operation of an elevator in a hotel, by a woman over twenty-one years of age.

§ 4. This act shall take effect September first, nineteen hundred and nineteen.

Approved May 10.

Chapter 545.

An Act to amend the labor law, in relation to inspection of scaffolding.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section nineteen of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," is hereby amended to read as follows:

§ 19. Inspection of scaffolding, ropes, blocks, pulleys and tackles [in cities]. Whenever complaint is made to the commission[er of labor] that the scaffolding or the slings, hangers, blocks, pulleys, stays, braces, ladders, irons, or ropes of any swinging or stationary scaffolding used in the construction, alteration, repairing, painting, cleaning or pointing of buildings [within the limits of a city] are unsafe or liable to prove dangerous to the life or limb of any person, such commission[er of labor] shall immediately cause an inspection to be made of such scaffolding, or the slings, hangers, blocks, pulleys, stays, braces, ladders, irons or other parts connected therewith. If, after examination, such scaffolding or any of such parts is found to be dangerous to life or limb, the commission[er of labor] shall prohibit the use thereof, and require the same to be altered and reconstructed so as to avoid such danger. The commission[er of labor or deputy factory inspector making the examination] shall attach a certificate to the scaffolding, or the slings, hangers, irons, ropes, or other parts thereof examined by [him] it, stating that [he] it has made such examination, and that [he] it has found [it] *them* safe or unsafe, as the case may be. If [he] it declares [it] *them* unsafe, [he] it shall at once, in writing, notify the person responsible for [its] *their* erection of the fact, and warn him against the use thereof. Such notice may be served personally upon the person responsible for [its] *their* erection, or by conspicuously affixing it to the scaffolding, or the part thereof declared to be unsafe. After such notice has been so served or affixed, the person declared responsible therefor shall immediately remove such scaffolding or part thereof and alter or strengthen it in such manner as to render it safe, in the discretion of the officer who has examined it, or of his superiors. The commission[er of labor] and any of [his] *its* deputies whose duty it is to examine or test any scaffolding or part thereof, as required by this section, shall have free access, at all reasonable hours, to any building or premises containing them or where they may be in use. All swinging and stationary scaffolding shall be so constructed as to bear four times the maximum weight required to be dependent therefrom or placed thereon, when in use, and not more than four men shall be allowed on any swinging scaffolding at one time.

§ 2. Section twenty of such chapter, as last amended by chapter four hundred and ninety-two of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

§ 20. Protection of persons employed on buildings [in cities]. All contractors and owners, when constructing buildings [in cities,] where the plans and specifications require the floors to be arched between the beams thereof, or where the floors or filling in between the floors are of fireproof material or brickwork, shall complete the flooring or filling in as the building progresses. If the plans and specifications of such buildings do not require filling in between the beams of floors with brick or fire-proof material all contractors for work, in the course of construction, shall lay the underflooring thereof on each story as the building progresses. Where double floors are not to be used, such contractor shall keep planked over the floors two stories below the story where the work is being performed. If the floor beams are of iron or steel, the contractors for the iron or steel work of buildings in course of construction or the owners of such buildings shall thoroughly plank over the entire tier of iron or steel beams and extending not less than six feet beyond such beams on which the structural iron or steel work is being erected, except such spaces as may be reasonably required for the proper construction of such iron or steel work, and for the raising or lowering of materials to be used in the construction of such building, or such places as may be designated by the plans and specifications for stairways and elevator shafts. If elevators, elevating machines or hod-hoisting apparatus are used within a building in the course of construction, for the purpose of lifting materials to be used in such construction, the contractors or owners shall cause the shafts or openings in each floor to be inclosed or fenced in on all sides by a barrier at least eight feet in height, except on two sides which may be used for taking off and putting on materials, and those sides shall be guarded by an adjustable barrier not less than three nor more than four feet from the floor and not less than two feet from the edge of such shaft or opening. If a building in course of construction is five stories or more in height, no lumber or timber needed for such construction shall be hoisted or lifted on the outside of such building. The chief officer, in any city, *town or village*, charged with the enforcement of the building laws of such city, *town or village*, and the commission[er of labor] are hereby charged with enforcing the provisions of this section and sections eighteen and nineteen, and said chief officer in any city, *town or village*, charged with the enforcement of the building laws of such city, *town or village* shall have the same powers for the enforcement of these sections as are vested in the commission[er of labor].

§ 3. Section twenty-b of such chapter, as added by chapter five hundred and forty-three of the laws of nineteen hundred and thirteen, is hereby renumbered section twenty-c.

§ 4. Section twenty-one of such chapter, as amended by chapter one hundred and fifty-two of the laws of nineteen hundred and sixteen, is hereby amended to read as follows:

§ 21. Commission[er of labor] to enforce provisions of article. The commission[er of labor] shall enforce all the provisions of this article. He shall investigate complaints made to him of violations of such provisions and if he finds that such complaints are well founded he [may] *shall* issue an order directed to the person or corporation complained of, requiring such person or corporation to comply with such provisions, or he may present to the

district attorney of the proper county all the facts ascertained by him in regard to the alleged violation, and all other papers, documents or evidence pertaining thereto, which he may have in his possession. The district attorney to whom such presentation is made shall proceed at once to prosecute the person or corporation for the violations complained of, pursuant to this chapter and the provisions of the penal law. If complaint is made to the commission[er of labor] that any person contracting with the state or a municipal corporation for the performance of any public work fails to comply with or evades the provisions of this article respecting the payment of the prevailing rate of wages, the requirements of hours of labor or the employment of citizens of the United States or of the state of New York, the commission[er of labor] shall, if [he] it finds such complaints to be well founded, present evidence of such non-compliance to the officer, department or board having charge of such work. Such officer, department, or board shall thereupon take the proper proceedings to enforce compliance with the provisions of this article.

§ 5. Section twenty-two of such chapter, as added by chapter three hundred and twenty of the laws of nineteen hundred and thirteen, is hereby renumbered section twenty-three.

§ 6. This act shall take effect immediately.

Approved May 10.

Chapter 546.

An Act to amend the labor law, in relation to the powers and duties of the commission.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section fifty-nine of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as thus renumbered and amended by chapter one hundred and forty-five of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

§ 59. Id.; General powers and duties. 1. The Commission[er of labor] may divide the cities [of the first and second class] of the state into mercantile inspection districts, assign one or more mercantile inspectors to each such district, and may in [his] its discretion transfer them from one such district to another; [he] it may assign any of them to inspect any special class or classes of mercantile or other establishments specified in article twelve of this chapter, situated in cities [of the first and second class], or to enforce in cities [of the first or second class] any special provision of such article.

2. The commission[er of labor] may authorize any deputy commissioner or assistant and any agent or inspector in the department of labor to act as a mercantile inspector with the full power and authority thereof.

3. The commission[er of labor], the chief mercantile inspector and his assistant or assistants and every mercantile inspector or acting mercantile inspector may in the discharge of [his] their duties enter any place, building or room in cities [of the first or second class] which is affected by the provisions of article twelve of this chapter, and may enter any mercantile

or other establishment specified in said article, situated in [the] cities [of the first or second class], whenever [he] ~~they~~ may have reasonable cause to believe that it is affected by the provisions of article twelve of this chapter.

4. The commission[er of labor] shall visit and inspect or cause to be visited and inspected the mercantile and other establishments specified in article twelve of this chapter situated in cities [of the first and second class], as often as practicable, and shall cause the provisions of said article and the rules and regulations of the [industrial board] ~~commission~~ to be enforced therein.

5. Any lawful municipal ordinance, by-law or regulation relating to mercantile or other establishments specified in article twelve of this chapter, in addition to the provisions of this chapter and not in conflict therewith, may be enforced by the commission[er of labor] in cities [of the first and second class].

§ 2. This act shall take effect immediately.

Approved May 10.

Chapter 582.

An Act to amend the labor law, in relation to hours of labor of miners and women.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions one and two of section seventy-seven of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as amended by chapter five hundred and thirty-nine of the laws of nineteen hundred and twelve, are hereby amended to read, respectively, as follows:

1. No child under the age of sixteen years shall be employed or permitted to work in or in connection with any factory in this state before eight o'clock in the morning, or after five o'clock in the evening of any day, or for more than eight hours in any one day, or more than six days or *forty-eight hours* in any one week.

2. No male minor under the age of eighteen years shall be employed or permitted to work in any factory in this state more than six days or fifty-four hours in any one week, or for more than nine hours in any one day, except as hereinafter provided; nor between the hours of twelve midnight and four o'clock in the morning.

§ 2. Subdivision three of section seventy-seven of such chapter as amended by chapter five hundred and thirty-nine of the laws of nineteen hundred and twelve, and chapter four hundred and sixty-five of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

3. No female minor under the age of twenty-one years and no woman shall be employed or permitted to work in any factory in this state more than six days or fifty-four hours in any one week; nor for more than nine hours in any one day except as hereinafter provided. No female minor under the age of twenty-one years shall be employed or permitted to work in any factory in this state before six o'clock in the morning or after nine o'clock in the evening of any day.

§ 3. Subdivision one of section seventy-eight of such chapter as amended by chapter five hundred and thirty-nine of the laws of nineteen hundred and twelve, is hereby amended to read as follows:

1. A female sixteen years of age or upwards and a male between the ages of sixteen and eighteen may be employed in a factory more than nine hours a day: (a) regularly in not to exceed five days a week, in order to make a short day or holiday on one of the six working days of the week; (b) irregularly in not to exceed three days a week; provided that no such person shall be required or permitted to work more than ten hours in any one day or more than fifty-four hours in any one week, and that the provisions of the preceding section as to notice or time book be fully complied with.

§ 4. Subdivision two of section one hundred and sixty-one of such chapter as amended by chapter three hundred and eighty-seven of the laws of nineteen hundred and ten, chapter eight hundred and sixty-six of the laws of nineteen hundred and eleven, chapter four hundred and ninety-three of the laws of nineteen hundred and thirteen and chapter three hundred and thirty-one of the laws of nineteen hundred and fourteen and chapter three hundred and eighty-six of the laws of nineteen hundred and fifteen, is hereby amended to read as follows:

2. No female employee over the age of sixteen years shall be required, permitted or suffered to work in or in connection with any mercantile establishment more than six days or fifty-four hours in any one week, or more than nine hours in any one day, except that one day in each week may be longer than nine hours for the purpose of making one or more shorter work days in the week; or before seven o'clock in the morning or after ten o'clock in the evening of any day. This section does not apply to the employment of persons sixteen years of age or upward between the eighteenth day December and the following twenty-fourth day of December, both inclusive, or to such employment for two additional days at any time during the year for the purpose of stock-taking[.], *except that females who are engaged or employed as writers or reporters in newspaper offices shall not be affected by the limitations as to the hours before seven o'clock in the morning or after ten o'clock in the evening of any day as well as to the period of six days in any one week.*

§ 5. This act shall take effect September first, nineteen hundred and nineteen.

Approved May 12.

Chapter 583.

An Act to amend the labor law, in relation to employment of women on street, surface, electric, subway or elevated railroads.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article twelve of chapter thirty-six of the laws of nineteen hundred and nine, entitled "An act relating to labor, constituting chapter thirty-one of the consolidated laws," as renumbered by chapter one hundred and forty-five of the laws of nineteen hundred and thirteen, is hereby amended by inserting therein a new section, to be section one hundred and sixty-one-d, to read as follows:

§ 161-d. Employment and hours of labor of women employed on any street, surface, electric, subway or elevated railroad. 1. No female, under the age of twenty-one years, shall be employed, permitted or suffered to work at any time in any of the occupations specified in this section.

2. No female over twenty-one years of age shall be employed, permitted or suffered to work in or in connection with the operation of any street, surface, electric, subway or elevated railroad, or to sell or accept fares or admissions in any railroad station, car or train of any street, surface, electric, subway or elevated railroad more than six days or fifty-four hours in any one week, nor more than nine hours in any one day, nor before six o'clock in the morning, nor after ten o'clock in the evening of any day.

3. The daily hours of labor of such female employees shall be the period between the time of reporting for duty at the barn, terminal, car or station and the time when the employee is released for the day. The daily hours of labor shall be consecutive, except that one hour shall be allowed for meals.

4. The provisions of section one hundred and sixty-eight-b in relation to drinking water; of section one hundred and sixty-eight-c in relation to wash stands, and section one hundred and sixty-eight-e in relation to water closets shall also apply to the employments specified in this section. Such facilities shall be provided in all stations, terminals and car barns where women are employed or report for duty. The provisions of section one hundred and sixty-eight-d, in relation to dressing rooms, shall also apply to the employments specified in this section, and such facilities shall be provided in all terminals and car barns where women are employed or report for duty.

5. Not less than one hour in any one day shall be allowed for the meals of the employees specified in this section, unless the state industrial commission shall permit a shorter time. Such permit, if granted, shall be kept posted in the main entrance of the station, terminal or car barn where such employees are employed or report for duty, but it may be revoked at any time by the state industrial commission.

6. A printed notice, in a form which shall be furnished by the state industrial commission, stating the number of daily hours of labor for each day in the week of the employees enumerated in this section, and the time when their work shall begin and end, shall be kept posted in a conspicuous place in each terminal, station or car barn where they are employed or report for duty. Such employees may begin their work after the time for beginning, or stop before the time for ending such work, as stated in such notice, but shall not be otherwise employed, permitted or suffered to work in any occupation specified in this section, except as stated therein. The terms of such notice shall not be changed after the beginning of labor on the first day of the week without the consent of the state industrial commission. The presence of such employees in, or in connection with, the occupations specified in this section at any other hours than those stated in the printed notice, or, if no such notice be posted, before six o'clock in the morning, or after ten o'clock in the evening of any day, shall constitute prima facie evidence of a violation of this section.

7. A time book, in a form to be approved by the state industrial commission, shall be correctly and properly kept, giving the names and addresses of all female employees, and the hours employed in occupations mentioned herein, and the hours worked by each of them on each day and the time of beginning

and ending the day's work, and shall be exhibited on the order of the state industrial commission, or, on the request of its subordinates promptly, on demand.

§ 3. This act shall take effect immediately.

Approved May 12.

Chapter 591.

An Act making appropriations for the bureau of employment in the department of labor.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The several amounts hereinafter named, or so much thereof as shall be sufficient to accomplish the purposes designated by the appropriations, are hereby appropriated to the state industrial commission, for the bureau of employment, in addition to any sums heretofore appropriated for maintenance or operation of or personal service in such bureau. The moneys appropriated by this act shall be available only for the eight months beginning July first, nineteen hundred and nineteen, and ending February twenty-ninth, nineteen hundred and twenty.

PERSONAL SERVICE.

Administrative:

Inspector of employment offices.....	\$2,000 00
Placement secretary	1,666 67
Statistical and filing clerk.....	1,200 00
Stenographer	1,000 00
Stenographer	800 00
Stenographer	480 00
Junior accountant	1,200 00

Division of unskilled labor, Manhattan office:

Superintendent	1,666 67
Assistant superintendents, 2 at \$1,000.....	2,000 00
Assistant superintendents, 2 at \$900.....	1,800 00
Assistant superintendents, 4 at \$800.....	3,200 00
Guides, 2 at \$666.67.....	1,333 34
Stenographer	600 00
Switchboard operator	533 33
Clerk	666 67

Manhattan office, general:

Superintendent	1,666 67
Superintendent, woman	1,333 33
Assistant superintendent	1,200 00
Assistant superintendents, 2 at \$1,000.....	2,000 00
Assistant superintendents, 2 at \$900.....	1,800 00
Assistant superintendents, 3 at \$800.....	2,400 00
Stenographers, 2 at \$680.....	1,360 00
Switchboard operator	533 33
Clerk	666 67
Laborer	600 00

Division of juvenile placement, Manhattan office:

Supervisor	\$1,200 00
Assistant supervisor	900 00
Assistant supervisor	800 00
Assistant supervisor	666 67
Stenographer	600 00

Bronx office:

Superintendent	1,333 33
Assistant superintendent	1,200 00
Assistant superintendents, 2 at \$1,000.....	2,000 00
Assistant superintendents, 2 at \$900.....	1,800 00
Assistant superintendents, 2 at \$800.....	1,600 00
Stenographer	600 00
Switchboard operator	533 33
Clerk	666 67
Laborer	600 00

Negro branch:

Assistant superintendent	1,000 00
Assistant superintendent	900 00
Assistant superintendent.....	800 00
Stenographer	600 00

Division of juvenile placement, Bronx office:

Supervisor	1,000 00
Assistant supervisor	800 00
Assistant supervisor	666 67
Assistant supervisor or stenographer.....	666 67

Brooklyn office (Jay street):

Assistant superintendent	1,200 00
Assistant superintendent	1,000 00
Assistant superintendents, 2 at \$900.....	1,800 00

Division of juvenile placement, Brooklyn office:

Assistant supervisor	800 00
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Williamsburg office:

Assistant superintendent	900 00
Assistant superintendent	800 00
Stenographer	600 00

Long Island City office:

Assistant superintendent	800 00
Stenographer	600 00

Yonkers office:

Superintendent	1,333 33
Assistant superintendents, 2 at \$800.....	1,600 00
Stenographer	533 33
Laborer	480 00

Newburgh office:

Superintendent	1,200 00
Assistant superintendent	800 00
Assistant superintendent or stenographer.....	600 00
Laborer	480 00

Albany office:

Assistant superintendent	\$1,000 (m)
Assistant superintendent	800 (m)
Assistant superintendent	666 67

Division of juvenile placement, Albany office:

Assistant supervisor	900 00
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Schenectady office:

Superintendent	1,200 (m)
Assistant superintendent	800 (m)
Assistant superintendent or stenographer.....	600 (m)
Laborer	480 (m)

Utica office:

Superintendent	1,333 33
Assistant superintendents, 2 at \$800.....	1,600 00
Stenographer	533 33
Laborer	480 (m)

Syracuse office:

Assistant superintendents, 2 at \$1,000.....	2,000 00
Assistant superintendent	900 (m)
Assistant superintendent	800 (m)
Clerk or stenographer.....	666 67
Switchboard operator	520 00

Auburn office:

Assistant superintendent	800 00
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Elmira office:

Superintendent	1,200 00
Assistant superintendent	800 00
Assistant superintendent or stenographer.....	600 00
Laborer	480 00

Binghamton office:

Superintendent	1,333 33
Assistant superintendents, 2 at \$800.....	1,600 00
Stenographer	533 33
Laborer	480 00

Jamestown office:

Superintendent	1,200 00
Assistant superintendent	800 00
Assistant superintendent or stenographer.....	600 00
Laborer	480 00

Watertown office:

Superintendent	1,333 33
Assistant superintendents, 2 at \$800.....	1,600 00
Stenographer	533 33
Laborer	480 00

Rochester office:

Assistant superintendents, 2 at \$1,000.....	2,000 00
Assistant superintendent	900 00
Assistant superintendent	800 (m)
Clerk or stenographer.....	666 67
Switchboard operator	520 00
Laborer	480 00

Buffalo office:

Assistant superintendents, 2 at \$1,000.....	\$2,000 00
Assistant superintendent	900 00
Assistant superintendent	800 00
Clerk	666 67
Switchboard operator	520 00

Division of juvenile placement, Buffalo office:

Assistant supervisor	800 00
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Niagara Falls office:

Superintendent	1,200 00
Assistant superintendent	800 00
Assistant superintendent or stenographer.....	600 00
Laborer	480 00

MAINTENANCE AND OPERATION.

Advertising	3,400 00
Traveling expenses	3,400 00
Rent	23,300 00
Communication	11,800 00
Supplies	6,600 00
Equipment	16,400 00
Printing	4,400 00

§ 2. The moneys appropriated by this act shall be available only to pay liabilities incurred within the period of eight months beginning July first, nineteen hundred and nineteen, and ending February twenty-ninth, nineteen hundred and twenty.

§ 3. The several amounts herein appropriated shall be deemed to be only for so much thereof as shall be sufficient to accomplish in full the purposes designated by the appropriations and shall be paid by the state treasurer pursuant to the requirements of the state finance law.

§ 4. The salary or compensation of any officer or employee for which an appropriation is made by this act may be fixed by the state industrial commission at a less but not at a greater sum than the amount herein appropriated for the salary or compensation of such officer or employee. The appropriations made in this act for traveling expenses are for actual and necessary expenses only, in the performance of official duties, and to be paid upon proper proof thereof, as required by section twelve of the state finance law.

§ 5. The definitions of the classifications of expense by titles employed in the annual appropriation bill for the year nineteen hundred and nineteen, as prepared and published by the comptroller, shall apply to this act, to define the purposes for which moneys appropriated under each expense title may be expended. Such definitions, as they may be amended from time to time by the comptroller, shall govern expenditures from appropriations made by this act and the audit of claims and accounts by the comptroller where such classifications are used under this act.

§ 6. Except as they may be reduced by the state industrial commission, pursuant to the foregoing provisions of this act, any appropriation made by

this act for personal service of any officer or employee shall be the salary of such officer or employee for the period of eight months beginning July first, nineteen hundred and nineteen, and ending February twenty-ninth, nineteen hundred and twenty.

§ 7. This act shall take effect July first, nineteen hundred and nineteen.

Approved May 12.

Chapter 602.

An Act to provide increased compensation to officers and employees of the state of New York made necessary by the war, and making an appropriation therefor, and to repeal chapter five hundred and fifty-six of the laws of nineteen hundred and eighteen, entitled "An act to provide for increased compensation to civilian employees of the state of New York during the existing war for civilization, and making an appropriation therefor."

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. In recognition of continued increased cost of living occasioned by the war with the German empire and its allies and subject to the limitations and exceptions hereinafter set forth, there shall be paid for and during the fiscal year beginning July first, nineteen hundred and nineteen:

1. To all persons employed and paid by the state of New York and compensated at a less rate than fourteen hundred dollars per annum, additional compensation at the rate of ten per centum per annum, provided that if such extra compensation will make the total compensation of any employee exceed fifteen hundred dollars, only such proportion of said additional compensation shall be allowed and paid as will make the total compensation equal fifteen hundred dollars.

2. To all persons employed and paid by the state of New York and compensated at a rate of fourteen hundred dollars or more, but not exceeding twenty-five hundred dollars, additional compensation of one hundred dollars, provided that if such extra compensation will make the total compensation of any employee exceed twenty-five hundred dollars, such employee shall receive only such additional compensation as will make the total compensation equal twenty-five hundred dollars.

§ 2. The compensation on which the rate herein provided shall be based shall be the compensation paid on June thirtieth, nineteen hundred and nineteen, from the appropriations made by chapter one hundred and fifty-one of the laws of nineteen hundred and eighteen or any other appropriation act then effective providing money for the permanent salary or compensation of employees in any one or more departments of the state government.

§ 3. The additional compensation herein provided for shall not be paid to temporary employees or to those whose services are required for but brief periods. Nor shall it be paid to any persons who receive a part of their salaries or wages for the same service from sources other than the state if the total compensation for such service from all sources is more than the limitations provided by this act. The additional compensation payable hereunder to a person receiving a part of his compensation from sources other than the state shall bear the same ratio to the additional compensation allowed under section one hereof as does the regular compensation paid by

the state to the total regular compensation from all sources. Regular seasonal employees shall not be regarded as temporary.

§ 4. The additional compensation hereby provided for shall not be paid to any permanent or seasonal employee who shall enter the service after the enactment of this act.

§ 5. If the rate of compensation of any person shall be increased on or after July first, nineteen hundred and nineteen, either by increase in the salary of the position or by promotion or transfer, out of any moneys other than those appropriated by this act, to the extent of the additional compensation herein provided for, no additional compensation shall be paid to that person out of the moneys hereby appropriated, and if any such rate of compensation shall be so increased to the extent of less than the additional compensation herein provided for, the moneys hereby appropriated shall be available only to pay the difference between such increase and the additional compensation herein provided for.

§ 6. Where any salary or compensation is fixed by statute with the provision for periodical increases, the additional compensation herein provided for shall be computed upon that salary or compensation as fixed from time to time under such statute without regard to the rate of such salary or compensation on June thirtieth, nineteen hundred and nineteen. But if the statute so fixing compensations be amended to increase the salary of any position beyond that payable in the fiscal year ending June thirtieth, nineteen hundred and nineteen, to the extent of the additional compensation herein provided for, no additional compensation shall be paid hereunder. If any such salary shall be so increased by less than the additional compensation herein provided for, only such proportion of such additional compensation shall be allowed as will make the total compensation equal to the compensation payable in the fiscal year ending June thirtieth, nineteen hundred and nineteen, plus the additional compensation herein provided for.

§ 7. As to those officers and employees receiving maintenance, no additional compensation shall be allowed or paid under this act to those receiving a total of money compensation and maintenance equaling or exceeding the limitations provided by this act. If such total be less than such limitation the additional compensation to be allowed and paid under this act shall be computed on the salary compensation only and not on the total of salary compensation and maintenance or commutation.

§ 8. Regular officers and employees whose compensation is computed on the basis of hour, or day rates, shall be entitled to receive additional compensation at the rate specified herein when the fixed rate of compensation for the regular working hours of a day is less than five dollars; and when such additional compensation would bring the total to more than five dollars per diem, only such proportion thereof shall be allowed as will bring the total up to five dollars per diem.

§ 9. This act shall not apply to any new position created on or after July first, nineteen hundred and nineteen; but a position shall not be deemed new within the meaning of this section, if it supersedes a former position, in existence on June thirtieth, nineteen hundred and nineteen, and is merely a substituted position, of the same general character as the former position, under another name or description.

§ 10. Chapter five hundred and fifty-six of the laws of nineteen hundred

and eighteen, entitled "An act to provide for increased compensation to civilian employees of the state of New York during the existing war for civilization, and making an appropriation therefor," is hereby repealed.

§ 11. The sum of four hundred and twenty-nine thousand dollars (\$429,000), being the unexpended balance of money appropriated by chapter five hundred and fifty-six of the laws of nineteen hundred and eighteen, is hereby reappropriated and the additional sum of two hundred and seventy-five thousand dollars (\$275,000) is hereby appropriated for the purposes of this act, payable by the treasurer on the warrant of the comptroller in the manner provided by law for the payment of moneys appropriated for the compensation of the state officers and employees to which this act is applicable.

§ 12. This act shall take effect July first, nineteen hundred and nineteen.

Approved May 13.

Chapter 603.

An Act to amend chapter five hundred and fifty-six of the laws of nineteen hundred and eighteen, entitled "An act to provide for increased compensation to civilian employees of the state of New York during the existing war for civilization, and making an appropriation therefor."

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one of chapter five hundred and fifty-six of the laws of nineteen hundred and eighteen, entitled "An act to provide for increased compensation to civilian employees of the state of New York during the existing war for civilization, and making an appropriation therefor," is hereby amended to read as follows:

§ 1. During the continuance of the existing war with the German empire and its allies *and for the balance of the fiscal year in which peace shall be declared*, there shall be paid to all persons employed by the state of New York as civilian employees increased compensation at the rate of ten per centum per annum to such employees who receive salaries or wages from the state of New York at a rate per annum of less than one thousand five hundred dollars.

§ 2. This act shall take effect immediately.

Approved May 13.

Chapter 629.

An Act to amend the workmen's compensation law, in relation to agreements for compensation, providing for hearings thereon by the commission, and making appropriation therefor.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section twenty of chapter eight hundred and sixteen of the laws of nineteen hundred and thirteen, entitled "An act in relation to assuring compensation for injuries or death of certain employees in the course of their employment and repealing certain sections of the labor law relating thereto, constituting chapter sixty-seven of the consolidated laws," as re-enacted by chapter forty-one of the laws of nineteen hundred and fourteen and last

amended by chapter seven hundred and five of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

§ 20. Determination of claims for compensation. At any time after the expiration of the first fourteen days of disability on the part of an injured employee, or at any time after his death, a claim for compensation may be presented to the [employer and if rejected or if within ten days after presentation, a report containing an agreement for compensation be not made and filed with the commission as provided by this section, the claim may be presented to the] *employer or to the commission*. The commission shall have full power and authority to determine all questions in relation to the payment of claims presented to it for compensation under the provisions of this chapter. The commission shall make or cause to be made such investigation as it deems necessary, and upon application of either party, shall order a hearing, and within thirty days after a claim for compensation is submitted under this section, or such hearing closed, shall make or deny an award, determining such claim for compensation, and file the same in the office of the commission. [The commission may before making an award, require the claimant to appear before an arbitration committee appointed by it and consisting of one representative of employees, one representative of employers, and either a member of the commission or a person specially deputized by the commission to act as chairman, before which the evidence in regard to the claim shall be adduced and by which it shall be considered and reported upon.] Immediately after such filing the commission shall send to the parties a copy of the decision. Upon a hearing pursuant to this section either party may present evidence and be represented by counsel. The decision of the commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law. When [a claim is presented to an employer, and] the employer and employee, or in case of death, his principal dependent, enter into an agreement for the payment of compensation therefor pursuant to this chapter, a joint report of such claim containing such agreement shall be made to the commission *within ten days after the agreement is made* and upon a form prepared by it and signed by the employer and employee, or in case of death his principal dependent. [The commission shall examine such report and approve the same when the terms are strictly in accordance with this chapter and such approval shall constitute an award.]

The commission shall, in every case in which an agreement has been entered into for the payment of compensation or death benefits, notify the beneficiary or beneficiaries and the employer and insurance carrier to be present at a hearing for the purpose of determining whether or not the terms of agreement are strictly in accordance with the facts and the provisions of the law; and if they are found to be so, then the commission shall approve the agreement which approval shall constitute an award. Such hearing shall be held immediately after the employer or insurance carrier has notified the commission that it has made its last regular payment under the terms of the agreement and in no event later than sixty days after the joint report of agreement is filed with the commission. The employer shall upon the making of its last regular payment under the terms of the agreement give notice in writing to the commission upon a form prescribed by the commission

which notice shall contain the name of the injured employee or his principal dependent, the date of accident, the date to which compensation has been paid and the whole amount of compensation paid. Such notice may be given for the employer by the insurance carrier, but the insurance carrier shall not be released from any liability hereunder for failure of the employer to give such notice. In case the employer or insurance carrier fails so to notify the commission of the cessation of payments within sixteen days after the date to which compensation has been paid, the commission shall assess against such employer or his insurance carrier the sum of one hundred dollars, one-half of which shall be paid into the special fund created under favor of numbered paragraph seven of section fifteen herein and one-half of which shall be paid into the state treasury and be applicable to the expenses of the commission. However, the commission may make an award in the manner provided in this section in any case, and if the terms of the award vary from the joint report, the employer shall comply with the award. [In case of unfair dealing or of bad faith on the part of the employer under this section, the commission may impose a penalty of not more than ten per centum of the award.]

§ 2. Section twenty-a of such chapter, as added by chapter one hundred and sixty-eight of the laws of nineteen hundred and fifteen, is hereby amended to read as follows:

§ 20-a. Payment of moneys in advance of award by commission. [Any employer shall upon the making of the agreement provided for in section twenty advance to any injured employee or to the principal dependent of a deceased employee, the payment or payments provided for in the agreement, in return for which he shall receive a receipt on a form supplied by the commission and signed by the person receiving the money, which receipt shall specifically state in what capacity the signer acted while so receiving such money; such receipt shall be forwarded to the commission within forty-eight hours after date of its issuance and the sum stated on its face shall be returned to said employer as provided in section twenty-five.] Any employer or his insurance carrier shall upon the making of the agreement provided in section twenty pay to any injured employee or to the principal dependent of a deceased employee the compensation provided for in the agreement which shall not be less in the aggregate than the amount legally due at that time, in return for which he shall receive a receipt on a form prescribed by the commission and signed by the person receiving the money, which receipt shall specifically state in what capacity the signer acted when so receiving such money and which receipt shall be forwarded to the commission within forty-eight hours after the date of its issuance. The employer or his insurance carrier shall then continue to make payments of compensation according to the terms of the agreement and at regular intervals of not more than two weeks until the final payment is made when notice shall be given to the commission as is provided in section twenty, and in the event of the failure to continue to make such payments without notifying the commission as aforesaid, there shall be imposed an additional penalty equal to ten per centum of the unpaid compensation which shall accrue to the benefit of the injured workman or his dependents and shall be paid to them. In the event that the award is modified upon the hearing provided in section twenty, payment shall be adjusted to conform to the award, decision or order made upon the hearing.

[Prior to the making of said agreement or in the event of no agreement, any] *An employer or his insurance carrier may at his option advance to any injured employee or to the principal dependent of a deceased employee any sum of money, in return for which he shall receive a receipt on a form supplied by the commission and signed by the person receiving the money, which receipt shall specifically state in what capacity the signer acted while so receiving such money; such receipt shall be forwarded to the commission within forty-eight hours after date of its issuance. Should any agreement or award be made the sum so stated on the face of the receipt shall be credited to the payment under the award or agreement and shall be repaid as hereinbefore provided. Any money so advanced shall be at the employer's risk. Any employer who has made an advance payment under this section shall be entitled to be reimbursed by his insurance carrier out of an unpaid instalment or instalments of compensation due. No case in which an advance payment is made shall be barred by the failure of the employee to file a claim, and the commission may at any time order a hearing on any such case in the same manner as though a claim for compensation had been filed.*

§ 3. Section twenty-five of such chapter, as last amended by chapter one hundred and sixty-seven of the laws of nineteen hundred and fifteen, is hereby amended to read as follows:

§ 25. Compensation, how payable. Compensation under the provisions of this chapter shall be payable periodically [by the employer,] in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award; but the commission may determine that any payments may be made monthly or at any other period, as it may deem advisable. [The state fund or insurance corporation in which an employer is insured shall, within ten days after demand by such employer and on the presentation of evidence of payment of compensation in accordance with this chapter, reimburse the employer therefor.] *If the employer has made advance payments of compensation as provided elsewhere in this chapter, he shall be entitled to be reimbursed out of an unpaid instalment or instalments of compensation due, provided his claim for reimbursement is filed before compensation is paid. An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall forward receipts therefor promptly to the commission. If the employer or his insurance carrier shall fail to make payments of compensation according to the terms of the award, there shall be imposed a penalty equal to twenty per centum of the unpaid compensation which shall accrue to the benefit of the injured workman or his dependents and shall be paid to him or them. When the final payment is made or due the employer or his insurance carrier shall within sixteen days send to the commission a notice on a form prescribed by the commission that such final payment is due or has been made fulfilling completely the terms of the award, which notice shall contain the name of the injured employee or his principal dependent, the date of accident, the date to which compensation has been paid and the whole amount of compensation paid, and in case the employer or his insurance carrier fail so to notify the commission of the cessation of payments within sixteen days after the date to which compensation is due*

or his been paid, the commission shall assess against such employer or his insurance carrier the sum of one hundred dollars, one-half of which shall be paid into the special fund created under favor of numbered paragraph seven of section fifteen herein and one-half of which shall be paid into the state treasury and be applicable to the expenses of the commission. Whenever the commission may deem it advisable it may request any employer or insurance carrier to make a deposit with the treasurer of the commission to secure the prompt and convenient payment of such compensation, and the commission shall have power to make payments therefrom upon any awards. The commission, whenever it shall so deem advisable may commute such periodical payments to one or more lump sum payments to the injured employee, or, in case of death, his dependents, provided the same shall be in the interests of justice. Such commutation shall be made according to the method prescribed in section twenty-seven of this chapter.

§ 4. There is hereby appropriated out of any money in the state treasury not otherwise appropriated the sum of twelve thousand dollars (\$12,000), or so much thereof as may be necessary for the use of the bureau of statistics and information of such commission in carrying into effect the provisions of this act.

§ 5. There is hereby appropriated out of any money in the state treasury not otherwise appropriated the further sum of sixty thousand dollars (\$60,000), or so much thereof as may be necessary, for the uses and purposes of the state industrial commission in carrying into effect the provisions of this act.

§ 6. Any position established or salary fixed for the purposes for which such sums are appropriated shall be deemed temporary only and subject to future action of the legislature.

§ 7. This act shall take effect immediately.

Approved May 14.

Chapter 635.

An Act making an appropriation for the employment of prisoners in the construction of state and county highways.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The sum of twenty-five thousand dollars (\$25,000) is hereby appropriated for the construction of state and county highways by the employment of prisoners confined in the state prisons, and for the purchase of implements and equipment, pursuant to the provisions of section one hundred and seventy-nine of the prison law. The prisoners engaged in such work shall be under the direction of the superintendent of state prisons and such work shall be performed upon the state and county highways to be designated by the state commissioner of highways. Of the money hereby appropriated not more than one thousand dollars shall be available to the state department of highways for the payment of the salary of the engineer in charge of such construction, nor more than five hundred dollars shall be available to the state department of highways for the payment of the necessary expenses of such engineer.

§ 2. This act shall take effect immediately.

Approved May 14.

Chapter 638.

An Act to amend the insanity law, in relation to salaries of certain officers and wages of certain employees and making an appropriation therefor.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section fifty of chapter thirty-two of the laws of nineteen hundred and nine, entitled "An act in relation to the insane, constituting chapter twenty-seven of the consolidated laws," as last amended by chapter two hundred and eighty-six of the laws of nineteen hundred and seventeen, is hereby amended to read as follows:

§ 50. Salaries of certain officers and wages of certain employees prescribed. The officers or employees of the state hospitals now or hereafter classified as occupying offices or positions specified in the schedule at the end of this section shall hereafter receive the salaries or wages per month indicated opposite the name or title of such officer or position, except that where a minimum and maximum rate per month is prescribed, advancement from the minimum to the maximum rate shall be in accordance with the length of service, as prescribed in such schedule. If a minimum and maximum rate per month is not prescribed in such schedule, the salary or wages per month of such officer or employee shall be the amount indicated opposite the name or title of such office or position. Where an increase of salary or wages is allowed at a certain rate per month or otherwise for continuous service, continuous service performed prior to the time this section, as hereby amended, takes effect, in the same position or employment, shall be deemed a part of the continuous service in determining the salary or wages to which such officer or employee shall be entitled under this section. When employees are allowed to board and lodge away from the hospital on account of lack of accommodations in the institution a uniform rate of not less than twenty[-four] dollars per month shall be allowed in addition to the regular monthly wages, and this amount shall be apportioned at the rate of five dollars per month for each meal and five dollars per month for lodging. Such employees shall, subject to the approval of the commission, be allowed the privileges granted to employees residing in the hospital. *In all cases where a minimum and maximum rate of wage is scheduled for any given position, the increase from minimum to maximum will be made at the rate of two dollars per month for each six months of continuous service, and the first of the month nearest the date of employment shall be the date from which the first six months of service shall be reckoned. Where a telegraph office is maintained in an institution an extra compensation of ten dollars per month shall be allowed to the person performing the service of operator.*

When an employee is promoted to a position where the maximum wage of the position from which he goes equals the minimum wage of the position to which he goes, the time served in the lower position at the maximum wage shall count as time served in the higher position at the minimum wage, provided that if the minimum wage of the position to which an employee is transferred or promoted is less than the maximum wage of the position from which the employee is transferred the employee shall receive no less than the maximum wage of the position from which the employee was transferred.

* * * * *

§ 3. This act shall take effect July first, nineteen hundred and nineteen.
Approved May 19.

Chapter 640.

An Act to amend the military law, in relation to the compensation of employees in armories.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section one hundred and eighty-nine of chapter forty-one of the laws of nineteen hundred and nine, entitled "An act in relation to the militia, constituting chapter thirty-six of the consolidated laws," as last amended by chapter five hundred and fifty-eight of the laws of nineteen hundred and thirteen, is hereby amended to read as follows:

§ 189. Compensation of employees in armories. The persons appointed under the provisions of the two preceding sections shall receive compensation for the time actually and necessarily employed in their duties[, to be fixed by the officer appointing such persons] as follows: When employed in armories or arsenals housing or quartering brigade headquarters, regiments, battalions, squadrons, batteries, naval battalions, field hospitals, or signal corps, armorers, janitors, electricians and engineers [not to exceed four] six dollars per day; when employed in armories housing or quartering battalions, separate companies or separate troops, armorers, janitors, electricians and engineers, five dollars per day, other permanent employees, four dollars per day. An armorer, janitor, electrician, engineer or [laborer] other permanent employee appointed by the commanding officer of an organization located in a city who under orders duly issued by such officer performs the whole or any part of his duties outside of the limits of such city shall receive the compensation provided for an armorer, janitor, electrician, engineer or [laborer] other permanent employee employed in an armory, located in such city.[: laborers not to exceed three dollars per day. An armorer employed in an arsenal or armory having two hundred thousand or more square feet of floor surface and occupied by a regiment may in the discretion of the officer appointing, receive compensation not to exceed five dollars per day. The chief engineer in an armory having over two hundred thousand square feet of floor surface occupied by a regiment and lighted by electricity produced by machinery operated within such armory, may receive not to exceed five dollars per day]. The compensation, as certified to by the officer appointing such persons, under the provisions of the two preceding sections, shall be paid semi-monthly upon the certificate of such officer, and shall in counties outside the city of New York be a charge upon the counties constituting the brigade district and within the city of New York upon the county in which such armory or arsenal is situated; and shall be levied, collected and paid in the same manner as other brigade district or county charges are levied, collected and paid. A commissioned officer in active service shall not be eligible for appointment to and shall not hold the position of armorer, janitor, electrician, engineer or laborer in any armory or arsenal. The appointing officer shall grant to each employee a vacation of fourteen days per year with pay.

§ 2. This act shall take effect July first, nineteen hundred and nineteen.
Approved May 19.

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STATE OF NEW YORK

DEPARTMENT OF LABOR

SPECIAL BULLETIN

Issued Under the Direction of
THE INDUSTRIAL COMMISSION

JOHN MITCHELL, Chairman
EDWARD P. LYON JAMES M. LYNCH
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September, 1919
(Constituting Part II of No. 87)

**COURT DECISIONS ON
WORKMEN'S COMPENSATION LAW
AUGUST, 1916—JUNE, 1919**

Subjects Other Than Constitutionality and Coverage

Prepared by
THE BUREAU OF STATISTICS AND INFORMATION

INTRODUCTION

This special Bulletin is in sequence to Special Bulletin Number Eighty-one issued in March, 1917, and constitutes Part II of Special Bulletin Number Eighty-seven of which Part I was issued in June, 1918. Part I of Bulletin No. 87 related to "Constitutionality" and "Coverage" and presented decisions upon those two subjects in the period from August, 1916, to May, 1918, inclusive. The time required for preparation of Part II, originally planned to cover subjects other than constitutionality and coverage in the same period, has been such as to make it desirable to extend the period covered in Part II to July, 1919. With this change in scope it seems desirable to give this Bulletin a separate number (No. 95) in the regular series.

In addition to the re-enacting act and the eleven amendatory acts listed in the Introduction to Part I, the Legislature has amended the Workmen's Compensation Law by three acts of 1919; namely, L. 1919, ch. 458, effective May 5, 1919, ch. 498, effective May 9, 1919, and ch. 629, effective May 14, 1919. These changes in the law are taken note of in their appropriate connections in this Bulletin. It is well to repeat that the first precaution in studying any particular decision should be inquiry as to its status under amendments to the Compensation Law subsequent to its rendition. The Introductions to Bulletin No. 81 and Bulletin No. 87 present other suggestions and explanations applicable to this bulletin.

SUBJECT INDEX

	PAGE
Accidents, notice by employee to employer.....	352
occurrence, employees must prove.....	345
unwitnessed, presumptions.....	346
Adopted children, death benefit rights of.....	100
Advance payments by employers, deductions for.....	192
Agency for employing.....	194
Agreements, control by commission.....	247
Aliens, awards to.....	127, 189
Alimony, basis for death benefits.....	96
Appeals, certified questions, from answers to.....	375
death of claimant, effect.....	377
notice of, form.....	379
review by the commission relative to.....	370, 380
Architects as employers.....	224
Arm, award for loss of.....	160
Artificial limb, demand for.....	20
Attorney-general, aggregate trust fund, commission's policy.....	179
one hundred dollar payments, refundment.....	31
Bigamy, denial of death benefits because of.....	96
Bonuses as part of wages.....	153, 156
Brothers and sisters, death benefit rights.....	117
Cancellation, insurance contracts, private.....	226
self-insurance privilege.....	242
Care and treatment of injured employees.....	11
Certified questions, no appeal from.....	375
Children, death benefit rights.....	97
minors' expected increase of wages.....	158
Claimants, death of, pending proceedings.....	377
none existing, one hundred dollar payment.....	29
Claims for compensation, filing.....	253
presumptions in favor of.....	345
Commission, agreements, control.....	217
exclusive jurisdiction of.....	245
reconsideration of compensation cases by.....	356, 380
Commissions as part of wages.....	153
Common-law marriage, death benefit rights under.....	87
Contract between employers relative to labor.....	222
Contractors on same building, etc., responsibility for compensation.....	225
Credibility of witnesses.....	295
Cross-examine, right to.....	295
Death benefits.....	85
Dependency.....	85, 101
Deposit of present value of awards with state fund.....	162
Depositions as evidence.....	294
Disabilities, permanent partial, accidents prior to July 1, 1917, eye, loss of use of..	63
finger, permanent loss of use of.....	48
foot, loss of use of.....	60
hand, loss of use of.....	52

8 COURT DECISIONS ON WORKMEN'S COMPENSATION LAW

Disabilities, permanent, partial—Continued	PAGE
disfigurement.....	73
impaired earnings.....	78
phalanges, loss of.....	42
proportionate loss, award for.....	41
temporary total in connection with.....	32
vested interests, awards are not.....	79
temporary total and permanent partial from same accident.....	32
total permanent, border line cases.....	28
compensation, amount and payment.....	32
successive accidents.....	28
Disease due to accident, compensation for.....	352
Disfigurement, compensation for.....	73
Earning power, reduced, awards for.....	78
Earnings, annual average, methods of determining.....	140
Election of remedies under §§ 11 and 29.....	268
Employers, identification of.....	194
Estoppel from pleading time limits.....	251, 256, 304
Evidence, credibility of witnesses.....	295
cross-examination, right of.....	295
depositions, use.....	294
expert opinions of physicians.....	291
hearings, fairness and impartiality.....	295
hearsay.....	287
new, right to submit.....	295
notice of accident.....	303
presumptions.....	345
Exclusive jurisdiction of commission.....	245
Expert opinions of physicians.....	291
Eye, award for loss of.....	63, 160
Federal control, operation under.....	221
Fees of hospitals, physicians, etc., collection.....	21
Filing of compensation claims.....	253
Fingers, award for permanent loss of use of.....	48
Foot, award for loss of.....	60, 160
Foreign countries, compensation of claimants living in.....	127, 189
General employer versus special employer.....	209
Grandchildren, death benefit rights.....	119
Grandparents, death benefit rights.....	119
Half-blood relations, death benefit rights.....	101
Hand, award for loss of.....	52, 160
Hearings before commission, fairness and impartiality.....	295
Hearsay evidence.....	297
Hospital services.....	11
Identification of the employer.....	194
Illegitimate children, death benefit rights.....	97
Impaired earnings, awards for.....	78
"Incompetent," as used in § 116, interpretation.....	266
Insurance carriers, medical treatment and care, no voice in selection.....	12
self-insurance privilege, cancellation.....	242
subrogation in third party cases.....	278

	PAGE
Insurance contracts, private.....	226
Intent to injure self or another, presumption against.....	355
Intoxication, presumption against.....	355
Leg, award for loss of.....	160
Lump sum payments.....	183, 365
Marriage relative to death benefits.....	85
Medical treatment and care.....	11
Minors' expected wage increase.....	158
"Next friend," as used in § 116, interpretation.....	266
Notice of accident by employee to employer.....	303
presumption.....	305, 352
appeal to courts, form.....	379
insurance contracts, cancellation.....	226
Ownership of hazardous business in doubt.....	224
Parenthood relative to death benefits.....	97
Parents, death benefit rights.....	105, 123
Payment of compensation.....	162, 240
Periodic payment of awards.....	183
Phalanges, award for loss of.....	42
Physicians, expert opinions.....	291
services.....	11
Present value of awards, deposit with state fund.....	162
Presumptions in favor of compensation claims.....	345
Private insurance contracts.....	226
Reconsideration of compensation cases, appeals in relation to.....	380
commission's right.....	356
Remarriage relative to death benefits.....	87
Remedies, election under §§ 11 and 29.....	268
Rent as part of wages.....	153
Self-insurance privilege, cancellation.....	242
Sisters and brothers, death benefit rights.....	117
Special employer versus general employer.....	209
State fund, present value of awards, deposit.....	162
Step-children, death benefit rights.....	97
Step-parents, death benefit rights.....	103
Subrogation of insurance carriers in third party cases.....	278
Suicide, presumption against.....	355
Sundays, inclusion in compensation reckonings.....	148
Third party cases, subrogation in.....	278
Time limits, claims for compensation, filing.....	253, 255
notices of accident by employee.....	303
Tips as part of wages.....	153
Treatment and care of injured employees.....	11
Unwitnessed accidents, presumptions.....	346
Vested interests, awards are not.....	79
Wages as the basis of compensation.....	140
receipt by injured employee during disability.....	38
Wifhood relative to death benefits.....	85
Winnings as part of wages.....	153
Witnesses, credibility and cross-examination.....	299

TREATMENT AND CARE OF INJURED EMPLOYEES

(Workmen's Compensation Law, §§ 13, 24, 26, 33.)

Amendments of Workmen's Compensation Law, § 13, by L. 1918, Chapter 634, give the Commission discretionary power to require of the employer a period of treatment and care for his injured employee longer than the first sixty days and condition the furnishing of such treatment or care upon mere knowledge of the employer or his superintendent or foreman of an injury requiring it. Prior to this legislation, section thirteen, unlike other important sections, had not been changed since its original enactment. The subject has three aspects, the furnishing of the treatment, the character of the treatment and the collection of the fees. The texts of two important supreme court opinions relative to treatment and care have been presented in Bulletin 81, pages 267-272. Supreme court opinions and Commission rulings of later date are presented here.

A. Request by employee.—The amendment of 1918 establishes as law the ruling of the Commission in *Morey v. Worden* and other instances to effect that the employer is obligated to pay bills for medical services and treatment if he has had notice that they are required, even though the injured employee has not requested him to provide them. The Appellate Division, in *Goldflam v. Kazemier & Uhl*, had overruled such interpretation and reversed the award, saying:

But the award in this instance has been improperly made because the claimant did not request the employer to furnish medical services. Section 13 expressly makes such request a prerequisite to the validity of a claim by the employee against his employer. It is not contended that the circumstances were such that the employee could not make the request and the plain provision of the statute stands, therefore, as a bar to the claim. It is only where the employer fails to provide a physician after a request by the employee that the latter may employ a physician at the expense of his employer.

For the full texts in the *Morey* and *Goldflam* cases, see Bulletin 81, pages 328, and below, page 27. Upon authority of the *Goldflam* opinion, the Commission refused to award the doctor's bill in *Peck v. Allison*, S.D.R., vol. 15, p. 621, Bul., vol. 3, p. 147, Feb. 27, 1918, declaring that it was not sufficient "that the employer

the employee's compensation for their services, the employee brought suit against the employer in the Municipal Court of the City of New York, and recovered an amount equal to their bills. Upon appeal the Appellate Term of the Supreme Court in the First Department affirmed the judgment but the Appellate Division reversed it. The opinion of the Appellate Division is as follows:

JUNK V. TERRY & TENCH Co., 176 App. Div. 855, March 9, 1917.

SHEARN, J.: Plaintiff, a laborer employed by defendant, was injured in his employment about four-thirty P. M. on February 15, 1915. His injuries necessitated his removal in an ambulance to the Harlem Hospital, and disabled him so that under the provisions of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap 41], as amd.) he drew compensation at the rate of nine dollars and sixty-one cents per week up to the date of the trial. He was entitled to medical, surgical and other necessary treatment for sixty days after his accident at the expense of his employer (Workmen's Compensation Law, § 13), but it is conceded that the employer had the right to select the attending physician and the hospital. Plaintiff, in this case, selected his own physician and his own hospital, their bills for services being respectively one hundred and ninety dollars and eighty-one dollars, to recover which amount this action is brought. Plaintiff claims to have been justified in selecting his own physician because of lack of proper treatment provided in the Harlem Hospital, notice to defendant of such ill-treatment and failure on the part of the defendant to provide adequate treatment.

Plaintiff was put in the general ward of the hospital. There was conflicting testimony as to the way he was treated there and while the evidence is not very convincing, the jury was warranted in finding that he was not properly treated there. On the fourth day, that is, on February nineteenth, he insisted on leaving the hospital and going home. Although the hospital authorities considered it dangerous for him to do so, he went to his home, and on the next day a Dr. Hoy called to see him and had him taken away in an ambulance to the Misericordia Hospital, where he remained eight weeks under treatment of Dr. Hoy. The Misericordia Hospital and Dr. Hoy impressed liens on his award for the respective amounts of their bills.

Plaintiff's wife testified that on February seventeenth, after having visited her husband in the Hospital on the two preceding days, she went to One Hundred and Fifty-fifth street to get his pay and there saw a Mr. Wheeler, who was employed by defendant in some kind of office work; that Wheeler asked her how her husband was getting along and she told him that he was not satisfied with the Harlem Hospital, and that Wheeler said that he would report it and see that he got better care. She also testified that while her husband was in the Harlem Hospital she had a conversation with some one with regard to having him removed from the Harlem Hospital to the Post Graduate Hospital and that she was informed that defendant would take care of him in the Post Graduate Hospital, but that she never gave her consent to the transfer. Afterwards she testified that this conversation was on March twenty-fourth while her husband was in the Misericordia Hospital.

It appears that the defendant has a department to handle accident cases involving compensation; that Dr. Moorhead is the head of the department and that it retains forty-three physicians and surgeons in different sections of the city; that in hospitals of a private nature they pay fifteen dollars a week in the ward and pay the doctor who treats the employee, and in public hospitals they pay for ward treatment and remove the patient to the Post Graduate Hospital as soon as his condition warrants; that at the Post Graduate Hospital they maintain a ward of eight beds which is paid for whether filled or empty. It also appears that defendant heard of the accident on the day of its occurrence and that thereupon the chief clerk of the medical department telephoned to the Harlem Hospital, having been apprised that plaintiff had been removed there in an ambulance, inquired as to his condition and suggested his removal to the Post Graduate Hospital, but was informed that his condition was such that it would be impossible to remove him without danger; that he called up the hospital on each day that plaintiff was there and received the same information; that on the day following his removal he called up and was informed that he had been transferred to his home on release; that is, he had signed a release and left the hospital. A day or two after this he had a telephone conversation with Dr. Hoy, who told him that plaintiff was in his care, and he told Dr. Hoy that the company was not responsible for his bill; that the company wanted to take care of him in the Post Graduate Hospital, and he offered to take plaintiff to the Post Graduate Hospital, but "Doctor Hoy said there was nothing doing; that he had the case." Defendant paid the Harlem Hospital seven dollars and fifty cents for the time plaintiff was there.

Assuming that the plaintiff was not properly cared for in the Harlem Hospital, did the plaintiff make any demand upon the defendant for medical assistance as required by section 13 of the Workmen's Compensation Law? The wife's conversation with Wheeler was not such a demand, for there is nothing to show who Wheeler was or what his relations to the defendant were. But in such a case the court should not be astute to find that there was no demand, and here the company is not in a position to claim that there was no demand for medical assistance, because it knew that he was in the Harlem Hospital and paid the bill there, and thus showed that it understood that it was expected to render medical assistance.

The only question is, therefore, whether under all the circumstances defendant neglected to furnish proper medical care. If the defendant had originally selected the Harlem Hospital the case would, of course, be totally different. The exigencies of the case required plaintiff to go to the Harlem Hospital and defendant was informed that it was dangerous to remove the plaintiff therefrom. Even assuming, which is not the case, that defendant had notice of his complaint of the treatment at the Harlem Hospital, plaintiff left of his own accord and did not comply with the reasonable request of the defendant that he be transferred to the Post Graduate Hospital, where he would have been well taken care of without any expense to himself whatever. That he was able to be transferred to the Post Graduate Hospital is evident from the fact that he was transferred from the Harlem Hospital to his home and from his home to the Misericordia Hospital without any serious consequences. Under these circumstances it cannot be fairly held that the defendant neglected to furnish proper medical care on demand. Of course

the plaintiff would not have to wait day after day before proper attention was provided for him, but he was in the hospital where defendant had a right to assume that he would receive proper attention, and, if he did not, then it was his duty to bring knowledge of the fact clearly home to the defendant and also his duty under the circumstances disclosed to comply with the reasonable request of the defendant to be transferred to the Post Graduate Hospital.

The judgment should be reversed, with costs, and the complaint dismissed, with costs. CLARKE, P. J., LAUGHLIN, DOWLING, and SMITH, JJ., concurred. Judgment reversed, with costs, and complaint dismissed, with costs.

These claims for physician and hospital services in the Junk case, having failed as above in a court action, later came before the Commission, under authority of *Goldflam v. Kazemier & Uhl*, and were dismissed by it upon their merits and upon grounds similar to those that the court had given: S.D.R., vol. 16, p. 495, Bul., vol. 3, pp. 201, 227, 230, May 10, 1918.

The injured employee's prospect of having to pay the expenses of the first sixty days in case he declines the physician or hospital proffered by the employer appears to be about the only effective means whereby the employer can control and direct the medical care and treatment. He can ask the Commission to order the employee to submit to an operation or other treatment under its threat of stopping compensation payments, which he sometimes does; or he can plead inadequate treatment or recalcitrance of the employee upon appeal from the Commission's awards; but these have not availed him much. The Commission has held that an employee who did not fully accept the treatment offered by his employer had the right to exercise his own judgment: *O'Esau v. Bliss Co.*, S. D. R., vol. 14, p. 696, Bul., vol. 3, p. 79, Nov. 15, 1917; and has declined to order an employee to submit to an operation asked for by the insurance carrier on the ground that his chances of surviving the operation were as one to fifteen: *Fawcett v. Lagenbacker Bros.*, Claim No. 40370, June 25, 1917; 181 App. Div. 911, Nov. 14, 1917; 223 N. Y. 162, May 14, 1918.

The first of these two cases is still pending in the courts upon other points, June, 1919; the second has been affirmed by the Appellate Division and the Court of Appeals unanimously and without opinion. The insurance carriers pled recalcitrance of the injured employees relative to care and treatment in *Beckwith v. Bastian Bros. Co.*, S. D. R., vol. 13, p. 538, Mar. 14, 1917; 181 App. Div. 909, Nov. 14, 1917; *Mack v. N. Y. Dock Co.*, Death Case, No. 24142, July 16, 1917; 181 App. Div. 963, Dec. 28,

1917; 223 N. Y. 683, May 14, 1918; and *Miller v. U. S. Radiator Corp.*, File No. 12862, June 12, 1917; 183 App. Div. 914, Mar. 15, 1918, but the Appellate Division, unanimously and without opinion, affirmed the awards in all of these cases and the Court of Appeals affirmed the Mack case without dissent and without opinion.

D. Proper care and treatment.—Workmen's Compensation Law, § 13, says nothing about character or standard of care and treatment to be provided by the employer. The opinion in *Junk v. Terry & Tench Co.*, immediately above, implies that the treatment must be proper. The opinions in *Keigher v. General Electric Co.*, Bulletin 81, pages 267-271, suggest limitations upon the employer's discretion. "The employer of course cannot make an unreasonable selection. There may be instances where the employee would have a right to be consulted and a reasonable and proper deference paid to his wishes," says Justice Cochrane in the ruling opinion. "The employer must furnish a doctor such as the circumstances reasonably require and as the injured employee may reasonably request. A sick man must select his own doctor, nurse or hospital; otherwise the benefits intended will not be realized. There is no reason why the company should dictate as to the personnel of the doctor, the nurse or of a hospital for the first sixty days and have no voice in those matters after that time. It may cost the company less to select its own doctor, but the interest of the patient and not the economy of the employer was in the mind of the Legislature. I think, therefore, that if the injured employee makes a reasonable and timely request for the employment of a particular doctor, reasonably available, the request should be observed," says Justice Kellogg, concurring in the result.

In *McNeil v. N. Y. Central R. R. Co.*, Death Claim, No. 14239, July 11, 1916; 181 App. Div. 912, Nov. 14, 1917, the employee's head was crushed between heavy iron pipes that he was helping to move. The Commission found that the employer provided a physician immediately after the accident and that the physician refused requests of the employee within sixty days of the accident to be sent to a hospital. In view of this and other conduct of the employer's physician, the Commission held that the employer could not consistently claim to have been prejudiced by the employee's failure to give notice of the accident within thirty days.

The Appellate Division unanimously affirmed awards to McNeil's wife and eight children.

Findings of improper medical attention furnished by the employer's business manager for an employee's injured eye, with no notice to the insurance carrier, figure in *Boice v. Patent Specialty Supply Co.*, S. D. R., vol. 17, p. 614, Bul., vol. 3, p. 265, July 24, 1918.

Inadequate or improper medical treatment on the part of an employer's physician justifies an employee in procuring the services of a physician of his own selection without making further request of his employer. The Commission has awarded the amount of the employee's physician's bill in such a case and the award has been affirmed by the Appellate Division unanimously and without opinion, Mar. 5, 1919. The Commission's decision is based upon the following opinion of Commissioner Lyon:

BRASTOWICZ V. DOEHLER DIE CASTING Co., S. D. R., vol. 17, p. 650, Bul., vol. 4, p. 24, Oct. 16, 1918.

LYON, Commissioner: Claimant states that at least twenty-four hours, and perhaps thirty-six hours, elapsed after his first treatment, before the physician furnished by the employer visited him, although claimant was suffering great pain. The doctor denies this, but admits that the time between visits was very considerable.

I think in the case of a man injured as badly and suffering as much as the claimant was in this case, a careful physician should consider the psychology of the case as well as its purely medical or surgical aspect. It would seem that the claimant, under the circumstances, had the right at first, at least, to have had frequent visits from the doctor, even though from a medical standpoint they were not necessary. The recovery of a badly injured man might be seriously impeded by his belief while in pain that he was being neglected. Under the circumstances I think he was justified in calling in his own physician. I have not overlooked the testimony of the second doctor that in his opinion the claimant had been neglected, and, in fact, brutally treated by the first physician. I take this testimony with a grain of salt, because the witness is greatly interested in having the award made. I prefer to base my opinion on the proposition that, though from a purely medical standpoint, the treatment may have been proper, still it was not adequate because the doctor's visits were not frequent enough. The case called for the stimulus to the patient's mind which frequent visits would supply.

But it is said that he cannot cast the payment of the bill upon the employer, because he did not request treatment before his own doctor was called in, and reference is made to the case of *Goldflam vs Kazamier & Uhl*. It is true that the court in that case said, "It is only where the employer fails to provide a physician after request by the employee that the latter may employ a physician at the expense of the employer."

From the fact that the employer sent a physician to claimant in the first instance, we may assume that claimant in the first instance requested medical treatment, and he did not get adequate treatment. Is not inadequate treatment or insufficient treatment supplied by an employer tantamount to a refusal of treatment? Surely an employee need not request treatment which has already been shown to be inadequate. The employer, by offering inadequate treatment, I think, waived a further request from the employer for medical treatment. What use would a request for medical treatment be? The obvious answer of the employer would be, Why, I have supplied medical treatment. When, in fact, not being adequate treatment, it was, in the eyes of the law, no treatment at all. Must a badly injured employee stop to argue the question out with his employer while he is suffering under either no treatment or inadequate treatment? I think not. Supplying improper treatment is of itself a refusal of treatment within the meaning of the law. The award to cover the doctor's bill should be confirmed.

On the 10th day of October, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

On the other hand charges of neglect or bad management by physicians or others have not availed the employer upon appeal in *Beckwith v. Bastian Bros. Co.*, S. D. R., vol. 13, p. 538, Mar. 14, 1917; 181 App. Div. 909, Nov. 14, 1917; and *Stolte v. N. Y. State Sewer Pipe Co.*, Death File, No. 18389, Dec. 18, 1916; 179 App. Div. 949, July 3, 1917.

E. Operation against advice of employer's physician.—Where an insurance carrier's physician advised against an operation and an unsuccessful operation resulted in amputation, the employee did not forfeit compensation: *Beatty v. McAllister Dry Dock Co.*, N. Y. State Depts., Weekly Reports, Apr. 14, 1917, p. 819.

F. Employee aggravates injury.—By heavy drinking after the accident or by other conduct, the employee may prolong the period of disability or may transform what should have been easily cured injuries into serious or fatal ones. Thus, in the fatal case of *Beckwith v. Bastian Bros. Co.*, S. D. R., vol. 13, p. 538, Mar. 14, 1917; 181 App. Div. 909, Nov. 14, 1917, counsel for the employer alleged that the employee's attack of delirium tremens was due to the fact that he had not given the hospital timely information that he was a whiskey instead of a beer drinker; and in *Lindsay v. Gallagher*, S. D. R., vol. 9, p. 275, May 18, 1916, Bul. vol. 2, p. 50, Nov., 1916;— App. Div.—, May, 1917, the injured employee drank whiskey to intoxication every day after the accident and, by falling while in such state and reopening his wound, permanently lost the use of his hand. In the earlier case of *Crotty v. Pennsylvania R. R. Co.*, S. D. R., vol. 9, p. 364, July

19, 1916, the injured employee had almost recovered from a broken leg and was walking about the hospital on crutches; while poking a fellow patient with one of the crutches, the other slipped and threw him to the floor; the fall caused a green stick fracture; he contracted pleurisy and pneumonia by reason of his weakened condition and died as a result.

A second accident may occur without fault of the injured employee and may even be due to carrying out the doctor's orders. In *House v. Robinson & Carpenter*, File No. 7796, July 2, 1917; 181 App. Div. 911, Nov. 14, 1917, an employee recovering from a broken knee-cap slipped on a snow-covered walk while going home from the doctor's office and broke the knee-cap over again. The attorney for the insurance carrier made the point that slipping on the street might have injured the strongest of patellas. The Attorney General replied that the knee was weak from the first fracture, that the doctor had advised its exercise and that the risk was necessary in order to regain use and motion.

The Commission granted death benefits to Crotty's wife and six children and made awards in the other three cases. The Appellate Division affirmed the awards to House and to Beckwith's widow, unanimously and without opinion, but reversed the order relative to Lindsay and remitted his case to the Commission for further consideration as to the extent of his injuries.

G. Demand for an artificial limb.—An artificial arm is not an "apparatus" under the provisions of § 13. The employer need not supply it, though the employee demand it within sixty days after the accident. An opinion of the Appellate Division to this effect is as follows:

KUNASEK v. N. Y. CONSOLIDATED CARD Co., 176 App. Div. 135, Dec. 28, 1916.

WOODWARD, J.: The petitioner in the present proceeding before the State Industrial Commission lost his right arm in an accident on the 4th day of June, 1915. The Commission awarded him the full statutory allowance of 312 weeks' compensation, and the question presented upon this appeal is whether the claimant is entitled, in addition thereto, to an artificial arm, which he demanded during the first sixty days after his injury. The State Industrial Commission asks the question, "Is the employer, the New York Consolidated Card Co., or the insurance carrier, the Employers' Liability Assurance Corporation, Limited, or either of them, required under the provisions of section 13 of the Workmen's Compensation Law, to furnish the said William Kunasek, Jr., with an artificial limb?"

The Commission certify that the claimant could not have made use of the artificial arm at any time within the period of sixty days from the time of the

accident, and the question, so far as this case is concerned, merely requires the determination of whether the mere demand of the employee for an artificial arm within a period of sixty days entitled him to have such artificial arm, although he could make no use of it within the time limited by the statute.

This brings us to the question whether an artificial arm is an "apparatus" within the meaning of the provisions of section 13 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). That a natural arm is not to be considered as an "apparatus" must be clear to any one who stops to consider the matter for a moment. It was held in the early Massachusetts case of *Coolidge v. Choate* (11 Metc. 79) that a living bird or animal, as a game cock, could not be an implement or apparatus of gaming; that the words "implement" and "apparatus" were synonymous (*Commonwealth v. Adams*, 160 Mass. 310), and that neither of these covered a living animal, even though the particular game could not be carried on without them. It seems clear that the statute in this case does not contemplate anything more than the apparatus necessary or proper for the first sixty days of intelligent and practical treatment of the injured employee, and that there can be no justification for holding that an artificial arm is an apparatus any more than the natural arm would be an apparatus. An implement would certainly not be defined so as to include an artificial arm, and there is no occasion for construing apparatus in a broader scope, the two words being practically synonymous as generally used. No doubt the claimant could have called for any apparatus which was necessary or proper in the treatment of his health or strength during the sixty days following his injury, and it would have been the duty of the employer to have supplied them, under the conditions prescribed by the statute, but to contend that the claimant could by a mere arbitrary demand impose the duty of supplying a new arm, where he had been fully compensated for the old one, is, we think, wholly without warrant in law.

In view of what has already been said, it is not necessary further to consider the question of whether the artificial arm could have been used within sixty days of the injury.

The question should be answered in the negative.

All concurred.

Question certified answered in the negative.

II. *Collection of fees.*—It has been the practice of the Commission to investigate bills of physicians and hospitals and report upon their reasonableness. Upon notice from its medical department that they are reasonable, the insurance carrier has usually paid them without further ado. But where a bill so reported by the medical department has not been paid by the insurance carrier, the Commission, after a hearing, has approved it upon a form bearing the statement: "The Commission can only approve these bills, but cannot enforce the payment of the same. If unable to collect the amount of the bill, the only recourse is in a civil action to recover the amount as approved by the Commission." Such

civil actions have been brought and the courts have accepted jurisdiction, as in the case of *Junk v. Terry & Tench Co.*, above, page 14. But a line of court decisions has led the Commission to question the correctness of this interpretation of its own powers and to reverse its practice. In *Bloom v. Jaffe*, March 13, 1916, Bulletin 81, pages 271, 272, the Supreme Court, First Department, decided that a physician could not maintain an action against an employer under an assignment to him by the injured employee, or by beneficiaries, of the part of the compensation granted for his services. The language of the opinion is that bills for treatment and care during the first sixty days are "part of the compensation," the implication being that their payment is enforceable in the same manner as the periodic payments to the employee or the death benefits to his relatives, that is, by the summary proceedings and under the penalties provided in Workmen's Compensation Law, § 26. In *Keigher v. General Electric Co.*, Appellate Division, May 3, 1916, Bulletin 81, pages 267-271, Justice Kellogg, concurring, reasoned that the provisions of Workmen's Compensation Law, § 13, "are not intended for the benefit of the employer but of the injured employee." In November following the decision in the Bloom case, the Supreme Court, First Department, handed down an opinion similar to it, as follows:

HIRSCH v. ZURICH GENERAL A. & L. INS. CO., 97 Misc. 360, Nov., 1916.

GUY, J.: The plaintiff is a physician who rendered services as such to one Tartrax, an employee of the California Wine Cellars, who had been injured in the course of his employment, and the suit is against the defendant, the insurer of the employer under the Workmen's Compensation Law, to recover for the value of the services as fixed by the state industrial commission.

The complaint was properly dismissed.

While under section 13 of the Workmen's Compensation Law if an employer, as may be assumed in this case, fails to provide medical treatment for his injured employee, the latter may do so at the expense of the employer, it is further provided, by section 24, that claims for such services shall not be enforceable unless approved by the commission and that "if so approved, such claim or claims shall become a lien upon the compensation awarded, but shall be paid therefrom only in the manner fixed by the commission." And under section 26, as amended April 1, 1915, if payment of compensation be not made by the employer within ten days after the same is due the insurance carrier shall be liable therefor, and if not paid within ten days after demand by the injured employee, or, in case of death, his dependents or by the commission, the amount of such payment shall constitute a liquidated claim for damages against the self-insurer or insurance corporation, which with an added penalty of fifty per centum may be recovered in an action "to be instituted by the commission in the name of the people of the state."

The complaint alleges that the defendant undertook to pay any awards made by the commission to any employee. The only action which appears to have been taken by the commission was on July 9, 1915, when "this case came up for consideration of the doctor's bill. Dr. Albert Hirsch was present and his bill was approved at \$74." This was merely an approval by the commission of the plaintiff's bill to the amount stated, and it does not appear that any compensation had been awarded to the employee.

If the approval of the plaintiff's bill can be considered an award to that extent, then under the statute, as before noted, "such claim or claims shall become a lien upon the compensation awarded, but shall be paid therefrom only in the manner fixed by the commission;" and it does not appear that the commission has given any direction respecting the manner of the payment of the plaintiff's fees. *Bloom v. Jaffe*, 94 Misc. Rep. 222.

But assuming that no condition remains to be performed to make the plaintiff's claim enforceable against the defendant insurer, it was apparently the intention of the legislature that the enforcement of such claim should be effected not by an action by the employee or by the physician, but by an action "to be instituted by the commission in the name of the people of the state." The object of the statute was to secure for injured employees compensation for injuries subjecting them to the expense of litigation, and that object could not be accomplished if provision was not made for enforcing the decrees of the commission other than at the suit of the employee or persons standing in the right of the employee.

It may not be amiss to add that since the trial in this case section 26 has been amended (Laws of 1916, chap. 622, taking effect June 1, 1916), by providing that the decision of the commission, after thirty days' default in the payment of the award, may, in case no appeal has been taken therefrom, be filed with the county clerk of the county in which the injury occurred, and thereupon judgment must be entered in the Supreme Court in conformity with the decision immediately on the filing thereof, from which judgment there shall be no appeal.

The judgment should be affirmed, with fifteen dollars costs. *BIJUR* and *SHEARN, JJ.*, concur. Judgment affirmed, with fifteen dollars costs.

The actions in the *Bloom*, *Keigher* and *Hirsch* cases were brought by physicians. In the next case in point, *Semmen v. Butterick Publishing Co.*, September, 1917, the action was brought by the injured employee against his employer to recover amounts paid by himself for care, treatment and medicine. The trial court rendered judgment in his favor for damage and costs. In reversing the trial court's judgment and order, the Supreme Court, Second Department, held that the Legislature had not "intended to split the compensation for an injury into two parts, one recoverable according to the course of the common law, the other exclusively enforceable through the provision of the statute," but had "intended to invest the Commission with full power over" claims for medical care and treatment "and with full

as an exemption of all employers who complied with its requirements from suits at common law.

In *Miller v. New York Railways Co.*, 171 App. Div. 316, in considering this act, Mr. Presiding Justice Jenks, in construing section 29, providing for an election of remedies in the special case therein mentioned, held that the employee's decision to accept the compensation under the act constituted an election of remedies and estopped him from any other remedy, and he quoted from *Birdsall v. Coolidge*, 93 U. S. 64, for a definition of compensation, where the court says: "Damages are given as a compensation, recompense or satisfaction to the plaintiff for an injury actually received by him from the defendant. Compensatory damages and actual damages mean the same thing; that is, that the damages shall be the result of the injury alleged and proved, and that the amount awarded shall be precisely commensurate with the injury suffered, neither more nor less, whether the injury be to the person or estate of the complaining party. 2 Greenleaf on Evidence (10th Ed.) sect. 253."

I think it cannot be supposed that the legislature intended to split the compensation for an injury into two parts, one recoverable according to the course of the common law, the other exclusively enforceable through the provision of the statute. In section 20 of the act it is provided that, "The decision of the commission shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law." If the compensation commission err in the decision on the application made to it, such error can only be corrected upon an appeal to the Appellate Division of the Supreme Court in the third department. Its decision upon questions of fact is, unless reversed in that court, *res judicata* between the parties. See *Naud v. King Sewing Machine Co.*, 95 Misc. Rep. 676.

In *Bloom v. Jaffe*, 94 Misc. Rep. 222, the Appellate Term in the first department held that the physician who held an assignment from an employee of the portion of the award which was included as compensation for medical services could not maintain an action against the employer. The court, speaking through Lehman, J., says: "As part of this compensation it provides in section 13 for medical service at the expense of the employer, and where the employee has been compelled to procure such service himself the law makes provision for the inclusion of a claim for such service in a proper case in the award made to the employee. The primary purpose of the statute is not, however, to provide compensation to the physician, but solely to provide compensation to the injured employee for such medical service as the law permits him to procure at the expense of the employer." See, also, to the same effect *Hirsch v. Zurich General Accident & Liability Ins. Co.* 97 Misc. Rep. 360.

For these reasons I advise that the judgment and order appealed from be reversed and the complaint dismissed, but, as this phase of the case was not presented by the appellant, the reversal should be without costs. CLARK and JAYCOX, JJ., concur. Judgment and order reversed, without costs.

Impressed by these decisions, the Commission, in conjunction with insurance carriers, decided to make a test case by an award of compensation to an injured employee for medical services, the case to be carried to the Appellate Division, Third Department, regularly charged with compensation appeals. Such course was

pursued in the following case of *Goldflam v. Kazemier & Uhl*, in which the attorney for the employer and insurance carrier attacked the Semmen decision, cited the general law of contract in relation to physicians' services and argued that if medical fees were held to be "compensation," the Commission's calendar would be clogged with medical bills and physicians would become ambulance chasers. The brief was lively and readable. The discussions of opposing counsel brought under review every instance of the use of the term "compensation" in the Workmen's Compensation Law. The Appellate Division decided that medical care and treatment is "compensation." Its brief opinion, approving the reasoning in the Semmen case, is as follows:

GOLDFLAM V. KAZEMIER & UHL, 181 App. 140, Dec. 28, 1917.

COCHRANE, J.: This appeal involves the question of the jurisdiction of the State Industrial Commission, under the Workmen's Compensation Law, to make an award to an injured employee for medical services paid by him and rendered to him within sixty days after an injury sustained in the service of his employer. (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 13.)

We think such jurisdiction exists. It was so held in *Semmen v. Butterick Publishing Company* (101 Misc. Rep. 285), the reasoning in which case we approve. A repetition of the reasons there stated would be superfluous. In addition to the authorities cited in the opinion in that case, attention may be called to the cases of *Shanahan v. Monarch Engineering Company* (219 N. Y. 469), and *Matter of Skocalski v. Vinocour* (221 id. 276), which by implication seem to support this claim of jurisdiction.

But the award in this instance has been improperly made because the claimant did not request the employer to furnish medical services. Section 13 expressly makes such request a prerequisite to the validity of a claim by the employee against his employer. It is not contended that the circumstances were such that the employee could not make the request and the plain provision of the statute stands, therefore, as a bar to the claim. It is only where the employer fails to provide a physician after a request by the employee that the latter may employ a physician at the expense of his employer. The award should be reversed and the claim dismissed. All concurred. Award reversed and claim dismissed.

A year and a half before the Goldflam decision, an employer refused or neglected to furnish medical treatment and care and his injured employee procured them for himself; the Commission approved the hospital and physician bills to amount of \$175; the bills remained unpaid for more than a year after such approval when the Commission took them up under authority of the Goldflam decision and awarded them against the employer, giving liens to the physician and the hospital: *Iacomini v. O'Rourke Contracting Co.*, S.D.R., vol. 16, p. 449, Apr. 29, 1918.

DISABILITIES

(Workmen's Compensation Law, § 15)

A. *Total permanent disability.*—Workmen's Compensation Law, § 15, subd. 1, mentions the hands, arms, feet, legs and eyes and specifies that, "in the absence of conclusive proof to the contrary," loss of any two of these members shall constitute permanent total disability, compensatable for life.

1. *Border line cases.*—An employee may by the same accident completely lose one member and come so near to completely losing another as to make it questionable whether he should receive the life time compensation granted by subdivision one, or the briefer compensation granted by subdivision two of section fifteen. Injury to the hands of a youth of eighteen necessitated amputation of one of them and amputation of four fingers of the other; the Commission awarded him three hundred and sixty weeks, or about seven years compensation for the hand and four fingers and then upon rehearing awarded him life time compensation for both hands; the Appellate Division held that the award for the fixed number of weeks was the correct one: *Carkey v. Island Paper Co.*, S.D.R., vol. 6, p. 321, Nov. 3, 1915; 177 App. Div. 73, Mar. 7, 1917. Explanation and text of the court's decision appear below, pages 52, 53.

2. *Successive accidents.*—The Workmen's Compensation Law, as originally enacted, overlooked a class of cases in which the employee having lost one member by one accident loses another by another accident. For example, an employee having lost an arm in 1912 loses a leg in 1915. In a case of the kind, the Appellate Division ordered the Commission to award life-time compensation under § 15, subd. 1, and the Court of Appeals affirmed the Appellate Division's order: *Schwab v. Emporium Forestry Co.*, 167 App. Div. 614, May 5 and 11, 1915; 216 N. Y. Rep. 712, Nov. 30, 1915. The text of the Appellate Division's opinion in the Schwab case has been published in Special Bulletin No. 81, pages 274, 275, together with notice of the legislative amendment of L. 1915, ch. 615, to § 15, subd. 6, consequent thereupon. Life-time compensation has recently been granted in a case contemporary with the Schwab case: *Kriegbaum v. Buffalo Wire Works*, below, page 358. Further legislation of L. 1916, ch. 622, adding § 15, subd. 7, has provided a special fund for compensation of such ac-

cidents by levying one hundred dollars upon insurance carriers for every death case in which there are no persons entitled to compensation. The courts have upheld the constitutionality of this special fund legislation in *State Industrial Commission v. Newman* and *v. Edsall*. Portions of these decisions relating to constitutionality have been presented in part one of this bulletin, pages 37-41. The appellants also submitted a plea that undertakers are "persons entitled to compensation" so that payments of funeral expenses to them obviate payments to the special fund. Portions of the decisions denying this plea are presented here, as follows:

STATE INDUSTRIAL COMMISSION v. EDSALL AND v. NEWMAN, 179 App. Div.

481, July 2, 1917, *in part*.

In *Matter of Edsall* the appellant raises the further question whether, in the case of a payment for funeral expenses the statute requires a payment to be made to the State Treasurer. This last contention is plausible, but hardly sound. It may be well to dispose of this proposition first.

William S. Edsall, while driving an automobile for his employer, was instantly killed by reason of a blowout of one of the tires. He left him surviving no wife or child or children, and no person dependent upon him. William E. Autenrith, an undertaker, submitted his bill for the burial expenses of the deceased and was allowed \$100 by the Commission. The Commission at the same time awarded the State Treasurer the sum of \$100 under the provisions of subdivision 7 of section 15 of the Workmen's Compensation Law, and the question here is whether the State Treasurer is entitled to this sum as against the insurance carrier. The appellant's contention is that the undertaker was entitled to compensation, and that, therefore, there was a person entitled to compensation, and under the language of the statute there could be no payment due to the State Treasurer. In support of this contention the appellant cites the definition of the statute that "'compensation' means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein" (§ 3, subd. 6, as amd. by Laws of 1916, chap. 622), and that "If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following: 1. Reasonable funeral expenses not exceeding one hundred dollars." (§ 16, as amd. by Laws of 1916, chap. 622.) But we are to read the entire statute in the light of the rule that a thing within the intent of the Legislature is as much within the statute as though it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it is within the intention of the makers (*Riggs v. Palmer*, 115 N. Y. 506, 509), and it must be entirely obvious that the practical operation of the statute, as providing a special fund, would be nullified under the construction here contended for. Practically every accident in the industrial world resulting in death necessitates a funeral, and if the payment of funeral expenses by the insurance carrier operated to

relieve such carrier from the further payment into the special fund there would be no fund created of any practical value, and it may not be presumed that the Legislature intended to do a futile thing. But the essential fallacy in the contention rests upon the proposition that the payment to the undertaker for his goods and services is not "the money allowance payable to an employee or to his dependents as provided for in this chapter," but is the discharge of an obligation which would otherwise rest upon his dependents, or upon society at large. The undertaker takes no benefit from the death of the employee; he simply secures some business which calls upon some one to pay for the same, and the statute provides that in the case of the injury resulting in death what would otherwise be denominated compensation is to "be known as a death benefit," and this, after the payment of funeral expenses up to the amount of \$100, shall be "payable in the amount and to or for the benefit of the persons following." It is not a benefit to the undertaker in the sense in which that word is used in the statute; it is merely the payment of a just obligation to him. The benefit is to those who would otherwise be called upon to pay the funeral expenses, and thus understood there are no "persons entitled to compensation," unless there are such persons as are pointed out in section 16 of the act. Indeed, the enumeration of the persons who are to receive the death benefits necessarily excludes all others (*Erkenbrach v. Erkenbrach*, 96 N. Y. 456, 466), and the language of the statute, while not a model of construction, clearly does not include the undertaker as a beneficiary; it merely provides for "reasonable funeral expenses not exceeding one hundred dollars," and then points out the persons who are to receive the payment of the benefits. (§ 16.)

STATE INDUSTRIAL COMMISSION V. NEWMAN, 222 N. Y. 363, Jan. 29, 1918,
in part.

The industrial commission awarded against the employers and the insurance carrier to Edward W. Wainwright the sum of one hundred dollars on account of the funeral expenses of the deceased employee. The act provides (§ 16): "If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following: 1. Reasonable funeral expenses, not exceeding one hundred dollars;" (then follow subdivisions 2, 3 and 4 enumerating the persons who may be entitled to and apportioning the compensation). The act also provided: "'Compensation' means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein." (§ 3, subd. 6.) The record, therefore, presents the question whether or not Wainwright, the undertaker, was a person entitled to compensation within and making inapplicable here the provisions of subdivision 7 of section 15 relating to the special fund. The expressed legislative intention must dictate our determination. The legislation, in connection with the judicial decisions, indicates that the attention and consideration of the legislature was specially given to the conditions which induced the enactment of subdivision 7. Manifestly, the subdivision was intended to bring to the designated employees the additional compensation for total permanent disability, without making the payment of the compensation a ground for refusing employment to them. The legislative intention could be effected through the creation of a state fund. The insur-

ance carriers receive premiums based, in part, upon the inclusion as employees of those receiving injuries causing death and leaving no dependents entitled to compensation. They, receiving the premiums, and being free from liability to dependents, could contribute to the fund paying the additional compensation without harm to the employers. The legislature intended to create the fund. Through ordinary and common knowledge and experience, we know that the intention would be foiled in case the act, in fact, constituted the undertaker, who is awarded reasonable funeral expenses, a person entitled to compensation on account of the death of the employee. The act as originally enacted contained section 3, subdivision 6 and the part of section 16 we have quoted and the legislature in enacting in 1916 subdivision 7 did not heed the apparent inharmony between it and those parts. Indeed, in the original act, instances of like inharmony existed; for example, the provision that the "compensation under the provisions of this chapter shall be payable periodically, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award" (§ 25) is inapplicable to funeral expenses. The legislature intended in enacting subdivision 7 that the insurance carrier shall pay to the state treasurer for every case of injury causing death in which there is no person of those enumerated in subdivisions 2, 3 and 4 of section 16 surviving the deceased the sum of one hundred dollars. The legislative intention, if expressed, is the law itself. (*Matter of Meyer*, 209 N. Y. 386.)

The order should be affirmed, with costs. HISCOCK, CH. J., CUDDERACK, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur. Order affirmed.

Workmen's Compensation Law, § 15, subd. 7, does not specify that the previously incurred disability shall have been due to accident rather than to disease, and shall have been incurred in a hazardous employment; suggestion of these points is made in *Blaes v. Bliss Co.*, the text of which has been presented in part one of this bulletin, page 214.

The Commission requires payment of the one hundred dollars one year after death of the employee. If, after payment, the Commission discovers persons entitled to compensation, the state treasurer should refund the money to the carrier, as indicated by the following letter of the Attorney-General:

May 17, 1918.

Hon. James L. Wells, State Treasurer, Albany, N. Y.:

DEAR SIR.—In reply to your letter of the 17th inst., enclosing a letter from William Archer, Deputy Commissioner in the Bureau of Workmen's Compensation, with reference to repayment of \$100.00 paid to the State Treasurer in death cases where there are no dependents at the time of payment, but in which it afterwards transpires that there are dependents, would say that where the \$100.00 has been paid to the State Treasurer, and the State Industrial Commission upon a rehearing find and determine that there are dependents who are entitled to compensation, that repayment should then be

made by the State Treasurer upon the certificate and order of the State Industrial Commission; as, in that event, the State is not entitled to retain the \$100.00 provided by paragraph 7 of section 15 of the law.

Trusting this meets your inquiry, I am

Very truly yours,

MERTON E. LEWIS, Attorney General.

3. *Compensation—amount and payment.*—An employee's accident left him with a broken back and paralysis of the lower extremities. His weekly expenses for care and medicine were about forty dollars. The Commission could not see its way to grant his request for twenty dollars per week under § 15, subd. 5, or to commute his award to a lump sum: *Knerr v. Asbestos Protected Metal Co.*, S. D. R., vol. 12, p. 589, Bul., vol. 2, p. 106, Feb. 21, 1917. In a similar case in which an employee had lost both legs, Commissioner Lyon answered the complaint that "it is unjust and inconsistent to pay a man who has lost one leg at the rate of \$20 per week, and one who has lost both legs at the rate of only \$15 per week": *White v. Lodge*, S. D. R., vol. 18, p. 542, Bul., vol. 4, p. 27, Oct. 16, 1918.

B. *Award for temporary total and permanent partial disability on account of the same accident.*—The Commission may not award compensation for two injuries to an employee by the same accident, one of which is temporary and the other permanent. It may award compensation for the one or for the other, according to the schedule of Workmen's Compensation Law, § 15, but not for both. In so holding, the Court of Appeals has reversed the practice of the Commission and the approval thereof by the Appellate Division. Bulletin 81, pages 276-280, has traced the history of the Commission's practice and the Appellate Division's action.

In *Fredenburg v. Empire U. Rys.*, the Appellate Division forbade concurrent payment, but in *Marhoffer v. Marhoffer* acquiesced in consecutive payment for temporary and permanent injuries by the same accident. The text of the Fredenburg case is presented in Bulletin 81. In the Marhoffer case the Commission awarded thirty-eight weeks compensation, the first eight weeks for temporary total disability due to laceration of a thumb and an index finger and the last thirty weeks for permanent partial disability due to amputation of a second finger: S. D. R., vol. 8 p. 438, Apr. 6, 1916. The Appellate Division justified its affirmation of this award on the ground that the employee would fully recover

from the one injury but not from the other and that the legislature had based the period of compensation for the one upon the employee's inability to continue at or return to work but had fixed an arbitrary period of compensation for the other during which the employee might, by continuing at or returning to work, earn wages additional to his periodical compensation payments. In rejecting the Appellate Division's unanimous interpretation the Court of Appeals contrasted the specific provisions of the New Jersey and Massachusetts acts granting compensation for two injuries by the same accident, one temporary and the other permanent, with the silence of the New York act upon the point, and declared that the only theory of the New York law is "not indemnity for loss of a member or physical impairment as such but compensation for disability to work made on the basis of average weekly wages."

In the later case of *Erickson v. Preuss*, below, page 73, the Court of Appeals has noticed the amendment of L. 1916, ch. 622, adding Workmen's Compensation Law, § 15, subd. 7, relative to disfigurement, as a departure from the theory, and has declared that concurrent awards may be made for disfigurement and disability or loss of earning power. The opinions of the Appellate Division and the Court of Appeals in the Marhoffer case are as follows:

MARHOFFER v. MARHOFFER, 175 App. Div. 52, Nov. 15, 1916.

LYON, J.: The single question presented by this appeal is whether an employee, entitled to compensation for permanent partial disability, is also entitled to compensation for temporary total disability for injuries arising out of the same accident, and terminating within the period of the running of the award for permanent partial disability. The claimant was employed as a woodworker in the business of manufacturing wooden lamps at Long Island City, N. Y. On November 27, 1915, while cutting a piece of wood with a circular saw his right hand was accidentally forced against the saw cutting off his second finger and severely lacerating his thumb and index finger.

The State Industrial Commission in April, 1916, found as a conclusion of fact that the injuries to his thumb and finger, irrespective of the loss of his second finger, would have disabled him for a period of ten weeks from the time of the accident. The commission thereupon awarded the claimant compensation for the injuries to his thumb and index finger of two-thirds wages for a period of eight weeks from December eleventh; and for the loss of his second finger of two-thirds wages for the further and subsequent period of thirty weeks. The employer and insurance carrier have appealed from that portion only of the award which allows for the disability of eight weeks on account of injuries to the thumb and index finger. The appellants contend

that the claimant was not entitled to an award for the eight weeks' period, for the reason that the disability for which such award was made terminated within the thirty weeks' period covered by the award for temporary total disability.

Had the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1913, chap. 816, as re-enacted by Laws of 1914, chap. 41) made no specific provision for an award of compensation in cases of permanent partial disability, it seems probable that the claimant herein would have been entitled to an award of compensation to continue until the longest disabling injury had permitted him to resume employment, and to then cease. It is apparent, therefore, that the Legislature by providing a schedule of specific compensation for permanent partial disabilities intended to apply a different rule to an award where such a disability existed, than to an award where the employee had simply suffered temporary total disability. The reason for this seems to be found in the nature of the injuries. Under the latter class of disability, the employee's recovery usually leaves him in practically as good condition to labor as before. Under the former class, the disability must continue during life and doubtless to a greater or less extent disable the employee, and very likely prevent him from earning the full wages which otherwise he would have earned. Apparently with the view of providing some recompense for this hardship, the statute has arbitrarily fixed definite periods of award for permanent partial disabilities. Under it an employee is entitled to full compensation should he be able to resume employment within a week or even the next day, and is also entitled to retain the full wages which he may earn during the unexpired period. As a matter of common knowledge a person suffering such disability can reasonably be expected to be able to go back to work far within the period fixed by the statute for the continuance of compensation. In the case at bar the employee resumed his employment at the end of ten weeks from the time of sustaining the injuries. Many cases have been before us in which the employee suffering permanent partial disability has returned to his employment within a shorter time. In fact the testimony taken upon the hearing before the State Industrial Commission and the conclusions of fact of the Commission would seem to indicate that the claimant might have resumed his employment at an earlier date had it not been for the lacerations of his thumb and index finger.

Any wages which an employee might earn following his recovery from injuries constituting permanent partial disability being his notwithstanding at the time he may be receiving compensation for such disability, it would seem but just that if then prevented by reason of injuries constituting temporary total disability from resuming his employment, he should be compensated for such latter disability. I do not think he is entitled to receive any compensation on account of the temporary disability while being disabled from working by reason of the permanent disabilities, and being compensated therefor. While the construction which we have thus placed upon the Workmen's Compensation Law as to the matter involved may seem somewhat liberal, its fairness must be conceded, and we believe it is warranted by the intent of the Legislature.

The Massachusetts act provides (§ 11) that in case of the loss of a finger the employee shall be paid certain specified compensation for a definite period which shall be paid in addition to all other compensation. The New Jersey

act provides (§ 14a) for the payment of compensation during temporary disability, and following that, compensation consecutively for each permanent injury. That act fixes the period of compensation for the loss of a second finger at thirty weeks.

Just what rule the State Industrial Commission adopted in awarding compensation in the case at bar is not entirely clear. The Commission had the claimant before it, and doubtless had full knowledge as to the exact nature of the claimant's work and as to the disabling effect of the various injuries. The determination of the period of disability was one of fact, and the decision of that question by the Commission is final. I think we may assume the Commission decided that the injuries by the lacerations of the thumb and index finger, constituting temporary total disability, disabled the claimant from resuming employment for the period of eight weeks after he might have resumed it had the only injury been the loss of the finger. This conclusion is the more satisfactory from the fact that the sum involved is inconsequential in comparison of an early determination of the main question involved which affects not only this case but seven other cases submitted herewith.

The appellants contend that the provision of section 15, to the effect that compensation for the specific injuries constituting permanent partial disability shall be in lieu of all other compensation, prevents awarding compensation on account of temporary total disability arising out of the same accident. Plainly, the application of such clause is limited to such specific injuries. The appellants also contend that under the decision in *Matter of Fredenburg v. Empire United Railways, Inc.* (168 App. Div. 618), the award for eight weeks' concurring disability was erroneous. The awards in the case at bar were made to take effect consecutively, the moneys theretofore paid being applied so far as necessary to the payment of the eight weeks' compensation. The question whether the award for eight weeks should take precedence of that for thirty weeks has not been presented upon this appeal and would seem to be wholly immaterial. The question at issue in this case as to whether an award could be made for temporary total disability in the event of the claimant being able to resume employment within the period of the award for permanent partial disability did not arise in the *Fredenburg* case, nor was the possibility of his resuming employment suggested. The nature of his injuries to both hands and both feet from a current of electricity were so serious that following the decision of the appeal, an award was made for permanent total disability. That case is applicable to the facts of this case only to the extent of holding that concurring awards cannot be made.

We conclude that the awards should be affirmed. Award unanimously affirmed.

MARHOFFER V. MARHOFFER, 220 N. Y. 543, May 1, 1917.

POUND, J.: On November 27, 1915, claimant's right hand was injured in the course of his employment. The second finger was cut off and the thumb and index finger were severely lacerated. The injuries to the thumb and finger might constitute temporary total disability under paragraph 2 of section 15 of the Workmen's Compensation Law (Consol. Laws, ch. 67), for which he would be entitled to compensation at the rate of sixty-six and two-thirds per cent of his average weekly wages to be paid to him during the continuance thereof, not to exceed \$3,500. The loss of the second finger

Sons & Co.; and *Yamin v. Harris Raincoat House*. Later, in an opinion, it affirmed the double award of *Days v. Trimmer & Sons*. For the citations of these decisions see appended list of cases.

A recent opinion of Commissioner Lyon based upon the opinion of the Court of Appeals in the Marhoffer case is *Novembrini v. Holahan*, S. D. R., vol. 18, p. 603, Dec. 23, 1918.

C. Receipt of wages by injured employee during period of disability.—While receiving compensation for permanent partial disability an injured employee may in addition earn such wages as he can, even though they be as much or more than his wages at the time of his accident; so that, he may be getting at the end of the week's work full pay from an employer and two-thirds pay from an insurance carrier. But while receiving compensation for total disability any wages that an injured employee may earn are a charge by way of reducing or entirely eliminating compensation. Commissioner Lyon has interpreted the law of reduced earnings as follows:

O'ESAU v. BLISS Co., S. D. R., vol. 14, p. 696, Bul., vol. 3, p. 79, Nov. 15, 1917,
in part.

The Workmen's Compensation Law in its general features does not look to the payment of damages to an injured employee for industrial accidents. The whole genius of the compensation system, as it seems to me, is based upon the proposition that the question of damages *per se* shall be eliminated and payments shall be made on the basis of reduced earnings or reduced earning capacity, the compensation being paid for the purpose, if the injured man is capable of being restored to industry, of supplying him and his family with the means of subsistence while he is either recovering from his injury or if his injury is such as to incapacitate him for his former employment, while he is learning to perform other services which his injured condition makes possible.

The whole theory of the law, therefore, pre-supposes a reduction in earning power before anything arises which the Industrial Commission can take cognizance of. Perhaps this statement should be qualified when we take into consideration the payments made for dismemberment. A man, for instance, who loses the sight of an eye is to be paid 128 weeks' compensation, though he go back to work at his old wages the day following his accident, but I do not think that this militates against the general theory of the law, his compensation in that case being apparently based on a conclusive presumption that his earning capacity will be diminished in the course of his lifetime by what would be equivalent to 128 weeks' compensation.

The Commissioner, however, holds that an employer who pays wages to his employee during a fixed period of compensation for

dismemberment may reclaim the amount of such wages from the total allowance of compensation. Thus, he says:

NYBROE v. MILLS ESTATE, S. D. R., vol. 18, p. 637, Jan. 15, 1919, *in part*.

There is undisputed proof in the record that the employer has continued to pay the claimant his full wages ever since his disability. If the employer asks it, the number of weeks during which he has received his wages from the Mills estate should be deducted from the total of 288 weeks for the loss of the leg. This I think should not be done unless the Mills estate require it, because I suppose it is perfectly proper for an employer to continue the wages of an old and faithful employee if he wishes, altogether apart from the question of compensation. In no event does the payment of wages by the employer relieve the insurance carrier from the payment of the specified number of weeks for an amputation.

The Commission denied compensation to an employee whose employers paid him his full salary while he was temporary disabled from working: *Rosenwald v. Fine Hat Manufacturing Co.*, S. D. R., vol. 12, p. 576, Feb. 16, 1917. In granting compensation to temporarily injured employees it deducted full and reduced pay earned on certain days during the period of recovery: *Gleason v. Hall*, S. D. R., vol. 12, p. 547, Jan. 15, 1917; *Schuler v. Petroll*, S. D. R., vol. 15, p. 628, Mar. 11, 1918.

In the noteworthy case of *Ridout v. Rodgers & Haggerty*, the hands, eye, and face of Ridout, an expert mason, were severely injured by an explosion of gasoline. He elected to sue a third party. This action ran on for two years or more and was finally discontinued because of court demands for evidence impossible to obtain. Meanwhile Ridout had removed from New York to Connecticut and undertaken certain masonry contracts in which he supervised the work of his sons, doing some of the finer work himself. Having failed in his action for damages, he fell back upon his claim for compensation. The employer resisted the claim partly upon the ground that Ridout "had been in gainful employment since his injury." Ridout testified that he had not made \$500 by his contracts. His wage at time of the accident, \$6 per day, meant \$1,800 a year under method one. He would have had to have earned more than \$600 per year by contract or other work in order to incur any reduction of compensation. Upon December 11, 1917, more than three years after the accident, the Commission found his average weekly wage to have been \$34.61 and awarded him compensation at the rate of \$15 per week for

eye, extended to accidents under the new clause of subd. 3 relative to partial loss and partial loss of use of a hand, arm, foot, leg or eye. Upon further appeal, the Court of Appeals reversed the Appellate Division's order and affirmed the Commission's award of \$20 for 183 weeks. Its per curiam opinion appears below, page 160. A factory superintendent having lost four fingers of a hand and the Commission having made award for proportionate loss of the hand, the insurance carrier argued that award should have been made for loss of each finger but the Appellate Division affirmed the award, saying:

BERMAN v. RELIANCE METAL S. & S. Co., 187 App. Div. 816, May 7, 1919.
in part.

We are of the opinion that under the statute it was competent for the Industrial Commission to estimate the proportionate loss of the use of claimant's hand, and that the award is not to be disturbed on this account.

Illustrative awards for proportionate loss of the hand are: *Hartman v. American Meter Co.*, S. D. R., vol. 17, p. 600, June 13, 1918; *Repo v. Bartlett All-Steel Scythe Co.*, S. D. R., vol. 17, p. 604, June 17, 1918; and *Perl's v. Lederer*, S. D. R., vol. 19, p. —, Bul., vol. 4, p. 146, Mar. 11, 1919.*

E. *Accidents prior to amendments of 1917—decisions and opinions.*—The following cases illustrate the problems of the Commission and the courts under Workmens Compensation Law, § 15, subd. 3, as it stood prior to the amendments permitting awards for proportionate loss. With exception of the cases upon loss of phalanges their effect is offset by the amendments as concerns accidents occurring subsequent to July 1, 1917.

1. *Loss of phalanges.*—In *Matter of Petrie* the Appellate Division held that amputation of one-third of the bone constituted loss of an entire phalange, but in *Mockler v. Hawkes* that loss of a mere shaving of bone did not constitute loss of the phalange. The Court of Appeals affirmed the Petrie decision. Texts of the three opinions are in Bulletin 81, pages 286–293. The following later opinions are in line with the Petrie and Mockler cases.

* The State Industrial Commission has adopted a schedule of suggested proportional allowances in cases of loss of two or more digits which has been published in the Monthly Labor Review of the United States Department of Labor, vol. 8, pp. 864, 865 (March, 1919).

Loss of one-eighth of an inch of the bone from the end of a finger is compensatable for temporary total disability but not for loss of one-half of the finger:

GEIGER v. GOTHAM CAN Co., 177 App. Div. 29, Mar. 7, 1917.

LYON, J.: In May, 1916, the claimant was employed as an operator upon a press used for shaping covers in a tin can manufacturing establishment in the borough of Brooklyn, city of New York. By the accidental repeating of the press the second finger of her right hand was caught, and as the State Industrial Commission has found, "She received a traumatic amputation of one-eighth of an inch of the bone, same being a substantial portion of the bone." An award was made for the loss of one-half of the middle finger of the right hand.

The sole ground of appeal by the employer and the insurance carrier is that the amputation of so minor a portion of the first phalange did not of itself constitute loss of the phalange, and hence loss of one-half the finger, within the intent of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41, as amd.)

It was held in *Matter of Grammici v. Zinn* (219 N. Y. 322, 325) that a hand was not lost provided it could fulfill in a degree fair and worth considering, in any employment for which the claimant was physically and mentally fitted or adaptive, its normal and natural functions.

In *Matter of Petrie* (215 N. Y. 335, affg. 185 App. Div. 561) the State Workmen's Compensation Commission found that the injury resulted in the amputation of the finger near the first joint, and also that in such amputation about one-third of the bone of the distal phalange was cut off, and the Commission made an award for the loss of the entire phalange. The Court of Appeals held that the conclusions of the Commission construed together and in the light of the evidence might be regarded as stating that substantially all of the phalange was cut off, and that on that theory the award might be sustained. In its opinion the court said: "Applying these rules to what happens to be in this case an accident of minor importance, we think we should hold that the provisions of the statute providing compensation for the loss of a certain portion of the finger become operative and applicable when it appears that substantially all of the portion of the finger so designated has been lost, and that we should not interpret such provisions too narrowly for the purpose of defeating a recovery."

In the case of *Mockler v. Hawkes* (173 App. Div. 333) the injury was very similar to that in the case at bar, and resulted in "the amputation of the tip of the bone of the second finger of the right hand." The Workmen's Compensation Commission held that the loss of this small portion of the bone of the finger was equivalent to the loss of the first phalange, and, therefore, to the loss of one-half of the finger, and made an award accordingly. This count unanimously set aside the award, and rightly too I think.

Upon the argument of the case at bar, appellants' counsel presented to the court an X-ray photograph of the claimant's injured hand in the *Mockler* case for comparison with the X-ray photograph contained in the record herein showing the injury to the claimant's hand. While the photographs disclose a clearly perceptible difference in the extent of the two injuries, each

was caught between the knives of the machine, amputating one-quarter of an inch of the distal phalange of the index finger and one-eighth of an inch of the distal phalange of the second finger of his right hand, the Commission finding "same being a substantial portion of the said phalanges." * * *

The grounds of the appeal are: (1) That assuming any award should have been made against the carrier, the same should have been based upon either subdivision 2 or 4 of section 15 of the Workmen's Compensation Law, and not as it was based, upon subdivision 3 of that section. * * *

As to the first ground of appeal, the Commission has treated each injury as constituting permanent partial disability, and has allowed the claimant the compensation fixed therefor by subdivision 3 of section 15 for the loss of the first phalange, or one-half of the first finger, twenty-three weeks, and for the loss of the first phalange, or one-half of the second finger, fifteen weeks. The only surgeon examined at the hearing testified that he found the joints of the terminal phalanges normal, and just as good as the others, and that he did not think the injuries would incapacitate the claimant to any extent in performing the labor which he was performing when injured, or interfere at all with his carrying on work as a machinist. How long the claimant was incapacitated from working does not appear. The only evidence upon the subject is that of the claimant that prior to the time of the hearing in October, 1916, he had been working on the lakes at thirty dollars per month and board, and at the time of the hearing was a clerk in a grocery store at seven dollars per week. The claimant testified that as to the second finger the doctor cut a portion off, and that the claimant did not know whether he cut the bone, and that as to the index finger he could not tell whether there was any of the bone gone. The X-ray photograph received in evidence was confirmatory of the testimony of the physician and the finding of the Commission that one-fourth inch of the bone of the index finger was gone and one-eighth inch of the bone of the second finger. It also showed a practically normal projection of the fleshy bulbous terminal part of each finger beyond the end of the bone. We think the award of the Commission for the loss of the first phalange of each finger, and the consequent loss of one-half of the finger was not justified, and that the award instead of being based upon permanent partial disability should have been of sixty-six and two-thirds per centum of the difference between the claimant's average weekly wage and his wage earning capacity in the same employment or otherwise during the continuance of such partial disability. (*Mockler v. Hawks*, 173 App. Div. 333; *Geiger v. Gotham Can Co.*, 177 id. 29; 163 N. Y. Supp. 678; *Thompson v. Sherwood Shoe Co.*, 178 App. Div. 319; 164 N. Y. Supp. 869.) The case is very different from that of *Matter of Petrie* (215 N. Y. 335) in which the court affirmed an award for the loss of the phalange upon the ground that in the light of the evidence the conclusions of the Commission might be regarded as stating that substantially all of the phalange had been cut off. In the case at bar the evidence is conclusive that such was not the fact. * * *

For the reasons stated in considering the first and second grounds of appeal, the award must be set aside and the case remitted to the Commission to make an award in accordance with the views herein expressed.

All concurred. Award reversed, and matter remitted to the Commission for action in accordance with the opinion.

Upon authority of its decisions in the Tetro and Ide cases, the Appellate Division on June 30, 1919, reversed the award in *Buono v. Stanley Co.*

Loss of the distal phalange and of an inconsequential portion of the proximal phalange does not constitute loss of an entire digit:

BABON V. NATIONAL METAL SPINNING AND STAMPING Co., 182 App. Div. 284, Mar. 6, 1918.

LYON, J.: The question presented by this appeal is whether the claimant was entitled to be awarded compensation for the loss of an entire thumb, or for the loss of only one-half a thumb.

In March, 1917, the claimant while engaged in feeding metal into a power press at the plant of his employer, a manufacturer of brass goods in the city of New York, had his thumb accidentally caught in the press and the end of it crushed. The State Industrial Commission made an award of compensation for the loss of the entire thumb. The appellants claim that the award should have been limited to an award for the loss of one-half the thumb.

There is practically no dispute as to the nature and extent of the injury which the claimant sustained. The first or distal phalanx was amputated. The injury to the second or proximal phalanx consisted of the removal of a small triangular piece of bone about three-eighths of an inch in length on its longest side, running to a point on the inside of the thumb, which had for its base a portion of the apex of the phalanx. An X-ray photograph shows the fleshy covering of the whole proximal phalanx of the injured thumb to be practically the same as that of the uninjured thumb. The report of a surgeon of the medical division of the Commission mentions the injury to the proximal phalanx as being no more than the involvement of a very small portion of the bone.

The Commission has found that the injuries resulted in the amputation and loss of the distal phalanx together with the oblique loss of the tip of the proximal phalanx of the left thumb, "considered as the loss of the entire left thumb." The evidence, which includes an X-ray photograph showing distinctly the nature and extent of the injury to the proximal phalanx, being undisputed, the finding of the Commission that the injuries should be considered as the loss of the entire thumb is a legal conclusion subject to review by this court.

Section 15, subdivision 3, of the Workmen's Compensation Law (Consol. Laws, chap. 67), in force at the time of the injury, provided: "The loss of the first phalange of the thumb or finger shall be considered to be equal to the loss of one-half of such thumb or finger, and compensation shall be one-half of the amount above specified. The loss of more than one phalange shall be considered as the loss of the entire thumb or finger." Whether the award should have been for the loss of the entire thumb or for the loss of only one-half the thumb depends very much upon the construction which should be given the last sentence above quoted. If the sentence means that the loss, however slight, of more than one phalange of a thumb or finger shall entitle a claimant to an award of compensation for the loss of the

entire thumb or finger, then the taking off of the most minute sliver of the second phalanx, without regard to whether it in fact disabled the second phalanx, would entitle the claimant to an award for the loss of an entire finger. However, if the sentence should be construed as requiring the loss of more phalanges than one in order to constitute the loss of an entire finger, then the loss of a portion of the second phalanx must be so substantial as to entitle the claimant to an award if it were the only phalanx injured. Apparently, it was not the intention of the Legislature that a different rule should be applied to an injury to the proximal phalanx of a thumb or finger from that applicable to the distal phalanx, and that an injury which should be treated as inconsequential when occurring to one phalanx should be treated as creating disability and compensative when occurring to another. The statute makes no such distinction. It treats both alike. In either case the disability to the phalanx to be compensative must be, as was said in the frequently quoted portion of the opinion in *Matter of Grammici v. Zinn* (219 N. Y. 322): That a "hand, or the use of it, was not lost, provided it could fulfill, in a degree fair and worth considering, in any employment for which the claimant was physically and mentally fitted or adaptive, its normal and natural functions." In *Matter of Petric* (215 N. Y. 335) it was held that the provisions of the statute for compensation for the loss of a certain part of a finger become operative and applicable when it appears that substantially all of the portion of the finger so designated has been lost.

It is apparent from an inspection of the X-ray picture that the slight chipping off of the second phalanx has not lessened the use of the phalanx. The Commission has made no finding that the injury has so done or that the loss suffered by the claimant is of a substantial portion of the phalanx. The case is practically identical as to the seriousness of the injury with the following cases relating to injuries to the distal phalanx: *Mockler v. Hawkes* (173 App. Div. 333); *Geiger v. Gotham Can Co.* (177 id. 29), and *Thompson v. Sherwood Shoes Co.* (178 id. 319), in each of which we held that the injury did not constitute the loss of a phalanx.

The award should be reversed and the claim remitted to the Commission. All concurred. Award reversed and matter remitted to Commission.

2. *Permanent loss of use of digits.*—Amendment of L. 1916, ch. 622, to the paragraph entitled "Loss of use" in Workmen's Compensation Law, § 15, subd. 3, extends its provisions to permanent loss of use of a thumb, finger, toe or phalange. The paragraph makes loss of use from ankylosis or other condition equivalent to amputation.

In four cases of ankylosis in which the accidents occurred prior to the amendment, the Appellate Division has handed down opinions. The text of the earliest of these, *Feinman v. Albert Mfg. Co.*, has been published in Bulletin 81, pages 293-296. The form of the Commission's finding in this case (S. D. R., vol. 4,

p. 365) suggests that the award had been made for temporary total disability under Workmen's Compensation Law, § 15, subd. 2. The court, however, appeared to hold that the Commission had tried to apply the "Other cases" paragraph of subd. 3. It rejected such application. In a unanimous decision without opinion, May 2, 1917, the Appellate Division affirmed an award for loss of a finger to an employee whose injury consisted of permanent ankylosis of the finger: *Staufenberg v. Muller & Son*, S. D. R., vol. 10, p. 563, Aug. 28, 1916; 178 App. Div. 942, May 2, 1917. The full texts of two of the later opinions and pertinent part of the third are presented here. In contradiction of the Feinman and Staufenberg decisions, they hold that the "Other cases" paragraph was the proper basis of award for stiff fingers before the amendment. In the third and latest case the court reverses the award and remits the case to the Commission because the award does not take into account "wage-earning capacity" subsequent to the accident. The texts are as follows:

SUPPLE V. ERIE R. R. Co., 180 App. Div. 135, Nov. 14, 1917.

COCHRANE, J.: The claimant was injured May 5, 1916. The finding of the Commission is that "the index finger of his right hand became infected and resulted in an ankylosis, thereby causing a permanent loss of use of that finger." On this finding an award of compensation was made by the Commission of sixty-six and two-thirds per centum of the average weekly wages of the employee for a period of forty-six weeks "for the equivalent of the loss of the index finger of the right hand."

No witness was examined on the hearing before the Commission. There is no evidence supporting the finding that the claimant has sustained a loss of use of his finger. The employer's first report of injury states as the injury to the claimant that the skin was broken on the second and third fingers on the right hand and that the injury did not cause loss of any member or part of member. The attending physician's report contains the following questions and answers: "Give an accurate description of the nature and extent of the injury. Infected finger, left hand, and necrosed bone. * * * Has the injury resulted in a permanent disability or disfigurement of head or face? No. If so, what? (Permanent disability, such as loss of whole or parts of fingers, etc., must be accurately marked on diagram.) Stiff fingers. * * * For what period, from the date of accident (not from date of this report) is disability likely to exist? Twelve weeks." In the employee's claim for compensation to the Commission he states that he estimates his disability will continue for the remainder of his life, and that his daily earnings have been reduced by the injury twenty-five cents per day, and in his claim to the employer for compensation the employee stated that his index finger was "permanently disabled, being stiff." This is all the evidence disclosed by the record. It will be observed that the Commission accepted the claimant's own opinion that his finger was permanently disabled in preference to the opinion

of the attending physician that the disability was likely to exist twelve weeks, although this was not a physician furnished by the employer. Assuming, however, that there is evidence of a permanent disability in the use of the index finger, there is not a scintilla of evidence that such disability is equivalent to the loss of that finger, or even remotely approximates thereto. The claimant has stated that his finger is "permanently disabled, being stiff," and this statement has been deemed worthy by the Commission whereon to predicate their finding of a permanent ankylosis, although the only medical evidence in the case is to the contrary. But there is no evidence remote or otherwise that this permanent ankylosis is of such a character as to render useless the finger or destroy its efficiency. No presumption safeguards the finding of the Commission as to the extent of the injury or the rate of compensation to be awarded. (*Matter of Kanzar v. Acorn Manufacturing Co.*, 219 N. Y. 326.) If the injured finger can fulfill "in a degree fair and worth considering, in any employment for which the claimant was physically and mentally fitted or adaptive, its normal and natural functions," it is not lost. (*Matter of Grammici v. Zinn*, 219 N. Y. 322; *Matter of Kanzar v. Acorn Manufacturing Co.*, *supra*.) It does not appear in this case that the injured finger cannot partially and in a fair degree fulfill its normal and natural functions. The ankylosis may relate only to a single joint and that only to a very slight extent.

We think also that even if there is a permanent loss of the use of the finger, an improper rate of compensation has been adopted. The statute by amendment since the accident provides that "permanent loss of the use of a hand, arm, foot, leg, eye, thumb, finger, toe or phalange, shall be considered as the equivalent of the loss of such hand, arm, foot, leg, eye, thumb, finger, toe or phalange." (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 15, subd. 3, as amd. by Laws of 1916, chap. 622. See, also, Laws of 1917, chap. 705, amdg. said § 15, subd. 3.) Under the statute as it was at the time of the accident a finger was not included in that category. An award has been erroneously made for the equivalent of the loss of the index finger. The case of the claimant falls within another part of the statute (§ 15, subd. 3) regulating "Other cases," which provides that "the compensation shall be sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability," subject to the qualification that such compensation cannot exceed that for the loss of a finger. (*Matter of Feinman v. Albert Manufacturing Co.*, 170 App. Div. 147. See, also, *Sugg v. Erie Railroad Co.*, 180 id. 133, decided herewith.)

The award should be reversed, and the proceeding remitted to the Commission. All concurred. Award reversed and proceeding remitted to the Commission.

SUGG v. ERIE R. R. Co., 180 App. Div. 133, Nov. 14, 1917.

COCHRANE, J.: The claimant was injured January 14, 1916. The finding of the Commission is that "the index finger of the right hand became ankylosed, and Sugg has permanently lost the use of that finger." Compensation has been awarded at the rate of sixty-six and two-thirds per centum of the average weekly wages of the claimant for a period of forty-six weeks "for the equivalent of the loss of the index finger of his right hand."

Although the record is not very satisfactory, the finding that the claimant

has permanently lost the use of his finger probably finds support therein. But for the reasons stated in *Supple v. Erie Railroad Co.* (180 App. Div. 135), decided herewith, an improper basis of compensation has been adopted. The accident happened prior to the amendment of 1916 to subdivision 3 of section 15 of the Workmen's Compensation Law, making the permanent loss of the use of a finger equivalent to the loss of such finger. (See Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 15, subd. 3, as amd. by Laws of 1916, chap. 622.) Instead of awarding sixty-six and two-thirds per centum of the average weekly wages of the employee for forty-six weeks as for the loss of an index finger, the compensation should be "sixty-six and two-thirds per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability," not exceeding, however, the compensation for the loss of an index finger. (See § 15, subd. 3, "Other cases.")

The award should be reversed and the proceeding remitted to the Commission. All concurred. Award reversed and proceeding remitted to the Commission.

BEURENS v. STEVENS Co., — App. Div. —, May 7, 1919, *in part*.

The claimant was injured October 27, 1916. The injury has resulted in the contraction and inability to extend the second and third fingers of the right hand with consequent interference with the function of the hand and remaining fingers. Seven awards have been made from time to time, all of which have been paid except the last award covering the period from August 6, 1918, to September 27, 1918, from which this appeal is taken. The compensation paid covers a period of ninety-one weeks. We cannot agree with the contention of the appellants that compensation is limited to fifty-five weeks for the loss of a second and third finger under subdivision 3 of section 15. The injury affects the use of the hand and the remaining fingers and we agree with the Commission that under the statute as it was at the time of this accident compensation may be awarded under that part of subdivision 3 of section 15 regulating "other cases." (*Matter of Sugg v. Erie Railroad Company*, 180 App. Div. 133; *Matter of Supple v. Erie Railroad Company*, 180 App. Div. 135.) But even on this theory the award is wrong. It is sixty-six and two-thirds per centum of the average weekly wages of the claimant before the accident. The claimant earned nothing during the period covered by the award but the statute in such a case makes the compensation not sixty-six and two-thirds per centum of the difference between his former and subsequent wages but sixty-six and two-thirds per centum of the difference between his former average weekly wages and "his wage earning capacity thereafter in the same employment or otherwise." He may have had a "wage earning capacity" during the period covered by this award. That period was nearly two years after the accident. Within two weeks after the award he was working. Perhaps he was able to do so at the time of the award. No testimony was taken on this point and the award is unsupported. The Commission should determine the wage-earning capacity of the claimant and not base the award alone on actual wages received since the accident.

The award should be reversed and the proceeding remitted to the Commission. All concurred. Award reversed and proceeding remitted to the Commission.

3. *Loss of use of hand.*— Since the fingers have a co-operative function, loss of two of them from the same hand may be more serious than loss of one from each hand. Yet, the compensation, for example, which the Commission could grant for loss of the first two fingers of the right hand under Workmen's Compensation Law, § 15, subd. 3, as originally enacted, could not be greater than the compensation for loss of the index finger of the left hand and the second finger of the right hand. The Legislature has corrected this condition by amendments of L. 1917, ch. 705, to subdivision 3 which enable the Commission to award compensation for proportionate loss of the use of the hand or foot when the injury results in loss of more than one finger or toe. Illustrative cases of accidents occurring subsequent to such amendment are presented above, pages 41, 42. In case of accident occurring prior to such amendment, the Commission made award of two hundred and forty-four weeks for full loss of a hand on account of injury limited to all four of its fingers. In two cases of the kind, *Grammici v. Zinn* and *Kanzar v. Acorn Mfg. Co.*, the Court of Appeals reversed orders of the Appellate Division affirming the awards and reduced the awards to amounts provided by the schedules for loss of fingers and phalanges. The opinions of the Court of Appeals have been reproduced in Bulletin 81, pages 284–286. In three later cases the Appellate Division, on authority of these Court of Appeals opinions, has reversed awards with opinion and without dissent. Omitting portions not pertinent in this connection, the opinions are as follows:

CARKEY v. ISLAND PAPER Co., 177 App. Div. 73, Mar. 7, 1917, in part

LYON, J.: In July, 1914, the claimant, then eighteen years of age, sustained accidental injuries arising out of and in the course of a hazardous employment resulting in the amputation of his left arm between the wrist and elbow, and of the whole of the second and third fingers, and of two phalanges of the index and little fingers of his right hand. In October, 1914, the State Workmen's Compensation Commission awarded him compensation for 244 weeks for the loss of his left hand, and 116 weeks for the loss of the four fingers of his right hand, the rate of compensation being based upon his then daily earnings of one dollar and sixty cents, or an average weekly wage of nine dollars and twenty-three cents. In November, 1915, upon application of the claimant, the State Industrial Commission reconsidered the decision of the State Workmen's Compensation Commission, and determined that the injuries to the right hand had resulted in the permanent loss of the use of the hand, and made an award for total permanent disability. The Commission also in view

of the fact that under normal conditions, claimant's average daily wages would be expected to increase, fixed them for the purposes of making an award of compensation at two dollars and fifty cents per day, or at an average weekly wage of fourteen dollars and forty-two cents. Thereupon, this appeal was taken upon the grounds that the claimant's injuries did not constitute total permanent disability; and that the award was excessive as based upon such anticipated increase in the average daily and weekly wage.

The correctness of the award for total permanent disability depends upon whether the claimant can be said to have lost both hands, the permanent loss of the use of the right hand, if it exists, being considered the loss of the hand. Upon the hearing before the Commission it appeared that the claimant had some use of his hand, that he could pick up a lead pencil, but nothing much smaller; could write his name, and could dress himself except putting on his collar and tie. While the Commission was fully warranted in making the decision which it did under the statute as then construed, clearly under the recent decisions in *Matter of Grammici v. Zinn* (219 N. Y. 322), and *Matter of Kanzar v. Acorn Mfg. Co.* (Id. 326), which have been made since the decision of the State Industrial Commission, the claimant cannot be said to have lost his right hand. Hence, making an award for total permanent disability was not justified, but the award should have been made for permanent partial disability. In this respect, therefore, the award must be reversed.

ADAMS v. BOORUM & PEASE Co., 179 App. Div. 412, July 3, 1917, *in part*.

KELLOGG, P. J.: The claimant, who was injured on January 22, 1916, lost three fingers of the right hand, and the index finger remaining is permanently ankylosed. The thumb is in normal condition. The palm is not seriously affected aside from the loss of the fingers. It is evident that the claimant has some use of the hand, and within *Matter of Grammici v. Zinn* (219 N. Y. 322); *Matter of Kanzar v. Acorn Mfg. Co.* (Id. 326); *Matter of Boscarino v. Carfagno & Dragonetto* (220 id. 323), and *Carkey v. Island Paper Co.* (177 App. Div. 73; 163 N. Y. Supp. 710), the award granting compensation for the loss of the hand cannot stand. It is unnecessary to discuss just what the condition of the index finger is, for it was conceded by appellants upon the trial before the Commission that the claimant was entitled to compensation for the loss of four fingers.

Section 15 of the Workmen's Compensation Law fixes a schedule of compensation for certain disabilities, and provides, in substance, that in other cases of permanent partial disability the compensation shall be sixty-six and two-thirds percentum of the difference between the average weekly wage or earnings before and after the injury, subject to certain conditions. In the schedule of compensation a fixed sum is given for the loss of a finger or thumb, or the designated parts thereof, and for the loss of a hand. There is no other provision for the loss of a part of a hand. (See Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 15, as amd. by Laws of 1915, chap. 615).* It is, therefore, manifest that the commission cannot determine, in a case like this, that a part of the hand is lost, and award a corresponding part of the compensation fixed for loss of a hand. If the hand is not lost, but is injured otherwise than by the loss of the thumb or certain fingers, or part of them,

* Since and by Laws of 1916, ch. 622, and Laws of 1917, ch. 705.—[REP.]

the compensation must either rest upon the loss of the separate members, or must fall under the provision as to other injuries which will be compensated for by the difference between the earning power before and after the injury.

BARRINGER v. CLARK, 184 App. Div. 695, Nov. 13, 1918.

WOODWARD, J.: The claimant in this case, a girl of fifteen at the time of the accident on the 26th of August, 1916, had her hand drawn into a hot mangle, in the employer's laundry at Saratoga Springs, with the result that she lost, by amputation, the index, middle and ring fingers of her left hand back of the head of the metacarpal bones at about one-quarter of an inch back, while the little finger was amputated at the second joint. The end of the thumb was injured in its fleshy part, and appears to be somewhat sensitive, owing to the necessary treatment. The claimant was at the time in the course of her high school training, being employed in vacation, and is now studying telegraphy, where she expects to receive from seventy-two to ninety-three dollars per month. There is no evidence that she will not be prepared to do the important work involved in telegraphing, though it does appear, by reason of the injury, that she is not continuing the study of typewriting in connection with her telegraphic work, which will, in a measure, limit her efficiency, no doubt.

The State Industrial Commission has awarded compensation as for the total loss of the use of this hand, and identically the same question which was presented in *Matter of Grammici v. Zinn* (219 N. Y. 322) is involved in this appeal, so far as we are able to discover. There it was held that the basis of the award was the loss of the fingers, not for the total loss of use of the hand; and we think this rule is in no degree modified by *Dutcher v. American Express Company* (183 App. Div. 162) where the four fingers were amputated up to and including the greater part of their proximal phalanges, and the injury to the thumb made it impossible to bring the thumb in connection with the palm of the hand. In that case there was practically a total loss of the use of the hand for practical purposes, while here there is merely an amputation of portions of the fingers for which specific rates are fixed by the statute (Consol. Laws, chap 67 [Laws of 1914, chap 41], § 15, subd. 3, as amd. by Laws of 1916, chap. 622); and it affirmatively appears that the claimant is not incapacitated from doing the work for which she was preparing herself at the time of the injury.

It is urged, likewise, that the State Industrial Commission erred in fixing the probable wages of this minor at twelve dollars per week as the basis of the award. But she was fifteen years of age, was then in the high school, and was preparing to learn telegraphy, and we see no good reason why she might not be expected to earn at least twelve dollars per week within a reasonable length of time if possessed of both hands unimpaired.

We are of the opinion the award for 244 weeks is erroneous; that the matter should be sent back to the State Industrial Commission with directions to base the award upon the statutory allowance for the loss of the fingers, the injury to the thumb being only incidental to the general injury to the hand, and no part of it, recognized by the statute, having been lost.

The award should be reversed, and the case is returned to the State Industrial Commission to dispose of in harmony with this opinion. All

concurrent. Award reversed and case remitted to the State Industrial Commission to dispose of in accordance with the opinion herein.

The Boscarino opinion cited in the Adams case has to do with partial loss of vision of an eye and appears below, page 68. Upon authority of the Adams decision, the Commission has refused to make award for loss of a hand in *Galus v. Capital Seat and Novelty Co.*, S. D. R., vol. 16, p. 487, Bul., vol. 3, p. 200, May 10, 1918.

In the above cases, the injuries did not affect the palm or the thumb. Where injury has taken the fingers and has extended also to the palm or the thumb, the courts, as the four following opinions show, have affirmed award for full loss of the hand on account of loss of use.

The knives of a motor-driven jointer in a furniture factory cut off the fingers and palm of the left hand of its operator, leaving only his thumb. The Commission awarded him two hundred and forty-four weeks compensation for the equivalent of the loss of the hand. Upon appeal, the Appellate Division affirmed the award unanimously and with opinion. It distinguished his injury from the Grammici and Kanzar injuries. An attempt to carry the case to the Court of Appeals failed for want of timely notice: 221 N. Y. Rep. 574, June 12, 1917. The opinion of the Appellate Division is as follows:

COBB v. LIBRARY BUREAU, 176 App. Div. 91, Dec. 28, 1916.

KELLOGG, P. J.: The only question is whether the injured employee is entitled to compensation as for the loss of a hand. The Commission finds he lost "all the fingers of his left hand except the thumb and including the entire metacarpal bones of the middle, ring and little finger, and the major portion of the metacarpal bone of the index finger, thereby removing the entire palm from the hand, by reason of which injuries William H. Cobb has permanently lost the use of the left hand."

In the employer's report of the accident it states that the left hand was badly lacerated. In answer to the question, "Did injury cause loss of any member or part of member?" it answered, "yes;" to the question "if so, describe exactly?" it answers "probably all of his left hand. (See doctor's report.)"

In the employee's report he states the nature and extent of the injury as the loss of four fingers and most of the palm of the left hand. In the attending physician's report he is asked: "Is he able to attend to any part of present or any other occupation?" He answered, "he has lost prac-

the distal phalange of the fourth finger. In both cases the Court of Appeals held that the equivalent of the loss of a hand was not supported by the evidence, and that the hand or the use of it was not lost, "provided it could fulfill, in a degree fair and worth considering, in any employment for which the claimant was physically and mentally fitted or adaptive, its normal and natural functions." In the *Carkey* case the loss was of four fingers, but it appeared that the claimant had some use of his hand, that he could pick up a lead pencil, but nothing much smaller; could write his name, and could dress himself except putting on his collar and tie. In the *Adams* case the claimant's first finger was ankylosed at the first two joints but free where it joined the metacarpal bone, and he could write, cut leaves of paper, fold paper, and do many other things in his employment with that hand. In both the *Carkey* and *Adams* cases the court held that the claimant was not entitled to an award equivalent to the loss of the use of a hand. In the *Supple* case the court followed the *Grammici* and *Kansar* cases and reversed the award for the loss of the use of a finger as unsupported by the evidence. In the *Boscarino* case the court held that the loss of eighty per cent of the vision of an eye did not entitle the claimant to an award for the loss of an eye.

This court held in *Matter of Rockwell v. Lewis* (168 App. Div. 674) that the loss of the index, second and third fingers, and an injury to the fourth finger rendering it stiff and practically useless, was equivalent to the loss of a hand. This court also held in *Donohue v. McKaig-Hatch, Inc.* (177 App. Div. 938) that an award for the equivalent of the loss of a hand was justified where the claimant's thumb was amputated at the second joint, and his first, second and third fingers at the third joint and the fourth finger wholly uninjured. This decision was affirmed by the Court of Appeals (223 N. Y. 572).

From the evidence in the case at bar it appears that the claimant can push a truck, holding it with his left hand and pushing it with the palms of both hands, but that his right hand cannot be used in pulling the truck; that he can lift packages by pressing both palms against opposite sides of the package; that he can carry a package by lifting it with his left hand resting upon or supported by his palm and right forearm, or by inserting the palm of his right hand beneath the string by which the parcels are tied; that he can hold papers down with the palm of his right hand while writing on them with his left hand; that he can lift a small goblet of water to his lips, and that by a clip fastened to his hand he can hold a fork but cannot raise food held by the fork to his mouth; that with a pencil between the thumb and palm of his right hand he can write four or five words, but that his right thumb is weak, having about one-tenth strength, and that upon writing with his right hand his thumb loses its strength after a minute or two and he cannot hold the pencil. Upon the evidence the Commission found that there was a lack of the full use of the thumb, and that the prehensile function of the hand was lost, and that there was a permanent loss of the use of the hand considered as the equivalent of the loss of such hand.

While the claimant has some use, for certain limited purposes, of the remaining portion of his hand, I think that under the evidence it cannot fulfill in a degree fair and worth considering its normal and natural functions, and that the award of the Commission was fully justified and should be affirmed. Award unanimously affirmed.

An accident occurring twenty-two days earlier than the accident in *Cobb v. Library Bureau* was almost its exact counterpart both as to cause and result; the Commission awarded compensation for the equivalent of the loss of the left hand of a jointer operator, the revolving knives of the machine having taken away the four fingers and the palm; after the decisions of the Court of Appeals reversing the Grammici and Kanzar awards, the Commission reheard the case and affirmed the award, citing the Cobb decision; in advising the affirmation Commissioner Lyon said:

BLATTNER v. PA PRO Co., S. D. R., vol 14, p. 669, Bul., vol. 3, p. 52, Oct. 18, 1917, *in part*.

An examination of the claimant's hand, when he was before the Commission, as well as of the X-ray picture and the diagram made by the attending physician, makes it very plain to my mind that the claimant has, for practical purposes, nothing of his hand left except the thumb. It seems to me that more than three-fourths of the palm of the hand is gone. The stub of metacarpal bone for the index finger can be separated a trifle from the thumb so that it is possible to put a lead pencil between the thumb and this bone, but it is manifestly of no use for vocational purposes. I doubt whether any court reviewing our decision in this case, if it were possible to have ocular demonstration of the condition of the claimant's hand, would find that the claimant had not lost the use of his hand. The thumb which alone is uninjured is practically useless unless it can be used in conjunction with a finger opposite. When it cannot be placed opposite a finger, it is rather a hindrance than otherwise to a man in industry. A hand in the shape in which the claimant's hand is now, seems to me about as useless for vocational purposes as a half pair of shears would be for cutting. In the latter case there is, to be sure, a considerable portion of the shears left, but they won't cut. In the case of this injured man there is a considerable portion of the hand left, but it cannot be used. If the choice were given me of having a hand such as the claimant has, or having my hand amputated at the wrist, I would not hesitate a moment to choose the latter. In my opinion, an artificial hand properly applied at the wrist, would be more valuable in industry than this mangled member, and for some purposes, such as trucking and handling freight, a hook such as is seen in frequent use in case of an amputated arm, would certainly be far preferable to this fraction of a hand.

The Appellate Division affirmed the Blattner award, July 2, 1918, unanimously and without opinion upon authority of *Donohue v. McKaig-Hatch*, above.

For the extreme instance of loss of all five digits and award of compensation therefor see *Powers v. Auburn Button Works*, Bul., vol. 2, p. 193.

For an instance of crushing and fracture of the bones of the thumb, four fingers and palm of the left hand of a company president acting as an employee, with affirmation of an agreement upon a lump sum of \$2,600 for reduced earning power, see *Hoover v. Vulco Engineering Co.*, S. D. R., vol. 13, p. 513, Mar. 6, 1917.

4. *Loss of use of foot.*—A painter fell from a ladder and broke his leg. The Commission found that the injury had resulted in permanent loss of use of his foot and accordingly made award for two hundred and five weeks. Upon appeal, the Appellate Division affirmed the award without opinion, two justices dissenting upon authority of the Grammici, Kanzar, Boscarino and Carkey decisions: *Modra v. Little*, Case No. 22337; 181 App. Div. 914. Upon further appeal, the Court of Appeals held the cases cited by the dissenting justices governing, reversed the Appellate Division's order, and remanded the case to the Commission with opinion, as follows:

MODRA v. LITTLE, 223 N. Y. 452, May 28, 1918.

HOGAN, J.: August 29th, 1916, the claimant while engaged in the regular course of his employment as a painter fell from an upright ladder and sustained a compound fracture of the left leg and bruises. September 20th, 1916, an agreement was entered into between the claimant and the employer for the payment of compensation at the rate of \$15 weekly for total temporary disability between August 29th, the date of the accident, and September 19th, 1916. The agreement was subsequently approved by the commission and further payments thereunder were made by the employer down to April 25th, 1917. In May, 1917, about nine months subsequent to the accident, after a hearing before the industrial commission, an award was made to claimant for the permanent loss of the use of his left foot under subdivision 3, section 15 of the Workmen's Compensation Law, at the rate of \$19.23 per week for two hundred and five weeks from the date of the accident, payments of \$15 per week made to claimant to be credited thereon.

From the determination of the commission the employer and insurance carrier appealed to the Appellate Division. The determination was there affirmed by a divided court, and from the order there made an appeal was perfected to this court.

Section 15, subdivision 3, Workmen's Compensation Law (Cons. Laws, ch. 41), provides:

"*Permanent partial disability.* In case of disability partial in character but permanent in quality the compensation shall be sixty-six and two-thirds percentum of the average weekly wages and shall be paid to the employee for the period named in the schedule, as follows: * * * *Foot.* For the loss of a foot, two hundred and five weeks. *Loss of Use.* Permanent loss of the use of a * * * foot * * * shall be considered as the equivalent of the loss of such * * * foot. * * *"

The employer recognized a liability to claimant for a disability partial in character, and expressed willingness to continue to pay compensation therefor until reasonable opportunity was afforded to determine whether the use of claimant's foot would be lost. The claimant made no objection to such course provided he would not lose a right to secure compensation rightfully due him. The commission, however, proceeded with the hearing.

In my opinion, the commission failed to give due weight to the language of the statute "permanent in quality." The fact that claimant had sustained a compound fracture of the leg, between the ankle and the knee, does not create a presumption that he had lost the use of his foot. Section 21 of the Compensation Law relating to presumptions is not applicable to the present case. The burden of establishing a loss of the use of the foot in this case rested on the claimant, and in that respect his case failed as the record does not disclose any evidence to sustain the conclusion of the commission. On the contrary, the evidence tended to disclose that claimant had not sustained a loss of the use of his foot.

The employer's first notice of injury and the attending physician's report in addition to stating the nature and extent of the injury contained the statement that the period from the date of the accident disability is likely to exist "is three months." The record recites that one of the commissioners "read medical reports" but such reports do not appear in the record.

Dr. Reiss, representing the insurance carrier, expressed the opinion that nine months was a little too early to determine as to the permanency of the loss of the use of the foot, that there was a little motion to the ankle, good motion to the toes, and in his opinion no injuries to the foot proper as the fracture was between the ankle and the knee. In his opinion there was no contusion or bruises of the bones of the foot. Dr. Lewy, representing the commission, expressed his viewpoint of claimant's condition, as follows: "he has no joint, and entire outward and backward deformity—I think it is a permanent deformity equivalent to the loss of the use of the foot. It is useless for the purpose of a vocation either standing or walking if it is only a short distance." When asked by counsel for the carrier, "There are some occupations he can do?" Dr. Lewy replied, "If he can sit, he doesn't need to use his foot."

The record discloses that "claimant demonstrates ability to walk by walking to the end of the room and back again." The attempt was described by one of the commissioners in the following language: "In walking the left foot is brought to the ground some distance from the line of the right foot and claimant says he cannot bring his feet together without danger of losing balance. The distance between the two feet when brought to the ground is nine or ten inches or more than that; pretty nearly a foot."

At the time of the hearing before the commission, claimant resided at No. 2123 Caton avenue, Brooklyn. The meeting of the commission was held at No. 230 Fifth avenue, New York. To reach the office of the commission as appears by the statement of claimant, accompanied by his brother he boarded a trolley car directly near his residence, rode to Atlantic avenue, and then took the subway across to Manhattan, left the subway at Twenty-eighth street and Fourth avenue, walked from Twenty-eighth street to Fifth avenue and from Twenty-eighth to Twenty-seventh street to the office of the commission, demonstrating some use of his foot.

So far as the return discloses, neither one of the physicians present at the hearing made a thorough examination of the claimant to ascertain his physical condition. The claimant, though continuing treatment with a physician, did not call him as a witness to describe the condition of the injured member, his treatment of the same or to testify to the probable extent of the injury.

Claimant stated that he was unable to work at his business, painting, as he would be required to go up and down ladders and could not do so. One of the commissioners stated "that it is perfectly apparent, together with the medical testimony which is perfectly clear in this case as to the condition that exists." Another of the commissioners expressed his opinion, "I think within a reasonable time a man has the right to know what he is to expect, so that he may make his plans. A man must adjust himself to another change in his life."

The attention of the commissioners was called to our recent decisions in the *Grammici* and *Kansar Cases* (219 N. Y. 322, 326), but the commission held that the decision cited did not control in the present case. I do not agree with the view expressed by the commission. In the *Grammici* case the claimant lost the first, second and third fingers and the first phalange of the fourth finger of his right hand. One physician deposed that "the hand is useless in his vocation." As in the case at bar, claimant stated he could not work at his trade of painter by reason of his lack of ability to go up and down a ladder. In the *Grammici* case a second physician deposed "from vocation point of view, I consider this deformity equivalent to the loss of the use of a hand;" in substance the opinion expressed by Dr. Lewy in the present case. In the *Grammici* case Judge COLLIN, writing for this court, said: "The fact, if it existed, that the injuries barred the claimant from the employment or the particular occupation or vocation he was engaged in when he received them does not, in and of itself, tend to prove that the hand or the use of it was lost. It is not within the letter or spirit of the law or the legislative intention that an injury to a limb or member of an employee incapacitating him for the particular employment should establish that he was incapacitated for employment permitting or involving the use of the limb or member as injured. It is a matter of common observation and knowledge that a hand, arm, foot or leg incompetent, through injury, for certain employments is competent and useful for other employments. The expressions, 'loss' and 'loss of the use,' as used in the law, should be given their unrestricted and ordinary meaning. In the case at bar, the hand, or the use of it, was not lost, provided it could fulfill, in a degree fair and worth considering, in any employment for which the claimant was physically and mentally fitted or adaptive, its normal and natural functions. In case the hand was destroyed by amputation, directly or indirectly caused by the injuries, to such an extent that it could not thus fulfill its natural functions, it was, within the purview of the law, lost. (*Sneck v. Travelers Ins. Co.*, 88 Hun, 94; *affd.*, on opinion below, 156 N. Y. 669.) While the loss of a hand necessarily involves the loss of the use of it, the loss of the use of a hand does not involve the actual loss of the hand as a physical member—a distinction the law recognizes and observes." (p. 324.)

The *Kansar* case was argued with the *Grammici* case and decided upon the rule stated in the opinion in that case.

In *Boscarino v. Carfagno & Dragonette* (220 N. Y. 323) the claimant sustained an injury to his eye, and the industrial commission found that the injury resulted in iritis, and eventually in the loss of eighty per cent of the vision of that eye and the consequent loss of use of the right eye, which award was affirmed by the Appellate Division. This court, however, reversed the order of the Appellate Division and remitted the case to the industrial commission, following the principle laid down in the *Grammici* case, and held that if in the future the impairment of the claimant's vision would increase the industrial commission was empowered to reconsider the award made.

Applying the principle of the cases to which attention has been called to the case at bar, I conclude that they are controlling in the present case, and I recommend that the order appealed from and determination of State Industrial Commission be reversed and that the claim be remitted to the industrial commission for further consideration.

HISCOCK, CH. J., CHASE, COLLIN, CUDDEBACK, CARDOZO and McLAUGHLIN, J.J., concur. Order reversed, etc.

5. *Loss of use of eye*.—Partial loss of vision, like partial loss of hands, has given rise to court decisions reverse of Commission rulings. The grounds for reversal have been the same. Workmen's Compensation Law, § 15, subd. 3, as originally enacted, made no provision for eye injuries intermediate between temporary total disability and total loss of sight, except the "other cases" paragraph were held to apply. The legislature has corrected this condition by the amendment of L. 1917, ch. 705, just noted, which enables the Commission to make an award for proportionate loss or proportionate loss of use of an eye. In cases of accident occurring prior to this change, the Commission has made awards of one hundred and twenty-eight weeks for full loss of an eye on account of an injury leaving a percentage of vision. The Court of Appeals has reversed such an award and an order of the Appellate Division affirming it in the leading case of *Boscarino v. Carfagno & Dragonette*, in which eighty per cent of vision had been lost. This decision was handed down March 13, 1917. Previous to that date, the Commission, besides the Boscarino award, Claim No. 43262, Oct. 29, 1915, had granted compensation for total loss of the eye in *Flori v. Stewart & Co.*, S. D. R., vol. 8, p. 503, May 17, 1916, although only about seventy per cent of vision had been lost; in *Drennan v. Buffalo Dry Dock Co.*, S. D. R., vol. 12, p. 574, Feb. 13, 1917, although only about sixty-two and a half per cent had been lost; in *Arcangelo v. Gallo & Laquidara*, 177 App. Div. 31, Mar. 7, 1917, although improve-

AROANGELO V. GALLO & LAGUIDARA, 177 App. Div. 31, Mar. 7, 1917.

LYON, J.: The claimant was injured in the city of New York March 2, 1916, by a drop of plaster falling in his right eye while plastering a ceiling. He thereupon presented a claim for compensation under the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41, as amd.). The claim came on for hearing before a Deputy Commissioner April twenty-seventh, June fifteenth and August third, at each of which times an award was made, and the case continued, the awards of the two earlier dates being at the rate of fifteen dollars per week. The fourth and final hearing was had and the case closed September 28, 1916. In July, 1916, at the suggestion of the medical division of the bureau of claims of the Commission, an examination of the claimant's eyes was made by an eye specialist, who made a report to the Commission known as the "Weeks report." In this report were the following statements: "Vision 5/200. Eyes not painful, not inflamed. Interior of eye normal. Fields of vision complete. Left eye normal. Vision 20/20. The condition of the right eye will continue to improve but it will probably never be better than 20/70 or 20/50, and this will not be reached under one to three years. As vision of 20/40 at least is necessary to engage in the orderly vocation of life, you can readily see that this eye has lost at least three-fourths of its value."

Thus it will be seen that the "Weeks report" did not warrant the conclusion that there had been a permanent total loss of vision, but upon the other hand its statement that the eye would improve tended to negative that conclusion. At the August hearing the Deputy Commissioner assumed that the "Weeks report" was to the effect that the vision of the right eye would never be over 20/70; and he held that a vision reduced to that was no sight at all, and was the loss of the eye. The proceedings had at the hearing before the Deputy Commissioner September twenty-eighth appear in the record on appeal as follows: Attorney for employer and insurance carrier: "This is an eye case, and I believe it is proposed to make an award for loss of the eye, and I object to that award. We will agree to an award for two-thirds loss of the eye with the understanding that if the eye gets worse he can claim the balance." Deputy Commissioner to claimant (through interpreter): "The insurance company proposes to pay you for two-thirds loss of your eye, or 85½ weeks' compensation, with the understanding that if your eye gets worse you can then claim the balance up to 128 weeks, the full compensation allowed by law for loss of an eye. Are you willing to settle on that basis?" Claimant (through interpreter): "I can't see out of that eye at all." Deputy Commissioner: "We will make the award for the loss of use of eye. There is no question about it at all, according to Dr. Weeks' report on file. We will change the rate to \$20.00. Award made of 103 weeks, balance of award for loss of eye, at \$20.00 per week, and case closed; present payment \$185.00 and balance payable bi-weekly."

The award of 103 weeks was evidently inadvertently made as, with the previous awards, it gave compensation for 131 weeks.

Under the same date, September 28, 1916, an award was made by the Commission of twenty dollars per week for 128 weeks for the equivalent of the loss of an eye, the Commission finding that the injury "has left him a vision rated at 5/200, which is practically no vision. The possible improvement to the eye is not greater than to a point twenty-five per cent of normal

vision. Francesco Arcangelo has permanently lost the use of the right eye by reason of said injury."

It is a matter of common knowledge that the possession of two-fifths, two-sevenths or even of one-fourth vision is of much value. While the attending physician's report of April 3, 1916, stated that the claimant could count figures at one foot, and the irresponsible statement before quoted of the claimant September twenty-eighth, not under oath, was that he could not see out of his eye at all, it is plain from the record that the decisions both of the Deputy Commissioner and of the Commission were based upon the "Weeks report," and upon the conclusion that the loss of seventy-five per cent of the vision entitled the claimant to an award for the permanent loss of the use of the eye instead of for impaired vision. In *Matter of Grammici v. Zinn* (219 N. Y. 322, 325) the court said: "In the case at bar, the hand, or the use of it, was not lost, provided it could fulfill, in a degree fair and worth considering, in any employment for which the claimant was physically and mentally fitted or adaptive, its normal and natural functions."

In view of the positive statement in the "Weeks report" that the condition of the eye would continue to improve, although it would probably not be better than 20/70 or 20/50 which would be reached under one to three years, and of the conceded uncertainty as to the final result of the injury, the case should not have been closed September twenty-eighth in disregard of the protest of the appellants, but should have been continued at convenient intervals of perhaps two or three months each until the final result of the injury could be determined with reasonable definiteness. The total of the award was \$2,560, the payments extending over a period of practically two years after the case was closed. Much improvement might occur during that period. The difference between a vision of 20/50, stated in the "Weeks report" as the probable limit of improvement, and 20/40, stated therein to be necessary in the orderly vocation of life, is not great. The claimant was but thirty-four year of age, of a rugged nationality, and if we may judge from his earning capacity, a man of robust health and strength. It is a matter of common experience that assumptions, even by renowned experts in their professions, as to the extent and duration of physical ailments, frequently prove very uncertain and unreliable.

The continuance of the case would have been no great hardship to the claimant, the hearings being had in the city in which he resided. While receiving payments of twenty dollars per week founded upon the measure of his disability, he could not reasonably have objected to the employer and insurance carrier having occasional fixed opportunities to investigate as to the continuance and extent of his disability. At such times the Commission had the right to require the claimant to submit himself for medical examination, and the appellants would be entitled to have physicians of their own selection to be paid by them present to participate in such examination. The refusal of the claimant to submit himself to examination would have suspended his right to prosecute the proceeding or to receive compensation during the period of such refusal. While the Commission would yet have the power to require the claimant to submit to a medical examination, it may well be doubted whether having closed the case, the Commission would do so except upon an application to review the award founded upon some proof of a change in the extent of claimant's vision, which proof it would be very difficult

if not impossible to get except by claimant's admissions of improvement, or by his voluntary submission to an examination by an eye specialist, neither of which the appellants could probably obtain.

Under section 20 of the Workmen's Compensation Law either party upon application is entitled to a hearing. I do not think this provision of the law is complied with by the giving of one or more hearings, when additional hearings are necessary for the proper determination of the claim, but requires the giving at convenient times upon request, of such hearings as may be necessary for the determination with reasonable certainty of the material matters involved. The question as to whether the proceeding should be continued or closed was one involving not merely the exercise of discretion, but involving as well a substantial right of the appellants, the denial of which was prejudicial to them and imposed upon them a burden which the statute did not contemplate should be placed upon them.

The award should be reversed and the proceeding remitted to the Commission to the end that the matter may be reopened, and such further hearings had as may be necessary in order to determine with reasonable certainty the extent and permanency of the injury to claimant.

All concurred.

Award reversed and proceeding remitted to the Commission to the end that it may be reopened and such further hearings had as may be necessary in order to determine with reasonable certainty the extent and permanency of the injury to claimant.

In the ruling opinion, the Court of Appeals holds that loss of eighty per cent of vision is not loss of use of an eye. It decides that the case falls within its decision in *Grammici v. Zinn*. The opinion is as follows:

BOSCARINO v. CARFAGNO & DRAGONETTE, 220 N. Y. 323, Mar. 13, 1917.

CUDDEBACK, J.: The state industrial commission has awarded claimant in this case compensation for the loss of the use of the right eye, which, under the Workmen's Compensation Law, is the equivalent of the loss of the eye.

The finding of the commission, which was affirmed at the Appellate Division by a divided court, is that the claimant was employed in caulking a water main when "a chip of lead was accidentally thrown into his right eye, causing an abrasion of the cornea, resulting in iritis, and eventually in the loss of eighty per cent of the vision of that eye, and the consequent loss of use of the right eye."

The facts in the case are undisputed. The finding of the commission is based upon the report of a specialist in the treatment of eye troubles, who was agreed upon by the claimant and the insurance carrier. The report is as follows:

"The vision of the right eye equals 20/100 not materially improved with glasses. Aside from this opacity the eyeball is in good condition. The background of the eyeball appears to be normal. Fields of vision normal in extent. If an artificial pupil were made, the vision would be much improved, but in all probability would not be sufficiently good to permit him to follow any vocation requiring reading or any other relatively fine work. Prospects are that

the vision will remain about as it is at present until the artificial pupil is made. There is no danger to the other eye from the injured eye."

It seems to me that neither the findings of the commission nor the evidence before it justify the conclusion that the claimant has lost the "use of the right eye."

If the claimant still has vision in the eye, which equals twenty per cent of normal, he is very far from having lost the use of the eye and no amount of argument can add much to the force of that bare statement.

The cases cited by the Attorney General do not sustain the award. In *Beauregard v. Titchener & Co.* (6 Neg. & Com. Cases, 887, note) the Illinois industrial board held that ability "to only distinguish light and objects moving before the eye" is for all practical purposes a total loss of such eye. In *Sheanon v. P. M. L. Insurance Co.* (77 Wis. 618) the Wisconsin Supreme Court held, with regard to hands and feet, that "if their use is actually destroyed, so that they will perform no functions whatever, then they are lost as hands and feet." In *Matter of Petrie* (215 N. Y. 335) the claimant's "third finger was cut off near the first joint" and the court sustained a finding of the commission that the loss was substantially of the whole phalange.

These cases are all based upon the principle that when a member of the claimant's body or the use thereof is practically gone or destroyed the award may be for the loss of the whole member.

The case under consideration is not within that principle, but falls rather within our decision in *Matter of Grammici v. Zinn* (219 N. Y. 322, 325.) There the claimant had lost the first, second, and third fingers and the first phalange of the fourth finger of the right hand, and that was held not to be the equivalent of the loss of a hand. The claimant there had remaining the thumb and the greater part of the little finger, which were undoubtedly of use to him for many purposes. The court said: "The hand, or the use of it, was not lost, provided it could fulfill, in a degree fair and worth considering, in any employment for which the claimant was physically and mentally fitted or adaptive, its normal and natural functions."

Here the claimant can make use of the sight remaining in his right eye in many ways. He may not be able to follow any vocation which requires reading or other relatively fine work, as the evidence is, but he can pursue some calling similar to that in which he was engaged when injured.

If in the future the impairment of the claimant's vision should increase, the law gives the industrial commission the power to reconsider the award.

I recommend that the order appealed from be reversed, and that the case be remitted to the industrial commission for further consideration.

HISCOCK, C. J., and CHASE, HOGAN, POUND, McLAUGHLIN, and ANDREWS, JJ., concur. Order reversed, etc.

In a case decided by the Appellate Division after the decision of the Court of Appeals in *Boscarino v. Carfagno & Dragonette*, a flying piece of steel destroyed the lens of the retina of an employee's right eye. Its use was restored to normal by supplying an artificial lens but the employee could not use both eyes in conjunction. To use one he had to close the other. A deputy

commissioner having granted the employee compensation for loss of the eye, the Commission reversed the award without prejudice to future claims for loss of earnings but certified the question to the Appellate Division which gave opinion as follows:

FRINGS V. PIERCE-ARROW MOTOR CAR CO., 182 App. Div. 445, Mar. 6, 1918.

LYON, J.: The question certified by the State Industrial Commission is, "Did the injury as sustained by the claimant as found by the Commission herein, constitute within the meaning of the Workmen's Compensation Law the permanent loss of the use of an eye?"

The claimant was in the employ of the Pierce-Arrow Motor Car Company at Buffalo, N. Y., as an assembler of motor car vehicles. In July, 1916, while chipping a casting he was struck in the right eye with a sharp piece of steel which penetrated the cornea, rupturing the lens, causing traumatic cataract resulting in acute glaucoma which necessitated the removal of the lens. The Commission found, "As a result of said accident the vision of Richard Frings was impaired as follows: The vision of the left or uninjured eye, uncorrected is 20/20 plus 6, that is to say, normal. The vision of the right or injured eye with a correcting glass, or lens, worn in front of the eye equal to that of the lens of the eye which was removed, amounts to 20/20 plus 4. That is to say, a correcting glass worn with the right or injured eye gives to that eye normal vision. However, the correcting glass, or lens, can be worn on the injured eye and used only by closing and not using the uninjured eye. As a result of said accident, Richard Frings cannot use both eyes in conjunction. For all practical purposes he can use only one eye at a time, except that even though he is not using the injured eye it would protect him from moving objects in crossing the street. On September 21, 1916, Richard Frings returned to work for his employer at an actual daily wage of \$3. Prior to the accident, his actual daily wage was \$2.70." Compensation at a rate agreed upon between the claimant and the employer was paid to the claimant up to the time of his resuming work, and it may be observed that the disability occurred prior to the passage of the amendment awarding compensation in case of the partial loss of an eye. (Laws of 1917, chap. 705.)

The Commission made the following decision: "The claim of Richard Frings for the permanent loss of use of an eye is denied on the ground that he has not sustained the permanent loss of use of an eye, without prejudice however, to the claimant's renewing his claim when he can show loss of earnings due to the injury to his eye."

The eye specialist who attended the claimant testified "providing anything should happen to the other eye, a man with that such vision can and does and men do make a good living, necessarily in the same work, that is, the work in which they have been occupied at the time of injury. As for example, I had a man down at the dry dock who had a similar injury, but much more serious, seven years ago, who is still on the job at the same old thing and that is a riveter making his regular wages, and I have a man who until his death a short time ago, kept books, who had always been a timekeeper and who went back to his old occupation. So it is not all evidence that this man can't earn a living at that occupation."

Section 15, subdivision 3, of the Workmen's Compensation Law (Consol. Laws, chap. 67) provides that the permanent loss of the use of an eye shall be considered as the equivalent of the loss of such eye. It was said in *Matter of Grammici v. Zinn* (219 N. Y. 322, 325): "The expressions, 'loss' and 'loss of the use' as used in the law, should be given their unrestricted and ordinary meaning. In the case at bar, the hand, or the use of it, was not lost, provided it could fulfill, in a degree fair and worth considering, in any employment for which the claimant was physically and mentally fitted or adaptive its normal and natural functions." To a like effect is *Matter of Kanzar v. Acorn Mfg. Co.* (219 N. Y. 326). Unquestionably when the lens of the eye was destroyed the use of the eye, unaided, was lost. It was only by providing an artificial lens outside the eye that the image could be so thrown upon the retina as to restore the sight. The retina was not destroyed, and through the use of an artificial lens the eye, so far as its use alone was concerned, could fulfill the natural function of an eye. The claimant has permanently lost the use of the eye, when so supplemented, to the extent only of using it in conjunction with the other eye, which he cannot do owing to the lack of co-ordination of images. Should the claimant lose his left eye he would be able, using the injured eye aided by a lens to fully perform his duties. It was said in *Matter of Markoffer v. Markoffer* (220 N. Y. 543, 546): "The theory of the New York law is not indemnity for loss of a member or physical impairment as such, but compensation for disability to work made on the basis of average weekly wages."

I think there has not been the loss of an eye within the contemplation of the statute, and that the certified question should be answered in the negative.

All concurred, except WOODWARD and HENRY T. KELLOGG, JJ., dissenting. Question certified answered in the negative.

In a case following the Frings case in point of time, the employee had to close one eye in order to use the other but could then get only one-third vision from his injured eye. The Appellate Division distinguished this injury from the injury to Frings and affirmed an award for loss of use of an eye, one justice dissenting. The court's opinion is as follows:

SMITH v. F. & B. CONSTRUCTION CO., 185 App. Div. 51, Nov. 18, 1918.

JOHN M. KELLOGG, P. J.: By the award appealed from claimant has been compensated for the "permanent loss of use of the right eye, considered as the equivalent of the loss of such eye."

With the use of powerful glasses he has a vision of about one-third with that eye, but in order to obtain it he must close the other eye. In any event he can only have one eye, and if he uses the injured eye he has the vision of but one-third of an eye.

The case differs from *Frings v. Pierce Arrow Motor Car Co.* (182 App. Div. 445) where by the use of glasses claimant had the normal vision of the injured eye. There, without glasses, he had vision of but one eye and with the use of glasses had the normal vision of the other eye only. In any event he had the full vision of one eye and could use either eye at

the theory of the Workmen's Compensation Law was not indemnity to a workman for loss of a member or physical impairment as such, but compensation for disability to work made on the basis of average weekly wages. (*Matter of Markhoffer v. Markhoffer*, 220 N. Y. 543; *Matter of Winfield v. N. Y. C. & H. R. R. Co.*, 216 N. Y. 284.) The amendment of 1916, however, so far as facial or head disfigurement is concerned, is a departure from or modification to that extent of the prior theory upon which an award was based. The entire matter of awards under the Workmen's Compensation Law is committed to legislative discretion. (*Matter of Markhoffer v. Markhoffer*, *supra*; *Shanahan v. Monarch Engineering Co.*, 219 N. Y. 469.) The commission may now make an award for serious facial or head disfigurement, even though such disfigurement does not diminish or impair the earning capacity of the claimant. The amount is to be such as the commission deems proper and equitable, in view of the disfigurement, not exceeding \$3,500.

Concurrent awards may be made, one for serious facial or head disfigurement, and one for disability or loss of earning power. If so made, then it should clearly appear that the award for facial or head disfigurement does not include anything for diminished earning power. We think that fact does here so appear.

The order of the Appellate Division should, therefore, be affirmed, with costs. Hiscock, Ch. J., Chase, Collin, Cuddeback, Hogan, Cardozo and McLaughlin, JJ., concur. Order affirmed.

The point of unconstitutionality does not appear to have been urged against the disfigurement clause by the appellants in the Erickson case but has been put forward since in six disfigurement cases. The Appellate Division has affirmed these cases unanimously and without opinion. The Court of Appeals has affirmed three of them, two judges dissenting. Its opinions appear immediately below. The six cases are: *Sweeting v. American Knife Co.*, Claim No. 2407-S, May 23, 1918; 186 App. Div. 926, Nov. 13, 1918; 226 N. Y. 119, Apr. 8, 1919; *Bianc v. N. Y. Central R. R. Co.*, S. D. R., vol. 16, p. 424, Apr. 8, 1918; 186 App. Div. 925, Nov. 13, 1918; — N. Y. —, Apr. 8, 1919; *Vaughn v. Clark Knitting Co.*, Claim No. 35470, Bul., vol. 3, p. 114, May 23, 1918; 186 App. Div. 925, Nov. 13, 1918; — N. Y. —, Apr. 8, 1919; *Benson v. Gault Bros. & Hassett*, Claim No. 1116-B, June 21, 1918; 187 App. Div. 915, Jan. 15, 1919; *Wagner v. Fuld & Hatch Knitting Co.*, Claim No. 1918-A, June 5, 1918; — App. Div. —, May 20, 1919; and *Chase v. Eastern Estate Tea Co.*, S. D. R., vol. 18, p. 577, Nov. 21, 1918; — App. Div. —, May 20, 1919.

The Commission made awards of \$2,000 for disfigurement in *Daw v. Underwriters Ass'n of N. Y.*, S. D. R., vol. 16, p. 454,

Bul., vol. 3, p. 198, May 10, 1918; and *Kulp v. Stabell Co.*, S. D. R., vol. 17, p. 629, Aug. 16, 1918.

Besides the argument of unconstitutionality, the appellants in the disfigurement cases have protested against excessiveness of the awards. The law says that the "commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement but not to exceed three thousand five hundred dollars." In the nine cases enumerated above, the highest award was \$3,500; the lowest \$1,000; each of the two for loss of scalp by a woman employee, due to catching her hair in a revolving shaft. The injuries in three cases were burns due to explosion and fire. One employee fell against an unguarded belt and incurred lacerations, aggravated by gangrene. A lashing hose knocked out the teeth of another and scarred his face. A horse bit off the nose of another. A pole fell upon another fracturing his skull and leaving a deep indentation. In this last-named instance the appellants accused the employee of keeping his hair clipped short for the purpose of displaying his disfigurement and compared his award of \$2,000 with the woman's award of \$1,000. The award to him they protested was not "proper and equitable."

The Court of Appeals finds the disfigurement clause constitutional and the amounts of the awards in the three cases in hand, as well as the proceedings, not improper. It holds that power to legislate for workmen's compensation is broad enough to include not only insurance against loss of earning power but insurance against pain of mind and body. It discovers in the recent United States Supreme Court decisions (Bulletin 87, pages 11-37) no restriction except that amounts shall be reasonable. It makes the Sweeting case the subject of opinion and affirms the Bianc and Vaughn cases without opinion. Judge Pound, concurring, holds that "impaired ability to get work" is a broad enough ground for disfigurement awards and that other grounds are anomalous. The two opinions are as follows:

SWEETING V. AMERICAN KNIFE CO., 226 N. Y. 200, Apr. 8, 1919.

CARDOZO, J.: The claimant was employed in the grinding department of the American Knife Company. The explosion of an emery wheel destroyed the bridge of his nose, giving him what is commonly called a flat nose, with deep scars upon his face. The state industrial commission made an

award of \$2,500 for serious facial disfigurement. Subdivision 3 of section 15 of the Workmen's Compensation Law (Cons. Laws, chap. 67) (as amended in 1916) provides that "in case of an injury resulting in serious facial or head disfigurement the commission may in its discretion, make such award or compensation as it may deem proper and equitable, in view of the nature of the disfigurement, but not to exceed \$3,500." The employer and the insurance carrier insist that this provision of the statute is unconstitutional and void.

The argument is that the purpose of the amendment is to compensate the workman for injuries that have no relation to his earning power. If that were in truth the purpose, the statute would still be valid (*Matter of Erickson v. Preuss*, 223 N. Y. 365). The Constitution (Art. 1, section 19) authorizes the adoption of a system of insurance to compensate employees for injuries without regard to fault. Insurance against pain of mind and body is as legitimate, if the amount is kept within the bounds of moderation, as insurance against loss of earnings. It is of no moment that some other measure of compensation may have prevailed in the past. The Constitution does not stereotype the forms of legislation. The common law gave the workman compensation for pain and suffering, as well as for loss of earnings, when the employer was at fault. The statute takes that remedy away, and substitutes insurance within prescribed limits, irrespective of fault. Pain and suffering are part of the risks of the employment. The legislature may make them part of the risks of the insurance. The one restriction on its power is that the burden must be reasonable (*Mountain Timber Co. v. Washington*, 243 U. S. 219, 240, 241; *N. Y. Central R. R. Co. v. White*, 243 U. S. 188, 207).

The statute would stand, therefore, though facial disfigurement were unrelated to loss of earnings. But in truth it is related, and so the legislature must have found. One cannot defeat a statute by a presumption that in its enactment the truths of life have been ignored. The presumption is, on the contrary, that they have been perceived and heeded. But one of the truths of life is that serious facial disfigurement has a tendency to impair the earning power of its victims. In some callings it would rule out altogether an applicant for employment. In most it would put him at a disadvantage when placed in competition with others. There may, of course, be individual instances of disfigurement without impairment of earning power. That is true also where there has been the loss of a finger or a foot or an eye. Lawmakers framing legislation must deal with general tendencies. The average and not the exceptional case determines the fitness of the remedy.

The argument is made, however, that the findings are defective. If the purpose of the statute is to compensate for loss of earnings, there should be a finding, it is said, that the result of the claimant's disfigurement will be diminished earning power. One might as well argue that without a like finding there could be no recovery for the loss of a finger or a foot or an eye. The commission has found that there has been serious facial disfigurement, and that an award of \$2,500 is fair and equitable. Those are the ultimate facts to be embodied in the decision. The capacities and opportunities of the individual claimant have at the utmost an evidential value.

It is true that the commission has a wide discretion, and in fixing a fair and equitable compensation it may inquire into all the circumstances that will help to guide its judgment. But those circumstances, however pertinent as evidence, have no place in the findings. The mutilated face, like the mutilated arm or leg, is the capital fact upon which liability depends. The injury alone, without other proof of loss, makes out the claimant's handicap in the struggle of existence. Given the fact of injury, the commission is to assess the damages. The presumption is that all relevant circumstances have been weighed in the assessment. These findings, therefore, would be adequate even if the commission were a court. But in truth it is not a court, and the niceties of code practice have no place in its procedure. Its decision states the facts essential to liability. No more should be exacted.

There is nothing in the point that the extent of the compensation must be determined by a jury. The Constitution authorizes "the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation" (Constitution, art. 1, sec. 19). The award is not redress for a tort. It is an allotment to an insured workman of his proportion of a fund maintained for his insurance (*Mountain Timber Co. v. Washington*, *supra*, at p. 235). Nor does the statute become invalid because the commission has some discretion in fixing the amount. The legislature may provide for such a method of "adjustment, determination and settlement" as it will. There is reason for the distinction which it has drawn between facial disfigurement and other injuries, though the reason is hardly our concern. Some injuries, as for instance the loss of a limb, may be so defined and classified that the appropriate compensation may with a fair average of justice be estimated in advance. But cases of disfigurement have their special problems. It is difficult, if not impossible, to define and classify the injuries. A flexible compensation makes for justice alike to employer and to workman. It is not important that a lump payment is exacted. That may be done in other cases (Workmen's Compensation Law, sec. 27). The payment is not made by the employer himself, if he insures in the state fund, except to the extent of the premium which he pays for his insurance (Secs. 50, 53). It is a charge upon the fund. He may, of course, be a self-insurer, or pay his premiums to an insurance company (Sec. 50), but that is only at his option.

The statute is constitutional, and the proceedings under it have been regular.

The order should be affirmed with costs.

POUND, J. (concurring). I concur in the result. The compensation awarded to the employee under the Workmen's Compensation Law is based on loss of earning power. An allowance for serious facial or head disfigurement so far as such disfigurement has no relation to disability, is an anomaly. (*Matter of Marhoffer v. Marhoffer*, 220 N. Y. 543.) The language of the opinion in the *Erickson Case* (223 N. Y. 365-368), "The commission may now make an award for serious facial or head disfigurement, *even though such disfigurement does not diminish or impair the earning capacity of the claimant*," is unnecessarily broad and might have been limited to the language of the act itself, which does not include the words italicized.

Doubtless the general language of the New York Constitution (Art. 1, sec. 19) would permit us to uphold a statute which awards compensation

to employees for *all* industrial injuries, without trial by jury, but the theory of the Compensation Acts is that the community rather than the injured workman should carry the burden of *impaired earning capacity* due to accident. If that theory is extended to cases where the injured man can still work and get work and an administrative board is permitted to assess the damages, a new problem is introduced as to the limits of legislative power (U. S. Const. Amend. 14) and the reasonableness of the burden, the solution of which is not so easy. (*N. Y. Central R. R. Co. v. White*, 243 U. S. 188, 202, 203.)

Serious facial or head disfigurement may leave one *able* to work and *unable* to get work. Employers might refuse to employ a disfigured man in his trade either from lack of confidence in his unimpaired ability or because it would be unpleasant for others to work beside him or unprofitable to have him meet the customers. A woman whose hair had been torn off or whose face was badly scarred might be so repulsive to the eye that no one would employ her and yet be as competent as ever to do her work. In a lesser degree, the seriously disfigured face or head of a man might lead to discrimination against him. The House of Lords in *Ball v. Hunt & Sons* ([1912] A. C. 496), upholding an award for such injuries, said: "The injury for which the statute gives compensation is not mutilation or disfigurement or loss of physical power, but loss or diminution of the capacity to earn wages." The New York statute, by mentioning facial injuries, merely makes plain what the English act leaves to interpretation. If this award for disfigurement is placed on the broad ground of impaired ability *to get work*, no violence is done to the purpose of the act. In the absence of a finding of fact negating such impaired ability on the facts in this case, the award should be sustained. (W. C. L. § 21.) The order should be affirmed, with costs.

MCLAUGHLIN and ANDREWS, JJ., concur with CARDOZO, J.; HISCOCK, Ch. J., and POUND, J., concur in result in memorandum by POUND, J.; CHASE and HOGAN, JJ., vote to remit case to industrial commission for further hearing because of absence of findings showing that disfigurement has resulted in loss of earning power or of ability to obtain employment.

Order affirmed.

G. Impaired earnings.—The "Other Cases" paragraph of Workmen's Compensation Law, § 15, subd. 3, has been noticed at length in Special Bulletin No. 81, pages 297-306. It should be compared with § 15, subd. 4. The two provisions have not proved distinguishable in practice. Award for decreased earning power has been held appropriate in cases of loss of hearing: *Wagner v. American Bridge Co.*, Special Bulletin, No. 81, page 304; in cases of amputation of fingers not equivalent to loss of phalanges: *Ide v. Faul & Timmins*, above, page 45; and in cases of stiffened fingers: *Supple v. Erie R. R. Co.* and *Sugg v. Erie R. R. Co.*, above, pages 49, 50. Stiff finger accidents are now compensatable under the paragraph "Loss of use," in subdivision three.

The Commission has been making awards for "impaired earnings" in cases in which the injured employee has been able to return to work but with reduced capacity to labor and consequent reduced pay: *Saccoccio v. Bradley Contracting Co.*, S. D. R., vol. 6, p. 410; *Mike v. Glens Falls Portland Cement Co.*, S. D. R., vol. 7, p. 435; *Neuner v. Hanschman*, S. D. R., vol. 8, p. 419; *Kaempfer v. Automobile Club of America*, S. D. R., vol. 10 p. 591, Bul., vol. 2, p. 10; and *Miller v. Ludlum Steel Co.*, Bul., vol. 2, pp. 15, 21. Computation of the decrease is illustrated in *Gleason v. Hall*, S. D. R., vol. 12, p. 547; and *Ridout v. Rodgers and Haggerty*, S. D. R., vol. 14, p. 710.

II. *Award for a fixed number of weeks not a vested interest.*—Workmen's Compensation Law, § 15, subd. 3, prescribes definite numbers of weeks compensation for various accidental injuries constituting permanent partial disability. What remains of an award in such a case does not survive as part of the employee's estate if he dies of cause other than the accident before full payment has been made. For example, if an employee be awarded compensaion for fifteen weeks for loss of a little finger and a railroad accident kills him, the insurance carrier having paid him in full to date of death but three weeks compensation on the periodic payment plan, the insurance carrier does not have to pay the remaining twelve weeks compensation to his heirs. The Appellate Division has so held in the following opinion, which being merely a reply to a certified question has not been subject to review by the Court of Appeals. Justice Kellogg dissents with opinion which is presented also.

WOZNEAK V. BUFFALO GAS CO., 175 App. Div. 268, Nov. 15, 1916.

WOODWARD, J.: The minutes of the State Industrial Commission and the record show that for an injury which happened on November 19, 1914, the claimant, Michael Wozneak, was awarded compensation on or about the 26th day of July, 1915, for 128 weeks, credit being given for twenty-five weeks of such compensation already paid, on account of the loss of an eye while in the employ of the Buffalo Gas Company. The minutes recite: "Present payment, 9 weeks, \$60.57, and 47 bi-weeklies of \$13.46." That is, there was no award of the total amount of the 128 weeks, but an adjudication that because of the loss of the eye the claimant was entitled to the sum of six dollars and seventy-three cents per week for a period of 128 weeks. Twenty-five weeks had been paid at the time of the adjudication; nine weeks were payable presently, and the remainder was to be paid in forty-seven bi-weekly payments. This was in harmony with the provisions of section 25 of the

Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), which provides that the compensation "shall be payable periodically, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award;" with a further provision that the Commission, whenever it deems it advisable, "may commute such periodical payments to one or more lump sum payments, provided the same shall be in the interest of justice." (See, also, Laws of 1915, chap. 167, amdg. said § 25.)

It is true that the Commission makes some recitals which tend to show that there was an award of \$861.44, and that of this amount \$693.19 was due at the time of making the award, but the minutes of the Commission do not show this, nor is there any power vested in the Commission to make such an award. The statute (§ 15, subd. 3) for permanent partial disability provides that for the loss of an eye the compensation shall be "sixty-six and two-thirds per centum of the average weekly wages and shall be paid to the employee for the period named [128 weeks] in the schedule as follows," and section 25 provides that this compensation shall be paid, not in one sum, but periodically. The adjudication is that there has been a loss of an eye and that six dollars and seventy-three cents is the amount of compensation which is to be paid per week, at periods fixed by the award, during a period of 128 weeks, and there is no justification in the statute for the recitals of the Commission that any sums were due under such award, except such as might have accrued at the dates mentioned. A sum is not due until the time for its payment has arrived, and an award which extends the payments over a period of one hundred and three weeks from the date of the award does not make the aggregate sum of such bi-weekly payments due either at the time of making the award, or at the subsequent death of the claimant within the period of such payments. It is true that section 25 provides that these payments may, under conditions named, be commuted to one of more lump sum payments, but no attempt was made to make such commutation, and if made it would have to take into consideration the shortened time in which such payments were to be made, for we understand by authority to commute a power to anticipate the payments and to permit the insurance carrier to discharge the obligation for a less present sum than the ultimate payments. (8 Cyc. 398.) This view is supported by the provisions of section 27 of the law, which provides that "if an award under this chapter requires payment of compensation by an employer of an insurance corporation in periodical payments, and the nature of the injury makes it possible to compute the present value of all future payments *with due regard for life contingencies*, the Commission may, in its discretion, at any time, compute and permit or require to be paid into the State fund *an amount equal to the present value* of all unpaid compensation for which liability exists, in trust: and thereupon such employer or insurance corporation shall be discharged from any further liability under such award and payment of the same shall be assumed by the state fund." That is, the insurance carrier is permitted to pay the present value of all unpaid sums into the state treasury and to be relieved of his further obligations, where it is "possible to compute the present value of all future payments with due regard for life contingencies," which means, of course, a calculation based upon the

probabilities of life, as fixed by recognized tables, and an adjustment of the present value of such award.

The above language indicates clearly that the Legislature not only did not understand that the award became vested so as to be due at the time of the death of the claimant, or at the date of the award, but that the award was of a certain sum per week during the lifetime of the claimant if he died before the expiration of the time fixed by the statute for the compensation to continue. This is made entirely certain by the provisions of section 26 of the law, which provides that in the event of a default "in the payment of an installment of compensation *and the whole amount of such compensation be not due*, the Commission may, *if the present value of such compensation be computable*, declare the whole amount thereof due, and recover the amount thereof with the added penalty of fifty per centum, as provided by this section." (See, also, Laws of 1915, chap. 167, amdg. said § 26.) The award has a certain present value, taking into consideration the life contingencies; it is definite and certain as to the weekly allowance, and the number of weeks, subject only to the life contingencies, and if the Legislature had understood that the award became vested, so that it should pass to the representatives of the deceased claimant, who died without reference to the accident, it would not have required that in computing the present value of all future payments the life contingencies should be taken into consideration.

The claimant in the present case died on the 9th day of December, 1915, while a considerable portion of the time covered by the award remained to be filled. It is conceded that the death resulted from natural causes, entirely apart from the accident for which the award was made, and the State Industrial Commission has held, and now submits the question of law to this court, that "said award was a vested interest in the said Michael Wozneak and that the same did not terminate at his death, but passed to the personal representatives of his estate and that the said employer and insurance carrier be and they hereby are instructed to pay the balance of the said award to the representatives of the estate of the said Michael Wozneak, in accordance with the terms of the said award." The insurance carrier, upon the submission of this question, urges that the award terminated with the death of the claimant, and, from what we have already said, it seems clear to us that this contention is sound. The statute, making a radical innovation upon the common law, has provided a system of compensation for workmen in certain classifications of labor, and not only is it impossible to conceive of compensation after death in the industrial sense of that word, but the statute itself makes the distinction between the compensation which is to be paid the employee for injuries sustained to his earning powers, and the benefits which are to flow to those who are dependent upon him in the event of death resulting from the injury (§ 16, as amd. by Laws of 1914, chap. 316), and provides distinctly who shall receive this benefit. (§ 16, as amd. *supra*.) That which would be compensation for the injured employee is to be known as a death benefit to the dependents pointed out by the statute if the accident results in death, and not only is there no provision for continuing the award made for compensation for the injuries, but the letter and spirit of the act are opposed to such a construction. It is a Workmen's Compensation Law, with an insurance provision for those dependent upon him in the event of

the accident resulting in death; the workman himself is to be compensated for his loss of earning power out of the industry which employs him, and as he would have no earning capacity after his death, due to natural causes, he could have no just claim for compensation beyond his life span. It is only when his death results from the injuries received in the industry that there is any equitable reason why the industry should be called upon to pay benefits to those dependent upon him, and this distinction is found throughout the statute, and it is specially provided in section 33 that "compensation and benefits shall be paid only to employees or their dependents." That is, compensation shall be paid only to employees and benefits shall be paid only to dependents of such employees, and to make certain that the act shall be confined to those who are specially within the contemplation of the Legislature, it is provided in section 33 that "claims for compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this chapter, and shall be exempt from all claims of creditors and from levy, execution and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived."

If it could be held under any possible theory that the compensation awarded to the claimant was translated by his natural death into a benefit, the statute would still require that it be paid, not to the representatives of the estate of the deceased, thus to become subject to his debts (for a personal exemption clearly would not extend beyond the life of the claimant), but to the dependents named in the statutes, for it is provided that "compensation and benefits shall be paid only to employees or their dependents" (§ 33), and in these hands, and these only, would the exemptions provided in the act prevail.

That the award made to the claimant in this proceeding could not have been vested absolutely in the claimant is evident from the provisions of section 22 of the law, which provides that the Commission, on its own motion or upon application by any interested party, may, on the ground of a change in conditions, "review any award, and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this chapter, and shall state its conclusions of facts and rulings of law," etc. He had a right during his lifetime, and while the award remained unchanged, to receive the compensation fixed for the period limited by the statute, but with his death from natural causes he ceased to have any right to compensation, just as his contract of employment for a definite period would have been terminated by the same event if no accident had befallen him. The right to compensation was personal to himself as much under the statute as it was under his contract of employment; the former grew out of the latter.

We are clearly of the opinion that the right to compensation ceased upon the death of Michael Wozneak, and that the State Industrial Commission should be directed to conform the proceeding to this opinion. All concurred, except KELLOGG, P. J., who dissented in opinion, in which LYON, J., concurred.

KELLOGG, P. J. (dissenting): The compensation made by the award is for the "injuries sustained" as stated in section 2 of the law. Under section 14 in all cases the wages of the employees form a basis for the compensation. Under subdivision 3 of section 15 of the law, for permanent partial disabilities, the disability may or may not disable the employee from earning his usual wages. Nevertheless he receives the compensation for the injury he has

sustained. The law was passed to make the employment stand its ordinary risks and to indemnify the injured workman. He cannot assign, release or commute the claim except as permitted by the law, and it is exempt from execution (§ 33); the compensation is payable periodically (§ 25). These provisions are not limitations upon the right of compensation, but are intended to safeguard the compensation so that it shall be of the most advantage to the injured employee. For the loss of an eye the employee receives sixty-six and two-thirds per centum of his average weekly wage for 128 weeks. This does not mean that the weekly payment is to make good to him the diminution in earnings for the week on account of the loss of the eye, because the eye is lost forever. The payment each week is not for the injury sustained for that week, but the number of weeks is a convenient way of arranging payments in a manner which will do the most good to him and perhaps be the least burdensome to the employer. Under section 25, in the interest of justice, the Commission may direct that the award be paid in a lump sum rather than in installments. When the payments depend upon the contingency of life, section 27, in the discretion of the Commission, permits a commutation of the future payments with reference to such contingency. But no such provision is contained in section 25, and for that reason we may infer that the contingency of life does not enter into the award. By section 17, where the compensation is awarded to non-resident aliens, or to those about to become non-residents of the United States or Canada, the Commission directs payment of a lump sum equal to one-half of the regular payments, probably upon the theory that it is better for the party abroad, or going abroad, to receive one-half in a gross sum than to await the payments upon the installment plan, and perhaps for the further reason that as the party is a non-resident alien, the State cannot be prejudiced by the manner in which he uses his money. The compensation is for the loss of the eye, and the injured employee is to receive it whether his earning power is or is not lessened. I think the fair meaning of the law is that upon the award being made the employee has a vested interest, and the payments are to be made from time to time in the interest of the employee, the employer and the public.

It is said that the Commission may modify an award under section 22; but the modification is to be upon the ground of change in conditions only. It is difficult to see how a change in conditions can take place with reference to the specific injuries mentioned in subdivision 3 of section 15. If the compensation depends entirely upon the loss of earning power, it may be difficult to arrive at a lump sum, as the condition of the injured party from time to time may have a bearing upon that question, and the Commission has the power from time to time to increase or diminish the award. But for the loss of an eye the compensation cannot change or be varied from time to time. The amount to be paid is to continue for 128 weeks unless the Commission concludes that justice requires that it be paid in a lump sum. The fact that the amount to be paid in some cases depends upon the future, and upon the future act of the Commission, does not, therefore, control upon the question whether for the loss of an eye the award creates a vested interest. So far as the claimant is concerned the Legislature has fixed a price for an eye, and when the award is made it is a fixed obligation, and

quently used in the statute as including wife and children. Instances to that effect are numerous. Death benefits payable to wife and children, however, in no respect rest upon the question of their dependency. That very clearly appears from said section 16. Death benefits under that section to all other persons rest on the dependency of such person or persons to the deceased employee. That is true of husband, parents, brothers, sisters, grandparents or grandchildren of the deceased. But a surviving wife and children under eighteen years of age are entitled to an award although they may be wealthy. The distinction exists because of the legal and moral responsibility of a husband and father to support his wife and children irrespective of their individual means of support. The phraseology of section 16 clearly indicates this distinction, and when, therefore, in the closing sentence of that section it is stated "all questions of dependency shall be determined as of the time of the accident" the term "dependency" as there used should be restricted in its application to the same class of people to whom the term has previously been applied throughout the same section. It does not apply to the surviving wife and children because as to them the question of dependency is immaterial. Questions of dependency are frequently questions of fact, and it was the purpose of the Legislature in the last sentence of section 16 to fix a time with reference to which that question of fact should be determined. But this question of dependency *never* can arise in the case of a surviving wife or children for the reason that section 16 gives them a right to an award irrespective of that question. It is not the dependent wife but the "surviving wife" who is entitled to the award, and if the phraseology of the section be given its ordinary and natural meaning a "surviving wife" means a wife who survives her husband irrespective of the time she married him.

One of the fundamental rules in the construction of a statute is to consider the effects or consequences of the interpretation placed on such statute. The reasoning which would exclude this wife from the benefits of this statute simply because she was not a wife until after her husband received the injury which eventually caused his death would likewise in some cases exclude children from the benefits of the statute. A child under the statute includes a posthumous child. (§ 3, subd. 11.)* But suppose a man married before an injury, lives a year or longer after such injury and then dies in consequence thereof, and in the meantime a child or children be born to him before his death, such child or children would have to be excluded from the benefits of this statute if the widow in this case is to be excluded therefrom. It is unthinkable that the Legislature intended such a result.

Furthermore, before the enactment of this statute a widow was entitled to recover for her husband's death as the result of negligence irrespective of the question whether the relation of husband and wife arose before or after the accident. (*Radley v. Leray Paper Company*, 214 N. Y. 32.) The Workmen's Compensation Law was enacted partly at least with reference to the legal status of a widow in cases based on negligence causing the death of her husband and it is not to be assumed that the Legislature intended to restrict or narrow her rights or to place her in any more disadvantageous position under the act than she occupied before. The question certified should be answered in the affirmative. All concurred. Question certified answered in the affirmative.

* Since amd. by Laws of 1916, chap. 622.— [REP.]

b. *Remarriage*.—The Court of Appeals, in its brief opinion in *Adams v. N. Y., Ontario & Western Ry. Co.*, sustained the Appellate Division's reversal of the Commission's order which required employers to deposit in the state fund the money for future payments of death benefits. This it did upon the sole ground that the law did not provide a method of computing the probabilities of remarriage. The text of the opinions in this and later cases relative to deposit in the state fund are presented below, pages 164–183. By amendment of Workmen's Compensation Law, § 27, the Legislature of 1917 has given the Commission the power denied by court decision and has established the remarriage tables of the Dutch Royal Insurance Institution as the basis for remarriage computations. Tables for simple calculations have been published in the Monthly Bulletin of the Commission, vol. 2, p. 190.

In *Tremberger v. Pape & Co.*, Death File, No. 394, Jan. 19, 1916, the claimant's husband had lost his life while operating an elevator. Having received two years' compensation in one sum because of her remarriage, she discovered that the remarriage had been void by reason of bigamy on the part of her new husband and applied to the Commission for restoration of her former lifetime compensation status. But subsequently to the payment of the remarriage sum the Court of Appeals, reversing the Appellate Division in *Wilson v. Dorflinger & Sons*, had held that operation of elevators was not covered by the compensation law. Accordingly, the Commission declined to pass upon her application for restoration of status.

Increase of the shares of minor children after their mother's remarriage is commented upon below, page 100.

c. *Legality of marriage*.—Claims of alleged widows for death benefits may fail because proof of marriage is lacking, because the relation is shown to have been meretricious or because bigamy has been present.

1. *Common law marriage*.—The most important result of consideration of these problems has been the establishment of the validity of common law marriages. This validity, taken away by an act of the Legislature in 1901, has been restored by the repeal of part of such act in 1907, and an informal verbal agreement to be man and wife, evidenced by cohabitation and other

acts, is a lawful marriage in the State of New York. The Court of Appeals has so held in the following opinion affirmative of an Appellate Division decision noted in Bulletin 81, p. 308, as having upheld an award to a common law wife unanimously and without opinion:

ZIEGLER v. CASSIDY'S SONS, 220 N. Y. 98, Feb. 27, 1917.

HISCOCK, Ch. J.: The decedent, John Ziegler, was killed while in the employment of the defendant employer in a class of work and under circumstances which entitled his widow, if one were left, to compensation under the Workmen's Compensation Law. The respondent, Anna Ziegler, filed a claim for such compensation, alleging that she was such widow, and the principal controversy on the hearing before the commission arose over this claim of widowhood. The commission made what we regard as a finding of fact that the decedent "left him surviving his widow, Anna Ziegler, the claimant herein," and, inasmuch as the award based upon such finding has been unanimously affirmed, we should be precluded from passing on its correctness if there were nothing more. The record, however, presents other features which require us in the first place to determine a question of practice involved in the hearing before the commission.

The record discloses that on the first hearing before the commission this claim was dismissed on the ground that there was no evidence of a valid marriage by claimant to decedent. On the second hearing the commissioners announced that as the result of further consideration they had reached the conclusion that a so-called common-law marriage, which had existed, was valid and their award was expressly based upon the advice of counsel to that effect, and counsel for the defendant then and there gave notice of his intent to appeal from said determination. The query is whether under such circumstances a question of law was raised which survives the unanimous affirmance by the Appellate Division for consideration by this court. We think that we should hold that there was.

The question whether or not a common-law marriage was valid at the time when claimant alleges that she was married to decedent is a very substantial one, and its answer is not entirely free from doubt. The Workmen's Compensation Law (Cons. Laws, ch. 67) expressly provides that a hearing before the commission of such a claim "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure." There was no way in which defendant's counsel could compel the commission in any more formal way than it did to rule upon this question. He was not entitled to require a finding of fact or a conclusion of law which would present it, and a formal exception was not required or contemplated. Everything was done that was necessary plainly to present the question, and apparently every one interested though it was being presented, and the commissioners ruled on it. Under these circumstances we think that what was said by them amounted either to a ruling upon the law, or a finding of fact that the marriage between the parties was a common-law marriage, and that the question thus involved was one of law which was sufficiently raised and survives the unanimous affirmance. The statutory provision eliminating the application of technical rules is one which has been and ought to be liberally applied in accordance with the spirit of the provision for the protection of claimants against

technicalities, and equal justice requires that it should be so applied as to permit to a defendant consideration of a substantial question like the present one which has been raised as this one was in the only way open to him.

Adopting the view that the question was raised and is presented whether in 1909 when claimant's alleged marriage took place a so-called common-law marriage was valid, we pass to the consideration of that question for the purpose of determining whether the commission was in error in holding that it was thus valid.

Ever since the Revised Statutes were adopted in 1827 it has been provided by statute that marriage in this state should be regarded as a civil contract. The present statutory provision upon that subject is: "Marriage, so far as its validity in law is concerned continues to be a civil contract to which the consent of parties capable in law of making a contract is essential." The statutes upon this subject simply declare what was the prior common law in this state. (*Fenton v. Reed*, 4 Johna. 52.)

It is undisputed, and, therefore, the proposition need not be supported by review of statutes or citation of authorities, that prior to 1901 a common-law marriage, that is, a contract of marriage made *per verba de presenti* and evidenced of cohabitation and various other acts and not effectuated by any formal solemnization, was valid in this state.

In 1901 this law was changed by important statutory enactments. Chapter 330 of the Laws of that year amended section 11 of chapter 272 of the Laws of 1896 relating to marriages by entitling the section "How a marriage must be solemnized," and providing that "A marriage must be solemnized by either" certain persons there enumerated, including clergymen, municipal officials and various judicial officers, or by a written contract of marriage signed by the parties and witnessed as therein provided, and which contract it was provided should be filed within a given time in the office of the clerk of the town or city in which the marriage was solemnized, and certain benefits in the way of registration and otherwise were secured to parties entering into a marriage contract in one of the methods there prescribed.

Because this statute used the mandatory word "must" in prescribing the manner in which a marriage should be solemnized, it is argued that it thereby made it imperative that, with the exceptions specifically made in the statute, marriage should be solemnized in one of the enumerated methods and in effect prohibited and rendered invalid any other form of marriage contract including common-law marriages. I do not so interpret the statute.

In the first place, I think that the great weight of authority is to the effect that such a statute will be regarded as directory or as prescribing the essential requirements of a formal solemnization of a marriage such as may be necessary to secure the benefits of registry, etc., and will not be regarded as invalidating a form of marriage contract otherwise valid, in the absence of some provision expressly declaring or necessarily implying that result. It is true that the statutes which were being construed in some of the cases cited below did not employ words which in ordinary usage would be regarded as so mandatory as those employed in the statute which I have quoted, but I think that the rule which on the whole is sustained by the authorities rises above this difference in the language of different statutes and is applicable to our statute. (*Darling v. Dent*, 82 Ark. 76; *Askew v. Dupree*, 30 Ga. 174; *Teter v. Teter*, 101 Ind. 129; *Pegg v. Pegg*, 138 Iowa, 572; *Renfrow v. Renfrow*, 60 Kan. 277; *Hutchings v. Kimmell*, 31 Mich. 126; *State v. Worthington*, 23 Minn.

528; *Gibson v. Gibson*, 24 Neb. 434; *Carmichael v. State*, 12 Ohio St. 553; *Matter of McCausland's Estate*, 213 Penn. St. 189; *Becker v. Becker*, 153 Wis. 226.)

It is impossible within reasonable limits to quote at length from these cases, but the rule is fairly stated in the case of *Meister v. Moore* (96 U. S. 76, 78) and from the opinion in that case the following language may be quoted: "Marriage is everywhere regarded as a civil contract. Statutes in many of the States, it is true, regulate the mode of entering into the contract, but they do not confer the right. Hence they are not within the principle, that, where a statute creates a right and provides a remedy for its enforcement, the remedy is exclusive. No doubt, a statute may take away a common-law right; but there is always a presumption that the legislature has no such intention, unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publication of banns, or be attested by witnesses. Such formal provisions may be construed as merely directory, instead of being treated as destructive of a common-law right to form the marriage relation by words of present assent. And such, we think, has been the rule generally adopted in construing statutes regulating marriage. Whatever directions they may give respecting its formation or solemnization, courts have usually held a marriage good at common law to be good notwithstanding the statutes, unless they contain express words of nullity. * * * In most cases, the leading purpose is to secure a registration of marriages, and evidence by which marriages may be proved; for example, by certificate of a clergyman or magistrate, or by an exemplification of the registry."

But in the second place, if any doubt otherwise arose concerning the interpretation to be given to the section which has been quoted it seems to me that this doubt would be dissipated by a subsequent section enacted as part of the same chapter. This section provided: "No marriage claimed to have been contracted on or after the first day of January, nineteen hundred and two, within this state, otherwise than in this article provided, shall be valid for any purpose whatever," (L. 1901, ch. 339, section 6) with the provision, however, that no marriage which parties attempted to contract under the statute should be deemed or adjudged to be invalid, on account of any want of authority in any person solemnizing the same if consummated with a full belief on the part of the persons so married, or either of them, that they were lawfully joined in marriage, or be invalidated on account of certain other mistakes in the written contract provided for in the section heretofore quoted. This enactment, of course, expressly prohibited common-law marriages.

When we interpret these sections of the same statute with reference to each other as we are bound to, it seems to be perfectly plain that the first section quoted was adopted by the Legislature with a complete understanding of the rule that that section by itself simply provided forms of observance which would be necessary in case of a ceremonial or formal marriage contract and that it did not invalidate other forms of marriage; that in order to do that it was necessary to adopt an express prohibition of such other forms of marriage contract and, therefore, the later section was adopted complying with the rule.

Not only does this interpretation of the statute give the Legislature credit for an accurate comprehension and application of what I regard as a general rule upon this subject, but an opposite interpretation of the statute convicts it of doing an unnecessary and foolish thing. The section forbidding and invalidating common-law marriages was an absolutely new section expressly formulated for the purpose of being placed in the statutes at that time. If it be true that the prior section pertaining to the solemnization of marriages was in fact mandatory and exclusive, then the enactment of the second section was an entirely futile step, and of such idle action we should not suspect the legislature unless compelled so to do.

After the adoption of the statute in 1901 concededly common-law marriages became and remained invalid unless the law was changed in 1907.

In that year by chapter 742 various amendments of the Domestic Relations Law were adopted. The section pertaining to the formal solemnization of marriages, formulated in 1901, was not materially changed so far as the present discussion is concerned. Various sections, however, were repealed, and amongst these was the section adopted in 1901 prohibiting and declaring to be void marriages contracted otherwise than in the manner prescribed by the article containing such section. By this repeal not only was wiped out the statutory enactment against common-law marriages, but also there was erased the provision contained in said section and already quoted providing that marriages attempted to be solemnized in the statutory manner should not be rendered null and void because of honest mistakes of the parties in respect of the character of the person presuming to perform the marriage or because of certain failures to comply with the statute in reference to written contracts. Various supplementary sections were also adopted providing for the issuance of licenses and pertaining to the filing of licenses, certificates of marriage, etc., which we do not think change the complexion of the question before us.

The inquiry then arises as to the effect of this repeal of the prohibitory section, and we think that the answer to that question must be that when such prohibition was repealed the law originally prevailing again came into operation and common-law marriages became valid. (*Mathewson v. Phoenix Iron Foundry*, 20 Fed. Rep. 281; *State ex rel. Whitcomb v. Otis*, 58 Minn. 275, 278; *State v. Mines*, 38 W. Va. 131; *Insurance Co. v. Barley*, 16 Gratt. [Va.] 363, 384; *Baum v. Thoms*, 150 Ind. 378.)

This view is strengthened both from a legal and from a practical standpoint by certain special considerations. As throwing much light upon legislative intention we are to keep in mind that when this prohibition was repealed, the remaining provisions of the statute bearing upon this question were left in substantially the same form as in 1901 and when, as has already been pointed out, the legislature did not regard such provisions sufficient to forbid common-law marriages without an express prohibition.

Then, the provision that "Marriage, so far as its validity in law is concerned, continues to be a civil contract," was allowed to remain in the statute, and after the repeal in question there was no prohibition against that method of entering into marriage as such a civil contract which had been recognized as valid and effective in the absence of prohibition.

Again, if by the repeal of the prohibitory section the validity of other forms of marriage contract than those expressly prescribed by the statute was not restored, we have it that attempted marriages under the statutory provisions were not saved from the destructive effect of innocent or inadvertent

failures to comply with the statutory requirements, because the saving clause against such effects which had been inserted in the same section with the prohibition was repealed with it. It can hardly be believed that the legislature intended to make the statute regulating marriage exclusive and not at the same time afford some relief from such innocent failures as have been mentioned.

Our attention is called to three provisions in the statute pertaining to marriages as tending to establish the contention that a contract of marriage entered into in any manner other than is there prescribed or recognized is invalid. These provisions are the ones, *first*, that a written contract of marriage authorized by the statute "must in order to be valid be acknowledged before a judge of a court of record;" *second*, that the provisions of the statute so far as they relate to the manner of solemnizing marriages "shall not affect marriages among the people called Friends or Quakers, nor marriages among the people of any other denominations having as such any particular mode of solemnizing marriages; but such marriages must be solemnized in the manner heretofore used and practiced * * * and marriages so solemnized shall be as valid as if this article had not been enacted;" and, *third*, that marriages shall not be rendered void by the failure to procure a license of marriage as required by the statute.

I do not believe that these provisions carry a necessary implication that a marriage contracted otherwise than as in the statute provided is void, but that under a reasonable interpretation they simply pertain to a marriage formally solemnized or contracted in the statutory form and are intended to regulate the celebration of such a marriage and to provide what must or in certain cases need not be done if a person desires to secure the benefit of a marriage solemnization or contract under the statute. This was the interpretation given in the *Meister Case* (*supra*) to a provision in a Michigan statute somewhat similar to the one in our state relating to marriages contracted by Quakers or Friends, and the court refused to affix to such clause any such meaning as is here contended for by the defendants as excluding the validity of any other than the statutory form of marriage solemnization.

And lastly our attention is called to the fact that whereas the statute as it was written in 1896 contains a clause providing that it did not "require" any marriage to be solemnized in the manner therein specified and that "a lawful marriage contracted in the manner heretofore in use in this state" should be valid, the present statute does not contain any such clause recognizing the validity of common-law marriages. This provision in the statute of 1896 was of course properly stricken out in 1901 when the amendment was made expressly prohibiting common-law marriages. When in turn in 1907 the section prohibitory of common-law marriages was repealed, and as we think the validity of such marriages revived, it would have been proper enough to have restored the provision contained in the statute of 1896 recognizing the validity of such marriages. We do not, however, regard the failure to do this as of much consequence. We are forced to recognize that we are confronted by a piece of legislation which is not in all respects scientifically and plainly expressed and that under any exacting test which may be applied to it, provisions and reasons will be found pointing either toward or away from any answer which can be made to the question before us. Under such circumstances we are forced to weigh opposing arguments and it seems to us that the repeal in 1907 of the prohibition of common-law marriages and of

the clause saving formal marriages attempted under the statute where there had been some inadvertent and innocent omission to comply with the statute from the possible condemnation of invalidity which followed if common-law marriages were invalid, furnishes a much weightier argument in favor of the construction being adopted by us than is supplied against such construction by the feature just considered. It is difficult to grasp a supposed legislative intent to prohibit a given act, which is said to be expressed by the repeal, without making any plain substitute therefor, of an existing provision adopted a short time before forbidding such act.

If that aspect were open to us we should not fail to appreciate that troublesome considerations of policy are involved in the decision of the question now before us. On the one hand it will be argued that alleged common-law marriages, if such marriages are permitted, are liable to become the basis of fraud and blackmail, especially after the death of one of the parties. On the other hand, it may be urged that if such marriages are not recognized it will happen that the disgrace of an unlawful union or of illegitimacy will be inflicted upon unsuspecting women who have believed themselves to be lawfully married, and upon innocent children. Especially it may be urged that if the validity of other than statutory marriages be denied, it will happen that because of the repeal of the provision of the act of 1901 saving from illegality because of some innocent or inadvertent mistake marriages attempted to be consummated in accordance with the provisions of the statute, many marriages may be rendered void or voidable because of a perfectly innocent and inconsequential omission to comply with the statute.

Of course it is for the legislature to determine which argument is the more potent and which policy is the wiser. But certainly if that body deems it wise and best to affix the stamp of illegality upon every marriage contracted or solemnized otherwise than in accordance with the strict letter of the statute that purpose should be made plain and unmistakable. The courts ought not to be asked to pronounce marriages invalid and children illegitimate under a statute unless it has plainly decreed and foretold those consequences, and people ought not to be penalized in such matters as those by adoption of guess-work and conjecture as a method of statutory interpretation by which to accomplish such result.

The views which we entertain in respect of the question now presented to us are similar to those reached in *Matter of Hinman* (147 App. Div. 452) and which is the only decision by any appellate court of this state on the question.

In view of the conclusions reached it was not error for the industrial commission to make the award in this case, and the order appealed from should be affirmed with costs.

CHASE, CUDDERBACK and POUND, JJ., concur; COLLIN, HOGAN and CARDOZO, JJ., dissent. Order affirmed.

The Commission made award to a common law wife in *Dodd v. 461 Eighth Avenue Co.*, S. D. R., vol. 16, p. 427, Apr. 8, 1918. The case were argued in the Appellate Division, March 11, 1919, upon a question of lump sum award, and was affirmed May 7, 1919, one justice dissenting.

Such verbal agreements to be man and wife differ from mere promises of cohabitating parties to marry some time in the future. Meretricious relations in the outset vitiate the marriage relation. Commissioner Lyon has brought these points out in recommendations for denial of awards. In one of the cases a widow and her children lived with a man who introduced her as his wife though she retained her first husband's name. She asked for a marriage ceremony but he put her off. He lost his life by accident. The Commission certified to the Appellate Division the question whether she was his wife. The court remanded the case to the Commission because it had failed to make formal findings: *Reiter v. North Shore Gravel Co.*, — App. Div. —, Dec. 28, 1917; the Commission thereupon found that she was not his wife and the Appellate Division upon appeal affirmed denial of compensation, one justice dissenting with opinion as follows:

REITER V. NORTH SHORE GRAVEL CO., 185 App. Div. 910, Sept. 11, 1918.

Decision affirmed. All concurred, except JOHN M. KELLOGG, P. J., dissenting, with a memorandum.

JOHN M. KELLOGG, P. J. (dissenting): The Commission certified to this court the question "Is Florence J. Reiter the surviving wife of Paul Reiter, deceased." The court remitted the matter to the Commission to make findings of fact upon the question of the marriage of the claimant to Reiter. It is conceded there was no ceremonial marriage. The evidence, however, tends very strongly to show a valid common-law marriage. Whether or not there was a valid marriage was a mixed question of law and fact, and it cannot be determined as matter of law whether there was a valid marriage until the facts are ascertained. Perhaps different inferences may be drawn from the evidence, and for that reason the court desired findings of fact upon the evidence to enable it to pass upon the question of law. The Commission evidently misunderstood the action of this court and gives us no facts upon which we can determine whether or not its conclusion was properly made. The parties were competent to enter into the marriage state. He was a German and a Protestant; she was a French woman and a Catholic. They mutually agreed to marry. She desired to go to the church; he apparently was not anxious upon that point. Nevertheless they began to live together as husband and wife, and were known as husband and wife. Each of them told her daughters, who lived with them, that they were married, and he always treated her as his wife and treated her daughters as his children, and apparently took great pride in them. It is mere idle guess-work to say that their claim to be husband and wife was a mere cloak to cover up their illicit relations. We find nothing indicating that there was any bad faith upon the part of either, or that there was any doubt in the mind of either that they were husband and wife. It is, however, inferable that from the fact that there was no church ceremony the claimant felt that her full rights as wife were not established and that it was due to herself and her daughters that a church ceremony should be had. She,

from time to time, urged a ceremonial marriage at the church; he agreed to it but delayed. In my judgment, as matter of law, they were husband and wife, although some embarrassment may result on account of the findings of the Commission that the evidence does not establish a marriage contract. I think the Commission felt that a definite contract must be shown by which the parties, by word of mouth or writing, agreed at the moment to take each other as husband and wife. A mere formal contract is not the essential thing. Marriage is a status which may be established by the words, actions and lives of the parties evidencing their understanding and intent. If this man and woman engaged to marry and, wanting to marry each other, began to live together as man and wife believing that they were married, but intended at sometime to have a religious ceremony performed; if they held themselves out to the public as man and wife and lived in the belief that they were married, there would be a legal marriage notwithstanding the fact that no particular words can be referred to at any particular time which made a formal contract of marriage at that time. The agreement, from time to time, to have a church ceremony performed for the satisfaction of the wife, would not change the result. The findings, therefore, do not dispose of the case, or furnish any basis upon which it can be determined. I favor a reversal of the determination and a remission of the matter to the Commission for proper and full findings of fact.

Commissioner Lyon's views are set forth in *Dalecky v. Berkowitz*, S. D. R., vol. 14, p. 706, Bul., vol. 3, p. 102, Dec. 11, 1917, the case of a widow with four children who took in a man to help support them but was afraid to formally marry him lest their father who was missing might prove to be alive; also in *Ricco v. Rome Brass & Copper Co.*, Bul., vol. 4, p. 132, Feb. 25, 1919, and *Draper v. International Ry. Co.*, S. D. R., vol. 19, 543, Bul. vol. 4, p. 162, Apr. 30, 1919, similar cases.

A common law marriage is valid, if contracted in New York, but not, if contracted in Italy. For this reason the Commission denied award in *Angelucci v. Kerbaugh*, S. D. R., vol. 9, p. 387, Aug. 15, 1916.

2. *Rival claimants*.—In an interesting ruling interpreting the validity of divorce in relation to the residence of the parties and the comity among States, the Commission awarded compensation to a wife who had procured an interlocutory decree of divorce in New York just previous to the death of her second husband by accident, her first husband having procured a divorce from her in South Dakota many years before. The correspondent of the New York divorce proceedings claimed to be the lawful wife on the theory that the South Dakota divorce had been void under the law of New York: *Cameron v. Acheson Graphite Co.*, S. D. R., vol. 14 p. 683, Bul., vol. 3, p. 77, Nov. 15, 1917.

In a case in which both rivals presented marriage certificates, Deputy Commissioner Abbott held that the marriage of earlier date had been invalid because the woman claiming under it had never been divorced from a former husband and awarded compensation to the woman claiming under the later marriage who had lived with the employee for eighteen years up to the time of his fatal accident, during which time she had never heard of the other woman: *Hoag v. Ulster & Delaware R. R. Co.*, Bul., vol. 3, p. 134.

A third instance of rival claimants is the Mosier case noticed in Bul., vol. 3, p. 178.

3. *Bigamy*.—A woman remarried while her first husband from whom she had not been divorced was alive. The Commission having awarded her compensation for death of her second husband by accident, the case was argued upon appeal, March 5, 1918. The insurance carrier claimed that the second marriage was void by reason of bigamy; the Attorney-General, that it was valid because she had believed her first husband to be dead at the time of its performance. The Appellate Division affirmed the award unanimously and without opinion: *Beals v. Eureka Paper Co.*, Death File, No. 20057, Oct. 10, 1917, 183 App. Div. 914, Mar. 15, 1918. Bigamy charges figured in the Tremberger and Hoag cases noticed above under the sub-titles "Remarriage" and "Rival claimants."

4. *Failure of proofs*.—Claims of death benefits on behalf of wives married and remaining in foreign countries often meet with delay and failure because the evidence of marriage is unsatisfactory or wanting. Such is especially the case of claims on behalf of European wives under recent war conditions. In some instances it is difficult or impossible to locate the alleged wives. Cases in point are *Granofsky v. Bing & Bing Construction Co.*, Claim No. 28900, Apr. 5, 1916, 181 App. Div. 909, Nov. 14, 1917; and *Grubesich v. Valley Mills Co.*, S. D. R., vol. 14, p. 666, Bul., vol. 3, p. 54, Oct. 18, 1917.

d. *Divorce with alimony*.—A husband and wife lived apart four years; the wife then obtained a judicial separation with alimony of four dollars per week; four more years went by and she had not collected any of the alimony when the divorced husband lost his life by accident; the Commission awarded the wife death

benefits because of her loss of alimony; the Appellate Division affirmed the award unanimously and without opinion: *Cooley v. American La France Fire Engine Co.*, S. D. R., vol. 16, p. 429, Apr. 15, 1918; 185 App. Div. 918, Sept. 17, 1918.

B. Parenthood.—The Appellate Division and the legislature have been defining the status of children. The legislature has broadened the definition of a child in Workmen's Compensation Law, § 3, subd. 11, by L. 1916, ch. 622, to include a dependent step-child and by L. 1917, ch. 705, to include an acknowledged dependent illegitimate child.

a. Step-children.—In a case arising before the inclusion of illegitimate children the injured employee had married a woman who had an illegitimate minor daughter. By the marriage the girl became his step-child. Upon his death from the accident the question arose whether the step-daughter's illegitimacy should exclude her from death benefits. The Commission made an award to her which the Appellate Division affirmed unanimously and without opinion: *Beals v. Eureka Paper Co.*, Death File, No. 20057, Oct. 10, 1917, 183 App. Div. 914, Mar. 15, 1918. An award to an illegitimate step-son under similar circumstances was affirmed in the Appellate Division March 5, 1919, in *Lindfors v. Wheeler*, Death Case, No. 101283, Aug. 8, 1918.

The Commission awarded compensation to the step-daughter of a common law marriage in *Dodd v. 461 Eighth Avenue Co.*, S. D. R., vol. 16, p. 427, Apr. 8, 1918.

b. Illegitimate children.—The decision of the Appellate Division relative to the illegitimate step-child in the Beals case followed, with a year's interval, upon a decision of the same court with opinion that the Workmen's Compensation Law, as it stood prior to the amendment effected by L. 1917, ch. 705, did not cover illegitimate children. The opinion is as follows:

BELL V. TERRY & TENCH Co., 177 App. Div. 123, Mar. 7, 1917.

WOODWARD, J.: The State Industrial Commission submits to this court the question: "Are Albert Bell, son, Dorothy Bell and Marie Bell, daughters of Joseph K. Bell, deceased, dependent children of the said Joseph K. Bell, within the meaning of the Workmen's Compensation Law and entitled to the death benefits provided for by said law for dependent children?"

There is no question here that Joseph K. Bell was killed on August 13, 1914, under circumstances entitling his widow and children under the age of eighteen years to death benefits under the provisions of the statute. But

it is established that the persons mentioned as the son and daughters of said Joseph K. Bell are illegitimate children, the mother, Delia V. Bell, having entered into a ceremonial marriage with said Bell at a time when Bell had a wife still living and undivorced. The real widow has been awarded compensation after a revocation of a previous award to the bigamous wife, and an application in behalf of these illegitimate children having been made, the State Industrial Commission asks the judgment of this court upon the question of whether these children are in law entitled to the compensation fixed.

It is a rule of construction that *prima facie*, the word "child" or "children," when used in a statute, will or deed means legitimate child or children. In other words, bastards are not within the term "child" or "children." (5 Am. & Eng. Ency. of Law [2d ed.], 1095; *Van Voorhis v. Bristnall*, 23 Hun, 260, 263; *Gelston v. Shields*, 16 id. 143, 151; *Miller v. Miller*, 79 id. 197; *Matter of Miller*, 110 N. Y., 216.) And the rule is well settled that words having precise and well-settled meaning in the jurisprudence of a country have the same sense in its statutes unless a different meaning is plainly intended. (*Perkins v. Smith*, 116 N. Y. 441.) Section 16 of the act provides that "if there be surviving child or children of the deceased under the age of eighteen years" an additional amount shall be provided for such child or children until such child or children arrive at the age of eighteen years, and this without reference to whether the children are dependent upon the father or not. (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 16, as amd. by Laws of 1914, chap. 316.) In other words, the statute presumes that the children of a parent are dependent upon him or her up to the age of eighteen years and provides for them in the Workmen's Compensation Law. While, in a sense, the persons mentioned in the question are children they are not the lawful children of the decedent, and unlawful children are not favored in the law; they have only such rights as are expressly granted by statute in so far as property rights are concerned. Not only has the Legislature not provided for illegitimate children under the Workmen's Compensation Law by specific language, but, by its definition of "child" in subdivision 11 of section 3, it has clearly indicated an intention to use the word only in its legal sense, as modified. It declares that "'child' shall include a posthumous child and a child legally adopted prior to the injury of the employee," and, by expressly fixing these limitations, it must be understood to have excluded any other child or children than such as would be included at common law and under the statutory definition. "It is the duty of all courts of justice to keep their eye steadily upon the interests of the public, even in the administration of commutative justice; and when they find an action is founded upon a claim injurious to the public and which has a bad tendency to give it no countenance or assistance in *foro civili*.'" (*Veazy v. Allen*, 173 N. Y. 359, 368, and authority there cited.)

Whatever may have been held in other jurisdictions, under ever varying language and differing conceptions of public policy, there is no justification for reading into the statute a provision which shall permit illegitimate children to share in the benefits provided for the lawful issue of one suffering through an industrial accident. If the Legislature wants to assume this responsibility it should do so in plain and unequivocal language; it ought not to be done through strained and unnatural construction on the part of the courts. It is the duty of the court to enforce the provisions of

the statute without reading into it affirmative provisions. (*Irvine v. New York Edison Co.*, 207 N. Y. 425, 434.)

The suggestion that section 1745 of the Code of Civil Procedure may have something to do with the answering of this question, plausible upon the surface, utterly fails when we come to analyze the language of the section in connection with that of the Workmen's Compensation Law. The language of section 16 of the Workmen's Compensation Law is that "if there be surviving child or children of the deceased under the age of eighteen years" an additional amount is to be paid. This does not say if there are surviving children of the mother but they must be surviving children of the deceased, while section 1745 of the Code of Civil Procedure provides that in an "action to annul a marriage, upon the ground that the former husband or wife of one of the parties was living, the former marriage being in force," and that "it appears, and the judgment determines, that the subsequent marriage was contracted by at least one of the parties thereto in good faith, and with the full belief that the former husband or wife was dead or that the former marriage had been annulled or dissolved, or without any knowledge on the part of the innocent party of such former marriage, the issue of the subsequent marriage, born or begotten before the final judgment, are deemed for all purposes, the legitimate children of the parent, who at the time of the marriage was competent to contract, and are entitled to succeed as such, in the same manner as other legitimate children, to the real and personal estate of said parent; and the issue so entitled must be specified in the judgment, and the innocent party must be awarded their custody, and he or she is entitled to appoint a guardian of their persons by will." It will thus be seen that this case could not come within the provisions of section 1745 of the Code of Civil Procedure, for the employee knew of the marriage which stood in the way of lawful issue, and only the surviving child or children of the deceased are entitled under the provisions of the Workmen's Compensation Law. If we indulge the presumption, hardly warranted in this case so far as the record discloses, that Delia V. Bell was an innocent party to the bigamous marriage, the Code only legitimatizes the issue as to her and permits the children to inherit from her. It does not make them the legitimate children of the wrong-doing husband; they are "deemed for all purposes, the legitimate children of the parent, who at the time of the marriage was competent to contract," and we are not to read into the statute more than the Legislature has provided. (*Baylis v. Baylis*, 146 App. Div. 517; *affd.*, 207 N. Y. 446.)

The interrogatory of the State Industrial Commission should be answered in the negative.

All concurred, except LYON, J., who favored remitting the matter to the Commission to have certified the proofs establishing the alleged illegitimacy of the children.

Questions certified answered in the negative.

The decision of the Court of Appeals in *Ziegler v. Cassidy's Sons*, establishing the validity of common law marriages, of course establishes the legitimacy of the children of such marriages, including step-children: *Dodd v. 461 Eighth Avenue Co.*, S. D. R., vol. 16, p. 427, Apr. 8, 1918, — App. Div. —, May 7, 1919.

There were no child claimants in the Ziegler case. In *Dalecky v. Berkowitz*, S. D. R., vol. 14, p. 706, Bul., vol. 3, p. 102, Dec. 11, 1917, the alleged widow having failed to prove common-law marriage and the accident having occurred prior to July 1, 1917, the court rejected the compensation claims of the children along with the claim of their mother.

c. *Adopted children*.—A legally adopted child is entitled to death benefits: Workmen's Compensation Law, § 3, subd. 11. Adoption of a child according to the laws and customs of an Indian tribe is legal. The Commission has so ruled in *Jackson v. Sherman Paper Co.*, S. D. R., vol. 10, p. 605, Bul., vol. 2, p. 1, Oct. 19, 1916.

Though grandchildren are entitled to death benefits in certain contingencies, an adopted child is not entitled to death benefits for fatal injury to the parent of its foster parent. But a child dependent upon its grandparent is entitled to death benefits for fatal injury to such grandparent though its parents be living at the time of the accident and better able to support it than the grandparent. The Appellate Division's opinions in *Winkler v. N. Y. Car Wheel Co.* and *Yeople v. Rose Co.*, involving these two points, appear below, pages 102, 120.

d. *Children begotten after the accident*.—Under the reasoning in *Crockett v. International Ry. Co.*, above, page 85, if an injured employee marries after his accident and offspring results from the marriage, death benefits will be awardable to the child as well as to the mother in case he ultimately dies as a result of the accident.

c. *Shares of compensation*.—Workmen's Compensation Law, § 16, subd. 2, provides for increase of the benefits of a child for death of its father by industrial accident when his death is followed by death of his wife or for death of its mother by industrial accident when her death is followed by death of her dependent husband. These and other provisions of the section have been interpreted by the Commission to authorize an increase of benefits of a child for death of its father by industrial accident when his wife remarries or for death of its mother by industrial accident when her husband does not claim or prove his dependency upon her. The first point has been made in *Sullivan v. Industrial Engineering Co.*, S. D. R., vol. 14, p. 642, Bul., vol. 3, p. 44, Sept. 20, 1917; the second, in *Urban v. Frank & Co.*, S. D. R., vol. 11, p. 612, Bul., vol. 2, p. 46, Nov. 22, 1916. The death

benefits of the child in consequence of its mother's remarriage are limited by the Sullivan ruling to not not to exceed ten per cent of its father's wages and the increase is to begin two years after the remarriage. The increase to the child in consequence of its father's failure to claim or prove dependency may, by the Urban ruling, give it as much as fifteen per cent of its mother's wages.

D. *Dependency*.—A granchild, parent, grandparent, brother or sister claiming death benefits must prove that he or she was dependent upon the deceased employee at the time of the accident. Blood relationship is a factor. The contract of insurance may expressly stipulate that certain relatives are dependent. Grandchildren, brothers and sisters must show that they are under the age of eighteen. Dependency cases are divisible into those in which the deceased employee was living with the alleged dependent, or dependents, at the time of the accident and those in which he was not living with them. Each of the two groups has its special problems of proof.

a. *Blood relationship*.—The Commission awarded death benefits to two half-sisters of an employee dying as result of an industrial accident; the insurance carrier took an appeal on the ground that an award to relatives of the half blood was not valid; the Appellate Division affirmed the award unanimously and without opinion: *Zalewski v. Gair Co.*, Death Case, No. 17659, July 5, 1917; 181 App. Div. 964, Dec. 28, 1917. Awards to half brothers and sisters had previously been affirmed by the Appellate Division and the Court of Appeals in *Banks v. Adams Express Co.*, 176 App. Div. 916, Dec. 29, 1916; 221 N. Y. Rep. 606, July 11, 1917; and by the Appellate Division in *Bylow v. St. Regis Paper Co.*, 179 App. Div. 555, Sept. 13, 1917, the texts of which are in Bulletin No. 87, pages 197, 231.

Death benefits are not awardable to a legally adopted child on account of industrial accident to the parent of its foster parent, though the child may have been dependent upon the deceased employee at the time of the accident. The Appellate Division, one justice dissenting, has so held in reversing an award to a nine year old girl for death of the father of her foster mother. The deceased employee had been supporting both his daughter and her adopted daughter. In so doing the court has read the pro-

visions of the Domestic Relations Law into the Workmen's Compensation Law. The text of the decision is as follows:

WINKLER v. N. Y. CAR WHEEL Co., 181 App. Div 239, Dec. 28, 1917.

SEWELL, J.: Joseph J. Ullinger, deceased, was employed by the New York Car Wheel Company, and while working for his employer he received injuries which resulted in his death.

The Commission found that he left no surviving wife or child under the age of eighteen years, but left him surviving the claimant, Marion I. Winkler, aged nine years, a legally adopted child of the daughter of said Joseph J. Ullinger, who was dependent upon the deceased at the time of the accident, and awarded compensation to her under section 16 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of 1916, chap. 622).

The only question for determination upon this appeal is, whether the claimant was entitled to receive compensation as the grandchild of the deceased. In other words, does an adopted child by reason of such adoption become an heir at law and next of kin of the father of its adopting parent.

Subdivision 11 of section 3 of the Workmen's Compensation Law (as amd. by Laws of 1916, chap. 622)* provides that "'Child' shall include a posthumous child and a child legally adopted prior to the injury of the employee; and a stepchild dependent upon the deceased." The decision of the question presented must, therefore, depend upon the construction of section 114 of the Domestic Relations Law (Consol. Laws, chap. 14 [Laws of 1909, chap. 19], as amd. by Laws of 1916, chap. 453). By force of that statute a foster parent and the person adopted sustain toward each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, "and such right of inheritance extends to the heirs and next of kin of the person adopted, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting, * * *."

It is apparent, from the provisions of this statute, that the adoption does not change the law of descent and distribution as to the property of the ancestors of the foster parent; that the right of inheritance is extended only as between the foster parent and adopted child, and between the children of the adopted child and the foster parent; that while the adopted child, for the purposes of inheritance, becomes and is the lawful child of the adopting parent, the statute does not provide that it shall become his child, or make it the heir at law or next of kin of his father or of any of his collateral relatives. The identity of the child is not changed. It is given the right to inherit as a child without being a child, and that is as far as the statute goes. There is nothing in the statute to lead to the belief that it was the intention of the Legislature to permit one to adopt heirs for third persons.

Without something in the statute clearly indicating that the Legislature intended such a provision it cannot be arbitrarily inferred by the courts to give effect to an assumed object or purpose of a statute. Consanguinity

* Since amd. by Laws of 1917, chap. 705, so as to include an "acknowledged illegitimate child."—[REP.]

is so fundamental in statutes of descent and distribution that it may only be ignored when courts are forced to do so, either by the terms of express statute or by necessary implication.

It follows that the award should be reversed and the claim dismissed. All concurred, except Kellogg, P. J., dissenting. Award reversed and claim dismissed.

The compensation law defines the term "child" but not the term "parent." By its express terms death benefits are awardable to adopted children and to step-children. But it makes no mention of step-parents. Therefore a step-parent is not entitled to compensation for the death of a step-child by industrial accident: *Kelly v. Borden's Condensed Milk Co.*, File No. 25418, July 25, 1917; *Ackerly v. L. I. R. R. Co.*, S. D. R., vol. 19, p. 533, Bul., vol. 4, p. 151, Apr. 15, 1919.

b. *Express stipulation of dependency.*—The Commission awarded death benefits to three children for the death of their elder brother, having found the fact of their dependency upon "the express stipulation of the insurance carrier, which stipulation is limited to this fact": *North v. McCreery Realty Corp.*, S. D. R., vol. 6, p. 329, Nov. 17, 1915.

c. *Deceased employee lived with the alleged dependent or dependents.*—When an unmarried employee is living at home with his father's family at the time of the accident that causes his death, the dependency of the relatives claiming death benefits on his account is often a close question. The family may have other sources of income than his contributions such as the wages of his father, mother, brothers or sisters or rentals and interest. On the other hand, it may be carrying a heavy burden of debt. It may also have been giving him his board and lodging and other consideration as an offset to what he has been giving. The circumstances of the particular member of the family claiming death benefits are to be taken into account. A father aged seventy-five is more likely to be dependent than a father aged fifty. The Commission and the court will see their way more clearly to allowing death benefits to a mother who is an invalid or a widow than to a mother who is well and earning money herself or has a husband supporting her. The same is true of claimants other than the mother. A relative receiving money directly from the deceased employee has a clearer and stronger case than a relative receiving

support indirectly. Nevertheless, voluntary, partial and indirect support gives any member of the family circle not barred by age limit or non-relationship good claim to death benefits and the question is not who has the duty to support but who actually does it. The Appellate Division has so held in *Walz v. Holbrook, Cabot & Rollins Corp.*, 170 App. Div. 6, Nov. 10, 1915, and the Court of Appeals has so held in *O'Brien v. Flinn-O'Rourke Co.*, Case No. 26047, Jan. 29, 1917; 179 App. Div. 949, July 3, 1917; 222 N. Y. Rep. 644, Jan. 21, 1918. The text of the Appellate Division's opinion in the Walz case is in Bulletin 81, pages 312, 313. Affirmation of the award in the O'Brien case was without opinion either in the Appellate Division or in the Court of Appeals. In this case a lock tender was killed by a fall. He was an unmarried youth living at home. His father, though seventy-five years old, was at work at the time of the accident. His mother was sixty-five. The children, including himself, contributed from their earnings toward the family's general fund. The attorneys for the employer and insurance carrier conceded the claim of his father for death benefits but contested the claim of his mother. Her dependency, they argued, was upon her husband, the head of the household, not upon her son. She could be dependent upon her son only in case her husband were dead. They wanted an opinion of the Court of Appeals upon the principles laid down by the Appellate Division in the Walz case. "Dependence of a third person upon another who is dependent upon the deceased," they urged, "does not under the Act make that third person dependent upon the deceased." In his opposition brief the Attorney General cited compensation precedents of Great Britain and of American States other than New York in favor of the mother's claim and called attention to the language of Workmen's Compensation Law, § 16, subd. 4, awarding death benefits "for the support of each parent or grandparent." Upon precisely the same grounds the same attorneys representing the same employers had challenged an award to an aged grandfather who was being cared for by his daughter. The daughter's son who had been sending her fifty dollars a month had been accidentally drowned while in the service of his employer. The Appellate Division affirmed awards to both mother and grandfather unanimously and without opinion:

LeFevre v. Flynn-O'Rourke Co., File No. 11068, Mar. 14, 1917; 181 App. Div. 908, Nov. 14, 1917.

The following cases, all but four of which have been subject of appeal, demonstrate the variety and complexity of dependency claims.

1. *Parents*.—Award to parents has been denied in the following eight instances.

A married son and his wife lived with his father's family. He gave his mother from twelve to seventeen dollars a week and he and his wife ate without charge at the common table. His father was earning twenty-one dollars a week, of which he contributed nineteen to the family support. The Appellate Division reversed an award to the mother for death of the son by industrial accident. The text of its opinion is as follows:

BIRMINGHAM v. WESTINGHOUSE ELECTRIC & MANUFACTURING Co., 180 App. Div. 48, Nov. 14, 1917.

WOODWARD, J.: Harold Birmingham received fatal injuries on the 10th day of June, 1916, while employed by the Westinghouse Electric and Manufacturing Company in New York City. He was earning average weekly wages of nineteen dollars and sixty-one cents, and there is no complaint over the award of compensation to his widow. The question presented upon this appeal is whether his mother, aged forty-two years, with a husband in good physical condition, earning something over twenty-one dollars per week when employed, was a dependent of the deceased under the provisions of subdivision 4 of section 16 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of 1914, chap. 316, and Laws of 1916, chap. 622).

The statute, as amended by chapter 316 of the Laws of 1914 and chapter 622 of the Laws of 1916, specially provides that all questions of dependency shall be determined as of the time of the accident, so that in the consideration of this case we are to exclude from view all of the testimony relating to what Harold Birmingham did for his mother before his marriage, and while he lived in Pittsburgh, as well as all of the matters intruded in reference to the condition of the family subsequent to the death of the young man. Viewing the testimony in this light, we are to examine the record and learn, if we may, whether Virginia Birmingham, mother of the decedent, was "dependent upon him at the time of the accident." (§ 16, subd. 4.) This is a command to the Commission whenever it attempts to ascertain who are dependents of a deceased employee to take into consideration the circumstances at the time of the accident (*Matter of Kilberg v. Vitch*, 171 App. Div. 89, 91), and it must afford the rule upon an appeal from an award of the Commission. We have no right to look outside of the circumstances prevailing at that time; what occurred before or after the date of the accident is of no importance; it is what was the condition on that day.

Virginia Birmingham, the mother, claimant, after having testified at one hearing, was recalled and went over the entire matter a second time, with full opportunity to adjust herself to the probable requirements of the Commission. She testified that she was the mother of Harold Birmingham, who died on the 15th day of June, 1916, as the result of an accident in the Westinghouse plant a day or two before; that she had a husband living, whose wages were, at the time, forty-four cents an hour, although he had been paid forty-five cents an hour prior to Harold's death; that the husband, if he worked a full week, got something over twenty-one dollars, and that he gave to the claimant nineteen dollars; that he received these wages during the year prior to the death of Harold; that he was idle for an aggregate of about three months in the year before her son's death, and that he gave her nineteen dollars each week that he worked. The evidence developed that the Birmingham family consisted of the claimant and her husband, a married daughter, apparently living apart from her husband, and contributing nothing to the family; the mother of the claimant and a nephew, twelve years of age, and Harold Birmingham and his wife, and that Harold Birmingham contributed to his mother from twelve to seventeen dollars per week, and that both he and his wife lived in the family, eating at a common table with the others, for which no charge was made; that this situation had existed from April, when Harold and his wife came on from Pittsburgh, down to the time of Harold's death, and it is from this standpoint that we must view the testimony. The claimant testifies that she kept the money from Harold separate from the money given her by her husband, but it is apparent from the testimony throughout that what was done was that Harold and his wife came home to Harold's parents to live; there was no bargain about board; they just lived as a part of the family, Harold contributing enough to compensate for the board of himself and wife, and the mother furnished the table, etc., out of the funds contributed by Harold and his father. But the claimant's husband was working; he had worked all of the year preceding Harold's death, with the exception of about three months, and he was getting more wages than Harold, and, so far as the testimony discloses, at the time of the accident the claimant's husband was at work and was receiving forty-five cents per hour, and was averaging over twenty-one dollars per week, while Harold was receiving less than twenty. Can there be any doubt that had the claimant and her husband been living alone, free from the burden of caring for the married daughter, the claimant's mother and the nephew, the latter of whom could have had no possible claim to compensation, and none of whom were a legal charge upon the resources of the claimant's husband, there would have been no dependency upon Harold's contributions? It was only because of the presence of these people in the household, and the burden of boarding Harold and his wife, that there was any occasion for dependency upon the part of the claimant; and it does not occur to us that either the letter or the spirit of the Workmen's Compensation Law contemplates such a dependency as is here attempted to be asserted. It was held in the case of *Main Colliery Co. v. Davies* (2 W. C. C. 108; cited in *Matter of Tirre v. Bush Terminal Co.*, 172 App. Div. 386, 389) that the mere fact that a father receives money from a son and expends

it is not alone sufficient to establish dependency. As remarked by the court in *Matter of Tirre v. Bush Terminal Co. (supra)*, the "record will be searched in vain for any evidence confirmatory of the claim of actual dependency of the mother," and while dependency, as used in the Workmen's Compensation Law, "means one who looks to another for support or help," and that the dependency need not be total in order to entitle the dependent to the benefit of the statute (*Matter of Tirre, supra*), we think the evidence in this case does not support the finding of fact that the mother was dependent upon the decedent for any part of her support at the time of the accident. There is no evidence that the amount contributed by Harold Birmingham was not the fair equivalent of the entertainment which he and his wife were receiving from the mother, and the mere fact that there was no definite contract about board and lodging is of no consequence; a son of full age, bringing his wife to live in the family of his parents, would impliedly contract to pay for the entertainment afforded in the absence of any express contract, and there is no evidence whatever to show that the mother, with a husband earning forty-five cents an hour at the time of this accident, had any occasion to rely upon the alleged contributions of Harold Birmingham, who lived in the family, with his wife, and who may have been paying an indebtedness. There is no evidence that these alleged contributions were in whole or in part necessary for the support of the mother. (*Matter of Tirre v. Bush Terminal, supra*, 390.) Indeed, she testifies generally that Harold gave her the money, and mere gifts from a son to his mother do not constitute dependency. (See *Matter of Tirre v. Bush Terminal, supra*, 390.)

It seems to us that while it is true that the statute makes the findings of fact made by the Commission conclusive where there is any evidence to support the finding (*Matter of Rhyner v. Hueber Bldg. Co.*, 171 App. Div. 56, 57), it is necessary to show, not that a son, boarding with his wife at the home of his parents, has given his mother sums of money which would fairly compensate for the entertainment received, but that the mother stood in a position where such sums of money were necessary to her own support. "The statute plainly intended that the award to each person should be for the support of such person" (*Matter of Wals v. Holbrook, Cabot & Rollins Corp.*, 170 App. Div. 6, 9), and not for the maintenance of such a family as the claimant might elect to collect around her, and to whom she owed no legal obligation. The law makes it the duty of a husband to support his wife, in so far as he is able, and the claimant having a husband capable of earning more than twenty-one dollars per week, and being employed with a fair degree of regularity, the presumption must be that the claimant was not dependent upon her married son for any part of her support and maintenance. No evidence is given to show that she was dependent upon him; the most that can be said of the evidence is that it shows that he contributed rather more than his share of the expenditures of a large family, but it does not show that if these contributions were withdrawn the claimant's husband was not abundantly able to care for her out of his own earnings at the time of the accident. He was not obliged to support the other members of his household; none of them had a legal claim upon him; his duty was to support his wife, and the undisputed facts show that he was earning enough to do this equally as well as it was being done if he merely dis-

charged the duty imposed upon him by law. What the law contemplates is evidence showing that the persons mentioned in subdivision 4 of section 16 are in fact dependent, either in whole or in part. For all we may know from the record this claimant may be rich in her own right, or her husband may have an independent fortune. No claim is made to the contrary; nothing is offered to show dependency, except the fact that this deceased son, during the three months that he lived with his wife at his father's house, gave his mother from twelve dollars to seventeen dollars each week, and that she testifies that for the most part she used this for her own purposes. This court enunciated as liberal a rule as is consistent with the law in *Matter of Rhynor v. Hueber Bldg. Co.* (171 App. Div. 56), but there was evidence showing the true condition of the mother, and we merely held that it was not necessary to show that she had no resources whatever; that partial dependency was sufficient. Here we know nothing of the claimant's condition, except that it affirmatively appears that she has a husband capable of earning more wages than her son was earning, and it does not appear that he has any one legally depending upon him except his own wife, this claimant, while Harold's wife, who still makes her home with the claimant, has been provided compensation to the extent fixed by the statute, and may contribute something to the household if so disposed.

The award to Virginia Birmingham should be reversed and her claim dismissed. All concurred, except Kellogg, P. J., not voting. Award reversed and claim dismissed.

An unmarried son lived with his father's family. His father had but one leg and his mother but one eye. The Appellate Division reversed an award to his mother and minor brother for his death by industrial accident. The facts and conditions upon which it based its reversal are stated in its opinion which is as follows:

WILKES v. ROME WIRE CO., 184 App. Div. 626, Nov. 13, 1918.

LYON, J.: The question presented by this appeal is whether the mother and youngest brother of the deceased were dependent upon him for support at the time of his death on April 2, 1917.

James Wilkes was in the employ of the Rome Wire Company and met an accidental death. He was receiving an average of \$15.80 per week with ten per cent bonus. Of this sum he paid his mother \$10 per week "5.00 for his board, and \$5.00 toward the home, and to help send the little brother to school, and buy things." The father was employed in the Rome Iron Mills, Inc. He had received in wages for the week immediately preceding the son's death \$39.96. He received the week preceding, \$44.96. His wages for the year were \$1,611.91, or an average of \$31.60 per week. He gave his wife \$20 per week for the support of his family which consisted of himself, his wife, their children, James, Arthur, Joseph, Howard and Florence. None of them excepting James, Howard and Florence boarded at home. The mother received from Arthur, Joseph and Florence \$3 each per week, making her weekly income with the \$10 received from James and \$20 received from the husband, \$39 per week. The husband spent his remaining \$11.60 for clothes,

filling or grading about the house, and anything the family needed. The wife testified that it cost to support the family during April, the month of the death of the son, \$15 to \$20. They bought the house in July, 1916, and during the nine months between that date and April second, when James was killed, paid \$275 thereon, an average of about \$30 per month. Furthermore, during the previous years of idleness of the father, debts had accumulated to a large amount. These had been paid off. The son's life insurance of \$600 was applied, \$400 evidently in the purchase of the adjoining lot, and \$200 in payment on the house. This made the aggregate payments on the house \$500, with one payment of \$25. The wife stated over her own signature that the husband was paying her but \$10 per week, and the husband that he was earning but \$20 per week. In fact he was paying her \$20 per week, and his earnings for six weeks immediately preceding the death of James were upwards of \$40 per week, excepting for two weeks when they were \$30.96 and \$39.09 per week. He also testified that in the winter he could not work, while the payroll shows no lessening of his earning power for the winter months. We think this is not a family for whose benefit the Workmen's Compensation Law was enacted.

The award must be reversed and the claim dismissed. All concurred. Award reversed and claim dismissed.

A daughter, an only child, lived with her parents and turned over to her mother her wages of from \$8 to \$10 per week. She died of blood poisoning due to an industrial accident. Her father turned over \$19 per week to her mother. He lived in his own house, a four family tenement subject to mortgage and taxes. The Commission held that the mother was dependent upon the daughter and gave her death benefits: *Frey v. McLaughlin Bros.*, S. D. R., vol. 17, p. 591, Bul., vol. 3, p. 215, June 11, 1918. The Appellate Division held otherwise with opinion, as follows:

FREY v. McLOUGHLIN BROS., 187 App. Div. 824, May 7, 1919.

WOODWARD, J.: Mary Frey was a girl nineteen years of age, living at home with her parents, and employed by McLoughlin Bros., Inc., in a hazardous employment. On the 10th of August, 1917, this girl drove a tack through one of her fingers, in the course of her employment, and one week later she died, and the evidence supports, we believe, the finding that she died of blood poisoning. A claim was made on behalf of the father and mother as dependents. The claim of the father was rejected, on the ground that there was no dependency shown, but, strangely enough, the Commission, by a divided vote, found that the mother, the wife of the independent father, living in his home, was a dependent.

Of course the earnings of this minor child belonged to the father under the ordinary rules of law. They amounted to about eight dollars per week. She had been working about two years, and the mother says that the reason she was at work was because she was "a big girl and there was no reason why she should sit around and do nothing and her father do all the work; she was a strong girl." We find no evidence in the case that the mother depended

on the earnings of this girl. Her husband was, at the time of the accident (and this is the only only time that the statute considers—*Birmingham v. Westinghouse Electric & Mfg. Co.*, 180 App. Div. 48, 50, and authority there cited) drawing a salary of twenty dollars per week, and there is no evidence from which it can be made to appear that this did not afford the support of these two people. There is testimony that the daughter turned all of her wages—eight dollars per week—over to her mother, and that this was necessary to the support of the family, but this must be taken in connection with the fact that the daughter constituted one-third of the family, and presumptively it required as much for her support as for any one of them, and this was less than one-third of the income of the family from wages. Moreover, it appears that the father owned a four-family frame house of the assessed valuation of \$4,500, on which there was a mortgage of \$2,500, and that they had \$1,000 in bank. The house was rented, and the testimony shows that the income was sufficient to take care of the interest and taxes, and there is evidence that the family at the time of the death of the daughter was able to save \$2 per week, and that after the death of the daughter they were unable to save anything. It does not, however, show that the mother was dependent upon the income of the daughter. "The statute plainly intended that the award to each person should be for the support of such person," (*Matter of Wals v. Holbrook, Cabot & Rollins Corp.*, 170 App. Div. 6, 9; *Birmingham v. Westinghouse Electric & Mfg. Co.*, 180 App. Div. 48, 52) and not for the purpose of paying the mortgage upon the property owned by the claimant's husband. The evidence here shows without dispute that the mother is getting the same support now that she had while the daughter was alive; she merely says that since Mary's death she could save nothing. But her husband owes her the legal duty of supporting her; he appears to be abundantly able to do this, and no lack of disposition to discharge the duty is shown. The family goes on living as usual; no change in housing, no change in food, fuel, clothing, etc., and because there is no surplus to pay upon the debts of the husband we may not conclude that the mother was dependent upon the eight dollars a week provided by the daughter. Assuming that it required all of the earnings of the father and daughter to keep up the family expenses, the daughter was contributing less than a third of this sum, and her death, from a financial standpoint—aside from the funeral expenses in excess of \$100—would result in a saving to the family. And the question here is not the family, for an award has been denied to the father, but the dependency of the mother, and we find no evidence in the record from which the inference can be drawn that the mother has any less to-day than she had when her daughter was living, or that she was in any sense dependent upon her wages at the time of the accident and death.

The award should be reversed, and the claim dismissed. All concurred. Award reversed and claim dismissed.

A street railway conductor, living in his father's home circle, was thrown from the running board of his car and died of a fractured skull. The insurance carrier acquiesced in dependency awards to his mother and infant sister but contested an award to his father. The Attorney General pointed out upon

appeal that the father had tuberculosis and could not work hard or earn as much as the deceased son, but the Appellate Division, one justice dissenting, reversed and remitted the case with opinion, as follows:

KLEIN v. BROOKLYN HEIGHTS R. R. Co.,—App. Div.—, June 30, 1919.

H. T. KELLOGG, J.: This is an appeal from an award to the father, mother and infant sister of a deceased employee. The award to the father is disputed on the ground that he was not a dependent. The deceased earned eighteen dollars a week, reserved for spending money four or five dollars, gave his infant sister two or three dollars, and paid the balance of about twelve dollars to his mother, who bought his clothes and used the remainder for general family purposes. The father earned twelve dollars a week, which he paid to the mother, while a brother, who earned eight dollars a week, paid her six dollars for the family fund. The mother and sister were not wage earners. There were two other members of the family, but they need not be considered, for they were self-supporting, and did not contribute to the family maintenance. For the support of a family of five, therefore, there was a common fund of thirty dollars, to which the deceased contributed twelve dollars, the father twelve dollars, and the brother six dollars. If the fund was distributed equally to the needs of the five, so that each received the benefit of an expenditure of six dollars, then the brother expended just what he paid in, the deceased and his father each provided six dollars more than he expended, and the mother and sister were the sole beneficiaries of the excess payments. It is, therefore, difficult to see wherein the father could have been dependent upon his son. The aid of the son lightened the burden of the father, but such aid made the mother and sister, not the father, the dependents of the deceased. For the loss of such aid the mother and sister have received awards, and for the same loss the father cannot also be paid without duplication of compensation. It is clear that unless the father expended more than the twelve dollars which he paid he received no benefit from the contributions of his son. As no such expenditure was proven, the father was not a dependent of the deceased employee, and should not have had an award.

The award is reversed, and the matter remitted to the Commission for action in accordance with this opinion. All concurred, except Kellogg, P. J., dissenting. Award reversed and matter remitted to the State Industrial Commission.

A school boy earned one hundred and thirty dollars in vacation. He gave it all to his parents, who put one hundred dollars in the bank during the time. They supported him and gave him a dollar or two each week. He was killed by industrial accident. The father claimed death benefits. In denying the claim, the Commission, speaking through Commissioner Lyon, said:

MOLNER v. TERRY BROS. Co., Bul. vol. 2, p. 227, July 5, 1917.

LYON, Commissioner: The claimant is also employed by Terry Bros. Company and the record shows that for the year running from September, 1915, to September, 1916, omitting the months of January, February and March, when

it seems nothing is being done in the premises of Terry Bros. Company, who are brick makers, the claimant earned on an average of something more than \$16 per week. The statement of his earnings is given in bi-weekly periods and from April to September these bi-weekly payments to the claimant are in the following amounts: \$19.50, \$21.92, \$45.10, \$39.63, \$40.56, \$38.82, \$41.65, \$36.55, \$49.80, \$52.02, \$56.28, \$26.92. It is true the claimant alleges that his wife assisted him in earning these sums, but this is denied by the employer. In any event the family income is in these amounts. During the winter months the claimant is unable to work for this employer, but it does not follow that he cannot earn something.

The claimant testified when first before the Deputy Commissioner that his son had never worked until the latter part of May, 1916, and that if he had lived he would have returned to school in the fall. When before the Commission last time, he testified upon this point as follows:

"COM. LYON: You testified before Mr. Abbott that he is going back to school again in the fall, isn't that true?

CLAIMANT: I don't know whether or not I would stay in that town and I couldn't say if I would stay there whether I would send him to school or not."

There is also proof in the record that in time past the claimant had been sending money to his wife's relatives in Austria and that the war conditions in Europe now prevented him from doing so. It does not seem to me that the parents under these circumstances, can be said to have been dependent upon the earnings of this school boy but 16 years of age, almost all of whose earnings had been laid aside in a savings bank, leaving not more than thirty dollars for his board and clothing for three and one-half months, especially so, in view of the uncertainty as to whether his employment at all was anything more than temporary during the summer vacation of his school. While it is true that the amounts earned by the father are not large for the support of a family, averaging only a little over thirteen dollars per week taking it the year through, and somewhat over sixteen dollars per week omitting the winter months, it is still true that they had originally lived upon that sum and I do not think the record would warrant our finding that they were in fact dependent on the deceased at the time of his death.

On the 5th day of July, 1917, the Commission acted upon the foregoing matter in accordance with the foregoing opinion.

An unmarried son lived in an apartment with his mother, a widow, and his sister and her husband. The mother claimed death benefits on account of the loss of her son. She said that he had paid her about \$10 a week and had received his board and lodging. She collected \$1,500 insurance on his life. She owned unencumbered property, a house valued at \$8,000, from which she derived rentals of from \$39 to \$45 per month. Her daughter and son-in-law paid no rent. The Commission held that she was not in a condition of dependency and denied award to her. The Appellate Division affirmed the Commission's decision unanimously and

without opinion: *Bottjer v. Wall Rope Works*, S. D. R., vol. 18, p. 546, Bul., vol. 4, p. 28, Oct. 30, 1918, — App. Div. —, May 9, 1919.

An unmarried son lived at home with his father, mother and eight brothers and sisters. He was killed by an industrial accident. The father and the four older children, besides the deceased, were contributing to the family fund. The contribution of the deceased was \$7 per week. The mother had an equity of \$2,600 in two houses. The Commission denied her death benefits: *Gorman v. N. Y. Railways Co.*, S. D. R., vol. 18, p. 585, Dec. 11, 1918.

The Commission denied benefits to a father on account of the death of his daughter who lived in his family: *Schlemowitz v. Goldberg*, S. D. R., vol. 19, p. 466, Bul., vol. 4, p. 131, Feb. 25, 1919.

The affirmation of the award to both parents in the O'Brien case has been commented upon above, page 104. The Appellate Division, in the following fourteen instances, has affirmed awards to parents, unanimously and without opinion, except opinion cited in the Bylow case. One of the fourteen, the Frey award, has been affirmed by the Court of Appeals.

An unmarried chauffeur and salesman lived with his father, aged fifty-three, and his mother, aged fifty years. The father conducted a coal business, owned property and had income, but was in financial difficulties due to mortgages and other debts. The son gave to his parents about ten dollars a week out of his twelve dollars wages. Upon his death by an automobile accident, the court sustained awards to both father and mother: *Kennedy v. Loggie Bros.*, S. D. R. vol. 7, p. 411, Feb. 3, 1916; 175 App. Div. 957, Nov. 15, 1916.

A young man was killed by an explosion in a tank car. The Commission awarded death benefits to his mother, aged fifty-two, but denied them to his father, aged forty-seven. Upon appeal, the insurance carrier claimed that five dollars of the ten dollars he was giving to his parents weekly went towards paying for an automobile and that the other five was not enough to pay for his food, lodging and washing. The Attorney-General argued that there had been no arrangement relative to board, that what the

parents could give was not worth five dollars, that the children had to help the invalid mother with her household work and that the father had not been able to pay family expenses since the son's death. The court affirmed the award to the mother: *Moquin v. Robeson Process Co.*, S. D. R., vol. 7, p. 479, Mar. 8, 1916; 175 App. Div. 957, Nov. 15, 1916.

A young man was fatally scalded in a lumber mill accident. The Commission found that:

He was accustomed to give his mother an average of \$4 per week towards her support and towards the family fund, and had on various occasions bought cord wood, coal, groceries and pork for the family table and clothes for a younger sister and for his mother, said purchases being made of his own money. His contributions to his mother in money were used for the purpose of paying grocery bills.

The father was a mail clerk on salary of thirteen hundred dollars but was carrying debts amounting to twenty-five hundred dollars and was losing three or four hundred dollars salary annually on account of illness. The Commission decided that the mother was partially dependent upon her son but that "the father's claim being based upon his obligation to support the mother, who in turn was partially supported by the son, was a claim made by the mother through the father as her agent." It awarded death benefits to the mother but denied them to the father and the court affirmed its action: *Sampson v. O'Dell & Eddy Co.*, S. D. R., vol. 9, p. 272, May 5, 1916; 176 App. Div. 923, Dec., 1916.

An unmarried daughter living at home paid all of her wages of eleven or twelve dollars a week into the family fund. Her father, aged fifty-six, had irregular work and her mother, of the same age, was unable to do anything. Upon her death from industrial accident the court sustained awards to both of her parents: *Owens v. N. Y. Mills Corp.*, S. D. R., vol. 9, p. 367. July 19, 1916; 178 App. Div. 942, May 2, 1917.

A locomotive ran down and killed a laborer upon his employer's premises. The Commission found that the laborer's mother, sisters and brother were partially dependent upon him. In affirming the award, the Appellate Division said: "The question of dependency being one of fact the decision of the Commission under the evidence is final": *Bylow v. St. Regis Paper Co.*, S. D. R., vol. 12, p. 526, Jan. 3, 1917; 179 App. Div. 555, Sept. 13, 1917.

Full text of the court's opinion is in Bulletin No. 87, Part 1, pages 197-200.

A teamster fell under the wheels of his wagon and was killed instantly. He lived with his parents, each aged fifty-eight. A broken kneecap had prevented the father from working for about nine years. The mother earned a few dollars each week. The son was earning fifteen dollars a week at the time of the accident, of which he was giving eleven to his parents. Two other sons living in the family were each giving four or five dollars a week. The Commission and court awarded death benefits to both parents: *Bonke v. Shippers & Son*, Death File, No. 4621, Dec. 2, 1916; 181 App. Div. 912, No. 14, 1917.

A son lived with his father's family and paid his wages of ten dollars a week to his mother. She gave him back three dollars, sometimes more. His father was well and earning good wages. His parents owned their home clear. Upon death of the son by accident, the Commission awarded death benefits to the mother. The Appellate Division affirmed the award: *Garlapow v. Zuckmaier Bros.*, Death File, No. 18541, Apr. 18, 1917; 181 App. Div. 962, Dec. 28, 1917.

An elevator operator was crushed to death. He lived in the family of his father, a barber, who earned about ten dollars a week. Two younger brothers were dependent. His mother was sick and had to have attendance. He gave her all of his wages which were twelve dollars a week. She gave him back small sums now and then. The family income, apart from the deceased's contributions, had been \$2,210 during the year previous while its outgo had been \$2,658, indicating partial dependence upon him. The Commission and court awarded death benefits to the mother: *Ciringione v. Ritz Realty Corp.*, Death Case, No. 46556, Sept. 26, 1917; 182 App. Div. 907, Jan. 18, 1918.

The Commission awarded death benefits to the mother of a plumber's helper who was fatally burned by the overturning of a gasoline can. The deceased was eighteen years old and lived with his father's family. His apprenticeship wages were one dollar and sixty cents a day. Had he lived a year longer his pay would have advanced to four dollars and a half a day. The insurance carrier sought to prove that he was spending his money upon his fiancée, except five dollars that he had agreed to pay for board.

The mother testified that he sometimes gave her all of his weekly wages. She was an invalid unable to get out of her chair. The father earned ten or twelve dollars a week. The Appellate Division affirmed the award: *Halstead v. Bull*, Death File, No. 18775, Nov. 19, 1917; 184 App. Div. 919, May 8, 1918.

A lineman's helper fell from a repair truck and sustained fatal injuries. He had been earning \$15.40 per week, of which he had given his mother \$13 towards home expenses. His father and a brother had also given her money. The court affirmed death benefits to his mother, two brothers and a sister. Proof of dependency lay in the fact that the mother had to run into debt after his death: *Lee v. Transit Developing Co.*, S. D. R., vol. 16, p. 528, May 27, 1918; 185 App. Div. 919, Sept. 20, 1918.

An iron worker lost his life by a fall. He had earned \$5 per day and had given his mother \$15 per week. His father had given his mother \$20 per week. He had contributed about \$200 towards payment of a mortgage. The standard of living of his father's home had been reduced by his death. The courts, without opinion, affirmed an award to his mother, brother and sister: *Fahey v. Boland Co.*, Case No. 26849, Mar. 20, 1918; 186 App. Div. 923, Nov. 13, 1918; 226 N. Y. Rep. —, Apr. 22, 1919.

An unmarried son living in his father's home stepped on a rusty nail while at work. Infection resulted in his death. There were nine children in the family of whom four were minor daughters. The father earned from \$17.50 to \$42.46 per week. The total family income was \$58 per week of which the deceased contributed \$11.33. The court affirmed awards to the mother and the four minor sisters: *Mahatcek v. Gordon & Son*, Bul., vol. 2, p. 232, July 24, 1917; Death Case, No. 100335, July 3, 1918; 186 App. Div. 932, Nov. 22, 1918.

A nineteen year old youth fatally injured himself by a fall from a ladder in a factory. After paying an award to his mother on his account for a time, the carrier asked the Commission to declare her no longer dependent because two younger sons had found employment and were helping her. The Appellate Division heard appeal from the Commission's denial of the request, and sustained the Commission's finding: *Solitar v. Neuglass & Co.*, Death Case, No. 42922, Nov. 1, 1918; — App. Div. —, May 7, 1919.

A seventeen year old youth was killed by a falling chain hoist. He boarded at home and gave money to his mother. His father, aged forty-two, was earning five dollars a day. He had six minor brothers and sisters. The Commission, upon ground that dependency of the family upon his earnings was but partial, denied award to the father but granted award to the mother and denied award to the four oldest, but granted award to the two youngest of the minor brothers and sisters. The Appellate Division affirmed this award: *Gressert v. Mousette Co.*, Death Case, No. 13788, Jan. 10, 1919; 187 App. Div. 965, Mar. 14, 1919.

The award in *Kennedy v. Central City Roofing Co.* to a father who was himself receiving more wages than his son, the victim of the accident, is noticed below under the next subtitle.

2. *Brothers and sisters.* The award to minor brothers and sister upon the expressed stipulation of the insurance carrier in *North v. McCreery Realty Corp.*, S. D. R., vol. 6, p. 329, Nov. 17, 1915, has been noticed above, page 103.

An unmarried laborer, aged twenty-three, was killed by a fall from a car. The Commission awarded death benefits to his mother and to each of six minor brothers and sisters. The insurance carrier agreed to the award to the mother but appealed from the awards to the brothers and sisters. The deceased's father was earning forty-nine to fifty-two dollars a month. The deceased paid his mother seven dollars and a half a month when it did not rain and received board and lodging. The insurance carrier argued that the case was distinguishable from the Walz case, in which the injured employee had been his family's main support. It declared that the death would be a profitable one to the family since it would receive nine dollars and sixty-one cents a week on account of the accident instead of the seven dollars and a half that it received while he was alive. The Appellate Division affirmed the award unanimously and without opinion: *Chabot v. Terry Bros. Co.*, Death File, No. 21735, Nov. 14, 1917; 184 App. Div. 917, May 8, 1918.

An unmarried son lived with his father's family. The mother was dead. Four younger brothers and sisters were in school. The father's wages were nineteen dollars and fifty cents a week; the son's, eighteen dollars. The son contributed thirteen dollars

a week to the family up-keep. Upon his death from industrial accident the Commission awarded death benefits to the father and to each of the brothers and sisters. It based its ruling upon the following opinion by Commissioner Sayer:

KENNEDY v. CENTRAL CITY ROOFING Co., S. D. R., vol. 15, p. 618; Bul., vol. 3, p. 145, Feb. 27, 1918.

SAYER, Commissioner: In my opinion, not only the children under the age of 18, but also the father, were in some measure dependent on this deceased's earnings. The young man appears to have been an excellent boy, hard working, and contributing to the family on an average \$13 a week out of his \$18 wages. Certainly the father's earnings alone would not have supported this large family of children in a decent manner.

The payment of \$3 each week to his employer on account of coal and food supplies was not for his benefit alone. It was for the benefit of the entire family. Further, the payment of \$10 to his sister for the house account was also in part for the benefit of the family. The other brother, whose wages were the same, paid in only \$5 a week, which was said to be the value of his board. On this basis, Francis, the deceased, might be held to have paid \$5 for board and the remainder of his contributions, amounting to \$8 a week, may be taken as the measure of his support.

It is not necessary under our law that the family be wholly dependent on the earnings of the deceased. It is well settled under the law of the State that if there is a partial dependency, that is, continuing, there should be compensation.

Some question is raised as to the dependency of the father, whose wages were \$19.50 a week. It must be borne in mind here, I think, that the natural, legal and moral obligation for the support, maintenance and education of these children is upon the father. The father is the natural head of the family. To him society and the law looks for the support that nature demands. If, owing to the exigencies of this particular case, and hundreds of others like it, the father is compelled to accept the help of his older children to discharge the obligation which society casts upon him, then to the extent that the son shared the father's burden, the father was dependent upon the son. It is not an answer to say that the father was earning enough to feed and clothe himself. The question is, was he earning enough to maintain himself and also those whom nature and the law have made his dependents.

Here we have a father of a large family, with an equity of \$600 in a house that he has saved out of his earnings of some years. But he has a large balance still to pay on account of the house, together with interest and taxes. Who in these days will say that this house was an asset? Was it not rather a burden to add to his already heavy burden of responsibility? It seems so to me.

Moreover, the father appears to be in poor health and has received wages for a long time that he did not earn, and which were in reality in the nature of charity from the employer he had so long served.

Let an award be made in this case to the dependent father and to the four children. Adjustments of the compensation rate must be made so that

the total shall not exceed 66 2-3 per cent. of the wages, and readjustments as the children reach 18 years.

On this 27th day of February, 1918, the Commission acted on the foregoing matter in accordance with the foregoing opinion.

A father and his unmarried son contributed their weekly earnings, except spending money, to support the father's family. Upon the death of the wage-earning son by industrial accident, the Commission denied death benefits to his father and to his fifteen year old brother, able to work, but granted them to his mother, and to his two brothers and a sister, aged twelve and eight years, who were in school: *Crawford v. N. Y. Consolidated R. R. Co.*, S. D. R., vol. 14, p. 605; Bul., vol. 3, p. 13, Sept. 5, 1917.

3. *Grandparents*.—The Appellate Division has affirmed awards of death benefits to an aged grandparent at the same time with a parent, though the grandparent was supported by the fatally injured employee only indirectly through the parent, unanimously and without opinion, in *Chase v. Fairbanks, Morse & Co.*, S. D. R., vol. 4, p. 369, Apr. 30, 1915; 181 App. Div. 908, Nov. 14, 1917; and *LeFevre v. Flinn O'Rourke Co.*, File No. 11063, Mar. 14, 1917; 181 App. Div. 908, Nov. 14, 1917.

4. *Grandchildren*.—Death benefits are awardable to a child dependent upon its grandparent for fatal injury to such grandparent though its parents be living at the time of the accident and amply able to support it. In the following case a father, temporarily separated from his wife by a quarrel, gave his infant daughter to his mother. There was not a legal adoption by the grandmother, but the father signed a paper willing the child over to her. Though the parents soon patched up their quarrel and lived together again, the daughter remained with the grandparents constantly for more than fourteen years until the grandfather met with his death. Had the grandmother adopted her granddaughter according to law, compensation, upon authority of *Crockett v. International Ry. Co.*, above, page 85, would have been awardable regardless of the question of dependency. The mother of the girl, by letter to the Commission and by appearance at the hearing, sought to prevent her daughter from receiving the award. The Commission made award. The Appellate Division and the Court of Appeals affirmed it, the former with, and the latter without opinion (223 N. Y. Rep. 687, May 14, 1918).

Two justices of the Appellate Division dissented from the court's action. The majority and minority opinions are as follows:

YEOPLE v. ROSE Co., 182 App. Div. 438, Mar. 6, 1918.

JOHN M. KELLOGG, P. J.: The mother and father of the claimant gave her to the grandparents when she was a few days old and they have maintained her for over fifteen years as their child. There was some writing made giving the child to them, the terms of which do not appear. Apparently, in a separation action between the father and mother, they gave up their rights to the child to the grandparents, and two dollars and fifty cents a week by the decree or settlement was allowed the wife for her support. The separation agreement made no provision for the child. The parents have lived next door to the grandparents and the child for years, and have not reclaimed her. It would be degrading for the child to be compelled to leave the grandmother, who had taken the place of mother to her, and return to the father and mother who had abandoned her, and it would be a gross injustice to the grandmother. The fact that the mother of the child appears in this action, testifying against the child, is evidence of the animosity which she bears to the grandmother and the want of love she has for her own child. It is manifest that the child would not be at home with her father and mother and that her real home is with her grandmother. The question of dependency is determined by the conditions existing at the time of the accident and is not affected by the fact that this fifteen-year-old girl was, at the time of the hearing, earning some wages, or that the mother, as a matter of spite to the grandmother, was offering to take care of the child. At the time of the injury the child was dependent solely upon the grandfather for her support and was supported by him. I favor an affirmance.

All concurred, except COCHRANE, J., dissenting in opinion, in which LYON, J., concurred.

COCHRANE, J. (dissenting): Cornelius Yeople died as result of injuries received, August 16, 1916, and an award has been made to his widow and to Jennie M. Yeople, as an alleged dependent granddaughter. No complaint is made of the award to the widow, but the sole question is whether the granddaughter was dependent on the deceased.

She was born October 22, 1901, her father being a son of the deceased. When she was four weeks old she was taken to the home of her grandparents where she has since resided, and has received her entire support from them. The cause of this unusual family disruption was an estrangement between her father and mother. An action for separation was instituted by the mother and alimony was paid her by her husband. After about a year and a half of separation, the parents made another attempt at domestic felicity and seem to have been measurably successful inasmuch as they have ever since resided together and the family now consists of the father and mother, and two sons aged fourteen and ten, both going to school. The daughter by consent of all parties has remained with her grandparents. The father and grandfather both worked for this same employer at the time of the accident. The earnings of the father were somewhat in excess of those of the grandfather. The latter had an invalid son, an epileptic, entirely unable to earn anything and living with and dependent absolutely on his father. The

claimant herself since the accident has been earning four or five dollars a week working in a button factory. It does not appear that the grandfather had any means of support except his limited and meagre earnings.

The statute (Workmen's Compensation Law [Consol. Laws, chap. 67; Laws of 1914, chap. 41], § 16, subd. 4, as amd. by Laws of 1916, chap. 622) requires that the question of dependency "shall be determined as of the time of the accident." In *Birmingham v. Westinghouse Electric & Mfg. Co.* (180 App. Div. 48) this court said in discussing a question of dependency: "What occurred before or after the date of the accident is of no importance; it is what was the condition on that day." In that case it was held that the findings of the Commission to the effect that a mother living with her husband was dependent on her son were without evidence in their support and an award in favor of the mother was reversed. It seems clear in the present case that the finding of dependency is absolutely unsupported by the evidence. In the case cited it was said: "No evidence is given to show that she [the mother] was dependent upon him [the son]; the most that can be said of the evidence is that it shows that he contributed rather more than his share of the expenditures of a large family; but it does not show that if these contributions were withdrawn the claimant's husband was not abundantly able to care for her out of his own earnings at the time of the accident. He was not obliged to support the other members of his household; none of them had a legal claim upon him; his duty was to support his wife, and the undisputed facts show that he was earning enough to do this equally as well as it was being done if he merely discharged the duty imposed upon him by law." So in the present case the legal liability to support the claimant rested not on her grandfather but on her father, and it appears that he was equally as able to discharge such liability as was the grandfather. Undoubtedly liability for support does not in and of itself under this law which we are now applying, determine a claim of dependency. But when in addition to such legal liability it appears that the person so liable was earning more than the deceased and was occupying equally as good a station in life, and that his family was not materially larger than that of the deceased and that he was able to give his daughter the natural advantages of a home with the influences and associations of father, mother and brothers, none of which associations or influences appear to be derogatory to the welfare of the daughter, the claim of dependency based not on the duty but on the generosity of a third person seems to disappear. More especially is this true when the daughter is approaching a time when she has an earning capacity of her own and can, therefore, if necessary contribute materially to her own support, an advantage which did not exist during the years she was living with her grandparents. The mother of the claimant testifies that she and her husband both desire their daughter to live with them. The fact that the grandmother wishes to keep her, and that the granddaughter may prefer to remain with her grandmother, does not establish a claim of dependency. Apparently all there is in this case in support of such a claim is the desire of these two people to live together, a desire stimulated by the prospect of an award which would not have been made if the claimant had been living with her parents. It clearly was not the purpose of the statute to make compensation in deference to a claim which rests on nothing but sentimentality.

The dependency of the claimant at the time of the accident under the undisputed facts was not on her grandfather but on her father.

The award so far as appealed from should be reversed, and the claim dismissed. LYON, J., concurred. Award affirmed.

A father and son were both widowers. The son had two minor children. Tuberculosis compelled the son to cease work and the father sent weekly sums for support of the son's children. The father having been killed by industrial accident, the Commission, notwithstanding the insurance carrier's protest that the sums sent were loans, granted compensation to the two children. The Appellate Division affirmed the awards unanimously and without opinion: *Bend v. Austen Mfg. Co.*, S. D. R., vol. 16, p. 441, Bul., vol. 3, p. 177, Apr. 23, 1918; 186 App. Div. 926, Nov. 13, 1918.

An engineer was electrocuted while changing a lamp globe. He had slept in the parlor and had had one meal daily at his son's home. He had paid eight dollars per week to the son's wife. The wife contended that \$3 of the \$8 had been given for her children and that the grandfather had bought all of their wearing apparel. The father of the children was earning wages but was in debt. The Commission awarded benefits to the children on account of the accidental death of their grandfather. The Appellate Division affirmed the awards unanimously and without opinion: *Simonson v. Montauk Metallic Bed Co.*, Death Case, No. 71526, May 8, 1918; 186 App. Div. 932, Nov. 22, 1918.

A scrub woman was accidentally killed by a fall down an elevator shaft. She had lived with her husband, children and grandchildren in the same apartment. She had been custodian of the group's income and paymaster. The Commission denied benefits to her husband and adult children but granted them to her six grandchildren. The father of the six children was living. The Appellate Division affirmed the decision, unanimously and without opinion: *Myshekia v. Hall*, Death Case, No. 67252, May 8, 1918; 187 App. Div. 961, Mar. 5, 1919.

A grandfather, living with his son's family, met with death from an industrial accident. His son claimed death benefits for four minor children on the ground that their grandfather had supported them in part by turning over part of his wages weekly and by sometimes buying them clothing or paying their doctor bills. The Commission found that there was no dependency and

refused to make an award: *Sheridan v. Fuller Co.*, Bul., vol. 3, p. 8, Sept. 5, 1917.

An adopted child supported by the parent of its foster parent is not entitled to death benefits for his fatal injury: *Winkler v. N. Y. Car Wheel Co.*, above, page 102.

d. *Deceased employee did not live with the alleged dependent or dependents.*—When the deceased employee has been supporting members of a family group while living apart from it, the complication of his having received board, lodging, etc., in return for contributions to the family “pot” does not arise, but the other elements determinative of dependency, exemplified in the numerous cases outlined under the preceding subtitle, may be present and of full force, as the following additional family group cases will show. When the deceased employee has thus been living apart or at a distance from the alleged dependent or dependents, written or documentary proof of dependence assumes an importance that it does not have when he has been living with them, especially when the alleged dependents have been living in foreign countries. Interpretation of the word “or” in the expression “father or mother or grandfather or grandmother” in Workmen’s Compensation Law, § 17, is pertinent to such aliens.

1. *Dependency in family group.*—A young woman who was burned to death in the Diamond Match Factory disaster had been sending money to her widowed mother in Italy. The mother was supporting a daughter aged eleven. About three months before the accident the mother had remarried, apparently without the knowledge of the daughter in America. The evidence consisted of a statement from an uncle that he had seen the deceased enclosing money in letters, the letters themselves and an affidavit of the mother. Award was denied to the mother but granted to the eleven year old sister. The insurance carrier argued that the sister’s dependency was inseparably connected with her mother’s dependency, that if the mother’s remarriage deprived her of death benefits, it should deprive the sister also. The Appellate Division affirmed the award unanimously and without opinion: *Napolitano v. Baratz*, Death File, No. 351, Apr. 27, 1916; 176 App. Div. 924, Dec. 29, 1916.

An Irish immigrant to America sent back money to the old country for the purchase of a farm. He gave free use of the

farm to his parents and younger brothers and sisters. He also sent them money. Upon his death by an industrial accident the family claimed compensation for his father and mother but not for his three minor sisters. The Commission found that the mother had become independent through the family's inheritance of the farm but granted death benefits to the father because of his incapacity to work. The case illustrates the fact that the death benefits of parents or grandparents depend not only upon dependency at the time of the accident but upon its continuance after the accident. The text of the opinion upon which the Commission based its ruling is as follows:

KERRIGAN V. INTERBOROUGH RAPID TRANSIT Co., Bul., vol. 2, p. 149, Apr. 27, 1917.

LYON, Commissioner: To my mind it is quite clear that the father and mother, the claimants herein, were dependent upon the deceased at the time of his death within the meaning of the Compensation Law. The fact of his having purchased a farm and placed it at their disposal, rent free, is as much an evidence of contribution to their support, as though he had retained the money here and sent the income from it to his parents in Ireland, but that is not necessarily controlling on the question of present dependency, for the statute provides that father and mother are entitled to compensation only during dependency. Of course, we are without evidence as to what the laws of descent in Ireland are, but I think it must be presumed that real estate, owned as this was by Frank Kerrigan, goes, on the owner's death, to the members of his family, so that this family which before the decedent's death had only the use of his farm, now have the ownership of it. In just what proportions we do not know, but apparently the father and mother and minor children have a legal right to a very large proportion of it. This being so and the proofs being that a cottage and an acre of land also in the vicinity of this land are owned by the father, it is questionable in my mind whether under ordinary circumstances this Commission ought to find that the father and mother are any longer dependent. It would certainly seem that with a cottage and a garden of an acre and sixty acres of land, one-half of which is under cultivation, would be sufficient to support a father, mother and five persons, all of whom with two or three exceptions are perfectly capable of working. The brothers, James and John, and the sister, Annie, are apparently capable of doing a day's work, while the two younger sisters are old enough to be of assistance about the farm. There is no evidence that the mother is not in good health, and if it were not for the proof that the father had suffered an injury which either does or may incapacitate him, I should hesitate about finding dependency upon his part, but under the circumstances, with evidence of the injury to the father, the Commission should find that the father was dependent upon the contributions of Frank Kerrigan in his lifetime and is still in the state of dependence, and I so recommend.

Awards to an Irish father and mother, aged respectively fifty-six and forty-eight years, who failed to make claim also for their six minor children, were unanimously affirmed by the Appellate Division with the following opinion which gives pertinent facts of the case:

MORAN v. RODGERS & HAGGETT, 180 App. Div. 821, Dec. 28, 1917.

LYON, J.: The death of Peter Moran, which occurred March 21, 1916, as the result of injuries sustained the previous day in the borough of Brooklyn, city of New York, was compensable under the Workmen's Compensation Law in case the evidence established the dependency of one or both of the parents of the deceased.

The father and mother of the deceased, aged, respectively, fifty-six and forty-eight years, with seven of their twelve children, resided on ten acres of rented land in the county of Leitrim, Ireland. Six of the twelve children were between six and eighteen years of age and attended school. The father had the use of only one hand, the other being paralyzed. The oldest son, who was twenty-one years of age, spent all his time at work on the place. Following taking the testimony of two of the brothers of the deceased residing in this country as to the dependency of the parents and the contributions of the deceased to their support, the Commission suspended the hearing pending the production of further proof upon those subjects. There was thereafter obtained and submitted to the Commission, upon notice to the appellant of the hearing, the affidavits of the father, mother, a groceryman and a hardware merchant taken in Ireland before a commissioner of oaths of the State of New York. The evidence thus amply established the partial dependency of the claimants for their support during more than the year preceding the son's death upon money sent by him to them.

The employer makes the claim upon this appeal for the first time that these affidavits were not properly receivable as evidence for the reason that section 68 of the Workmen's Compensation Law providing that the Commission shall not be bound by common-law or statutory rules of evidence, "except as provided by this chapter" and that the Commission should be authorized to make such investigations or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties, is limited by the provisions of section 72, entitled "depositions," which provides: "The Commission may cause depositions of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in the Supreme Court." If the contention of the employer is correct, and the section was intended to be mandatory, no affidavit taken either within or without the State is properly admissible under objection. Section 72 was plainly intended to be permissive only, and to furnish a further means within the discretion of the Commission of obtaining evidence for use before the Commission, and not to in any way limit or restrict the authority of the Commission under section 68.

The present case is distinguishable from that of *Casella v. McCormick* (180 App. Div. 94), in that the injury in that case occurred subsequent to June 1, 1916, the date when the amendment by chapter 622 of the Laws of 1916 took effect. The accident in the present case having occurred prior to June 1,

1916, the award of compensation is governed by the statute then in force, rather than by the statute in force at the time the award was made, the last sentence of subdivision 4 of section 16 providing, "all questions of dependency shall be determined as of the time of the accident." This provision was not changed by the amendatory act of 1916; hence an award of compensation to both the father and mother being proper at the time the accident occurred, the award of fifteen per cent to each was proper. Furthermore, under section 93 of the General Construction Law (Consol. Laws, chap. 22; Laws of 1909, chap. 27), which by section 110 of that law is made applicable, the enforcement of the right and liability to pay compensation was governed by the statute in force at the time of the accident.

The award should be affirmed. Award unanimously affirmed.

An employee was killed on July 10, 1917, by an explosion in a mine shaft. On July 4th, preceding, he had given his mother twenty-five dollars. He had lived away from home for a year and a half and had sent her money from time to time which she had used for living expenses. His father ran a threshing outfit and owned a small farm which was under mortgage. The Commission granted the mother's, but denied the father's claim for death benefits. The Appellate Division affirmed the award to the mother unanimously and without opinion: *Brotherton v. Rock Salt Corp.*, Death Claim, No. 128-R, Sept. 28, 1917; 183 App. Div. 911, Mar. 6, 1918.

A son who was earning about fifty-six dollars a month had lived in his father's family and had contributed about five dollars a week for the family's expenses. Upon leaving home he continued to contribute about five dollars for a few months until his death by industrial accident. Besides the father and mother, three sisters who earned nothing living in the home. The father was in good health and contributed about ten dollars a week to the family's support. The mother had an income of fifty-three dollars a month from rental of an apartment owned by her. The Commission, upon information that a mortgage upon the house was held by her husband and that she paid him no interest, rescinded an award which it had made to her: *Gregory v. Suffolk Light, Heat & Power Co.*, S. D. R. vol. 12, p. 520, Bul., vol. 2, p. 65, Dec. 27, 1916.

The preceding case may be compared with the case of a young salesman and collector killed by the overturning of his automobile while he was trying to avoid a drunken man. His mother, divorced from her husband, had reared him and given him his

education, having advanced four thousand five hundred dollars for his college course. At the time of his death she was fifty-six years old and was receiving thirty dollars a week as a teacher. She had no property. He had sent her a check for fifty dollars while out upon his selling trip. In awarding the mother death benefits the Commission, speaking through Commissioner Sayer, said:

He had repeatedly stated that all that was his was his mother's and that he would take care of her. She had arrived at an age when it was necessary for her to retire from teaching school, and after her years of toil and privation she had reached a time when she had right to expect her sons, whom she had reared and educated, to maintain her. There is evidence that I think we must believe that the deceased was a man of ability, that he had received offers of better employment, one of which he expected to accept after his return from this trip, and that his mother was deprived of a very substantial support that she had a right to look to in her later years.

The Appellate Division affirmed the award unanimously and without opinion: *Remington v. Briggs Bros. & Co.*, S. D. R., vol. 14, p. 558, Bul., vol. 2, p. 164, May 14, 1917; 179 App. Div. 966, Sept. 27, 1917.

2. *Claimants living in foreign countries.*—Besides the cases of the two Irish families under the preceding subtitle the following cases illustrate dependency of claimants living in foreign countries.

In five cases, reversing awards to foreign parents for dependency upon unmarried and childless labors in America, Justice Woodward of the Appellate Division has stated and emphasized the evidential requirements necessary to success of such claims. His five opinions are grouped together below. Four of them are of the same date. In all five of the cases the employees met with such sudden or speedy death that their own testimony was not taken. In four of them, the claimant father and mother were residents of Italy; in the other, residents of England. The opinions hold that the burden is upon the claimants to prove: (1) their existence and their relationship to the deceased employee; and (2) their support by him during and within the exact year preceding his accident. Mere unsubstantial statements and hearsay do not suffice. Certified copies of foreign records are legal evidence. Unauthenticated certificates of the existence of the claimants and of their relationship to the victim

are in law "mere scraps of paper." Claiming dependency upon a fifteen year old child "is crowding the Workmen's Compensation Law about to the limit." Contributions within the prescribed year must be regular or periodic, not occasional. Actual correspondence showing transmission of funds for support is substantial evidence. It is one thing for parents or others to use remittances and another thing to be dependent upon them. In order to award of death benefits such income must have affected the standard of living of the recipients. Texts of Justice Woodward's five opinions are as follows:

First Case

PIFUMER v. RHEINSTEIN & HAAS, 187 App. Div. 821, May 7, 1919.

WOODWARD, J.: The accident resulting in the death of John Pifumer occurred at Syracuse, while the decedent was employed by Rheinsteint & Haas, Inc., of New York, in the construction of a building. There is no question about the accidental character of the death, or of any of the conditions of liability. The decedent had no wife or children, and the State Industrial Commission, under the provisions of section 17 of the Workmen's Compensation Law, has made an award to both the father and mother of the decedent, on the ground of dependency.

This court is committed to the proposition that such an award, in a proper case, may be sustained (*Casella v. McCormick*, 180 App. Div. 94), and it does not seem necessary to go into that question on this appeal.

The real question involved is whether there is any evidence in this case from which the State Industrial Commission was justified in finding that the parents of John Pifumer, residing in Italy, were dependent upon him in any measure for their support during the year next preceding the accident. There is some evidence that John Pifumer and his brother sent two remittances aggregating less than fifty dollars, during the year in question, to the father, and the brother testified that "they lived on what he sent them;" that he had letters in which the father stated that they were living on what the brother sent them. No such letters were introduced in evidence; all we have is the statement of this brother that he had received such letters, which is obviously not evidence of any fact tending to show dependence. Assuming the existence of such letters, which is highly improbable, it does not show that they were dependent upon these remittances; does not show that the remittances were not for money owed by the decedent. The fact that they may have used the money for their support is entirely beside the question; we all make use of our income for our support, no doubt, but we are not necessarily dependent in a legal sense. The question is whether we are in a position where we require the assistance; where it is in a measure essential to our existence in a relatively permanent condition.

The only other matters shown in the record to establish this alleged dependency are certain so-called certificates. One of the these, which declares that the "mayor of the above town certifies that the heirs of Giovanni Paffumi, son of Venerando Paffumi and Venera Campo, who died at Syracuse on August 18 last as the result of the accident, depended exclusively on the deceased

for their support. Said dependents, who are of advanced age, are living in conditions little suited for self maintenance. Such heirs of Giovanni Paffumi possess a small home and an additional property valued at 100 lire (\$15). The family exists on the fruits of small jobs and are now in a state of extreme poverty. This is issued for the purpose of obtaining benefits." The last sentence is superfluous; the purpose is obvious. In one breath we are told that the parents "depended exclusively on the deceased for their support," and in the next that the family owns a home, with some little property, and that it "exists on the fruits of small jobs;" and this very remarkable certificate is signed "The Mayor." A second alleged certificate is likewise said to be signed by "The Mayor," and a third by "The Official." No authentication of these alleged certificates exists; they are, in law, mere "scraps of paper," yet the State Industrial Commission makes awards to these alleged dependents, whose very existence is not established by any possible legal evidence. (See Code Civ. Proc. §§ 952, 953, 956.) There is no presumption of dependency on the part of the parents of a man thirty-two years of age; hardly a presumption that such parents are living in a foreign country; and the Court of Appeals, in a very recent case, has held that these awards may not be sustained where there is no evidence of the essential facts upon which the awards are made. No reason seems to exist why the requirement of evidence should not be the same in reference to the persons who are to receive the benefits, as upon the question of the accident or other matter on which the right to the award is based. (*Matter of Belcher v. Carthage Machine Co.*, 224 N. Y. 326; *Matter of Hansen v. Turner Construction Co.*, Id. 331).

The award should be reversed and the matter returned to the Commission for such further consideration as may be proper in the premises.

All concurred, except JOHN M. KELLOGG, P. J., and LYON, J., dissenting. Award reversed and matter remitted to the Commission.

Second Case

BONNANO v. METZ. BROS., — App. Div. —, June 30, 1919.

WOODWARD, J.: On the sixth day of February, 1917, Vincenzo Bonnano, while in the employ of Metz Bros. Company, Buffalo, received injuries from which death resulted. The only question on this appeal is whether the father and mother of the decedent, living in Italy, were dependent upon him at the time of his death.

There is no evidence in the record that the father and mother are living. There is a certificate, signed by "J. Parini, Officer in charge," that "On the 21st day of January, 1859, Bonnano Antonino, son of Salvatore and of Schifano Giodanna, was born at Roccapalumba; as it is shown in the record of birth registered in the Bureau of Vital Statistics," and a similar certificate is made of the birth of a female, who is supposed to be the mother of the decedent, as the former is assumed to be the father of the decedent, and a like certificate of the birth to these two of a son by the name of the decedent in 1902, and the claim of dependency upon this child, who was born on the 10th of January, 1902, and was killed on the 6th of February, 1917, when he was approximately fifteen years and one month of age, is crowding the Workmen's Compensation Law about to the limit.

There is no evidence that this child of fifteen years of age had "supported,

either in whole or in part, for the period of one year prior to the date of the accident," either the father or the mother; the general allegation of a brother and sister that "when my brother Vincenzo died in consequence of an accident received in Buffalo, N. Y., on the 6th day of February, 1917, was alive periodically sent money to his family for support, they being in straightened circumstances," not amounting to such evidence. There is nothing to show that this brother and sister knew any of the facts which they assert; there is no date fixed, and no amount is stated to have been sent at any time within the limits fixed by section 17 of the Workmen's Compensation Law. In *Matter of Belcher v. Carthage Machine Company* (224 N. Y. 326, 328) the court held squarely that hearsay evidence, without any corroboration by facts, circumstances or other evidence, was not sufficient to sustain an award, where the question was as to the injuries; and we are of the opinion that in the matter of dependency it is necessary to establish by competent evidence that the claimants stood in that relation to the decedent. Here we do not have any competent evidence of the existence of the parents of the deceased; the statement of "J. Parini, officer in charge," that the bureau of vital statistics in a town or village in Italy shows certain facts is not competent evidence of the fact; we should have a certified copy of the record. (*Code of Civil Procedure*, §§ 956, 957.) The statute requires competent evidence, not difficult to procure if the facts exist, that the deceased has "supported, either wholly or in part, for the period of one year prior to the date of the accident," the person making the claim under the provisions of section 17 of the Workmen's Compensation Law, and anything less than this cannot be accepted as "just as good." If this child of fifteen years of age, working in America, has been supporting his parents for one year before his death, either wholly or in part, it is no hardship to have that fact proved in the manner required by law. This record does not disclose these facts, and the award ought not to stand.

The award should be reversed, and the proceeding remitted to the State Industrial Commission. All concurred. Award reversed and matter remitted to the State Industrial Commission.

Third Case

PROFETA v. RETSOF MINING Co., — App. Div. —, June 30, 1919.

WOODWARD, J.: Claimants' inter-state was employed by the Retsof Mining Company and was accidentally killed, in the performance of his duties, on the 29th day of January, 1918. The only question involved on this appeal is whether his father and mother were dependent upon him, and the award which has been made must depend upon the evidence tending to show that the decedent had "supported, either wholly or in part, for the period of one year prior to the date of the accident" (Workmen's Compensation Law, section 17) the claimants. The question of support, in whole or in part, for the year is the controlling consideration (*Casella v. McCormick*, 180 App. Div. 94, 95), and it has been held that "the mere fact that a father receives money from a son and expends it is not alone sufficient to establish dependency." (*Birmingham v. Westinghouse Electric & Mfg. Co.*, 180 App. Div. 48, 51.)

The record before us consists of papers alleged to have been prepared and subscribed in Italy, open to the same objections which exist in the *Matter of the Claim of Pifumer v. Rheinstein & Haas, Inc.* (175 N. Y. Supp. 858), and nowhere in the case does it appear, from any competent evidence, that the de-

dent "supported, either wholly or in part, for the period of one year prior to the date of the accident," the claimants in this case.

The award appealed from should be reversed, and the proceeding remitted to the Industrial Commission. All concurred, except John M. Kellogg, P. J., dissenting. Award reversed and matter remitted to the State Industrial Commission.

Fourth Case

CIANOA v. WEST END PAPER Co., — App. Div. . . . , June 30 1919.

WOODWARD, J.: The claimant's son, Serefino Serafeine, was drowned, on the 20th day of August, 1917, while employed by the West End Paper Co., and the State Industrial Commission has made an award to both the father and mother, residing in Italy, of twenty-five per cent of his wages during dependency.

There is nothing in this case to distinguish it from that of the claim of Pasquale Profeta and another against Retsaf Mining Company, decided herewith, and it does not seem necessary to go over that ground again.

The award should be reversed and the claim remitted to the State Industrial Commission.

Fifth Case

DRUMMOND v. ISBELL-PORTER Co., — App. Div. —, June 30, 1919.

WOODWARD, J.: The deceased, Arthur Drummond, was a bricklayer. He came to his death while taking measurements from the top of a furnace, where it is assumed he stepped upon some recently laid bricks on the edge of the furnace wall, which, falling out of place, caused him to lose his balance and drop to the floor below, fracturing his skull and producing death.

So far as the record shows there was, in this accident, nothing on which an action of negligence could rest under the provisions of section 1902 of the Code of Civil Procedure, and the claimants here are the father and mother of the decedent, residing in England, and there are brothers and sisters living. We call attention to these matters simply to emphasize the fact that the claimants can have no legal rights outside of those which depend upon the provisions of the Workmen's Compensation Law. The decedent, who appears to have been a citizen of England, twenty-seven years of age, was at work in the village of Massena, N. Y., when the accident occurred; he had the protection of the statute in so far as he was individually concerned, against any accident resulting in his disability. When the accident results in death, the benefits can only go to those who bring themselves within the provisions of sections 16 and 17 of the act. There is a presumption that the claim comes within the provisions of the act (section 21), but this presumption does not reach to the claimants; he or she must establish that the conditions exist which bring them within the statute. Under subdivision 4 of section 16 of the act the death benefit, in the absence of surviving wife and children or dependent brothers and sisters under the age of eighteen years, goes to "the support of each parent, or grandparent, of deceased, if dependent upon him at the time of the accident," such benefit being limited to twenty-five per centum of such wages to each of the persons described.

The primary purpose of the statute, of course, is the protection of the individual workman and his immediate family; his collateral obligations, not of a legal character, are incidental, and it seems to us that persons who claim

under the provisions of the Workmen's Compensation Law are bound to bring themselves within the language, at least, of the act. In other words, whether Charles Drummond is, in fact, the father of decedent; whether there is a surviving wife or children, or others who are entitled under the statute, and whether he has been "supported, either wholly or in part, for the period of one year prior to the date of the accident," are jurisdictional in their nature, and must be supported by evidence of probative character, in order to justify the taking of the money of the employer and insurance carrier. Primarily the employer owes no legal obligation to the father and mother of a man of full age living in a foreign country; it is only by virtue of statute law that any right survives the death of the decedent in an accident of the character here under consideration, and until we know that Charles Drummond was "supported, either wholly or in part, for the period of one year prior to the date of the accident," there is no foundation for the award. A fact of this nature, if it exists, is capable of proof under ordinary circumstances; there certainly is no great difficulty in a man or woman telling the facts in reference to such alleged support, and there would seem to be no consideration of policy which required the State Industrial Commission of the State of New York to strain after an excuse for charging our industrial life with an expense in favor of a resident of England, where the evidence does not meet the most ordinary requirements of proof.

The accident here under consideration occurred on the 19th day of September, 1917, and the period of investigation, therefore, goes back to the 19th day of September, 1916. We find in the record certain receipts for sums of money apparently sent to England from Massena, the first of these, within the period, being of November 9, 1916, for \$48.70, and the second for the same amount, dated the 10th of February, 1917. It was more than six months after this last remittance that the accident occurred, but there is no evidence that any other or further remittance was made, and beyond this the receipts in evidence do not show that the decedent made these remittances, or that they were made to Charles Drummond. All that appears from these two receipts is that some one made two remittances to England at the dates mentioned, and the only connection established by the proof is that one John Hatton, administrator of the estate of Arthur Drummond, the deceased, makes an affidavit that "deponent found in the possession of said deceased at the time of his death, certain postal money order receipts for money sent by said deceased to his parents in England through the Massena postoffice," and that "said deceased told deponent that he was sending money home to his parents in England to help support them and that deponent has been to the postoffice in Massena in company with said decedent and saw him purchase money orders and remit money to his said parents, but did not know the amount of such orders."

There is no attempt to identify the particular remittances within the period between September 19, 1916, and one year later when the accident occurred. There are several of the receipts in the record for small amounts running back to 1915, 1914, and the affidavit may be absolutely true, and yet not refer to either of the receipts within the year which alone is important here. So if we give all the force to the hearsay testimony that it can be entitled to under the most liberal rules, it does not meet the requirement of proof that the decedent made remittances to his father for the purpose of his support in

whole or in part, during the year preceding the accident; and a loose, general affidavit of what the decedent may have told him is very far from the high character of evidence which is ordinarily necessary to take the money of one man and transfer it to another between whom there is not the slightest relationship. All contributions of money to the father of a family and the husband of a wife are in a sense for the support of the family, but the occasional contributions of an absent son are not, in ordinary usage, considered in this light, in the absence of facts which show that such contributions were relied upon as an element in the support of the family; and here we have no evidence whatever that any remittances were made by the decedent to the claimant during the year preceding the accident.

Turning then to the proofs offered from the other side of the water, we find the claimant writing the State Industrial Commission that "as to the proof that deceased supported me for at least a year prior to his death, I can only refer you to the declaration of my claim. I have not kept the letters from my son and as the money was sent by postal orders I have no means of proving the payment. * * * The deceased was the only son that we had who was not married and he lived with us up to the time that he went to America. He sent money to us in varying amounts but not at any set periods. The contributions from my son were of material assistance to me in the maintenance of myself and wife and in keeping the home together," but no facts are given from which we may properly infer that the claimant relied upon these "varying amounts but not at any set periods," although the Commission had written him telling him that "you are now asked to furnish in the form of a sworn statement as to the conditions surrounding your manner of living and as to whether you and your wife are living together. Also more definite information as to what assistance was rendered you by deceased and what use was made of the money forwarded."

The claimant evidently intends to be an honest, self-respecting man. The Commission tells him "If you can furnish us with this proof as to how much you and your wife really depended upon your son, and whether loss of this money will affect your standard of living, we think the carrier will waive his objections and pay the award"; and under this appeal the claimant tells us in an affidavit that his son left England in 1913, and that he was then receiving one pound, four shillings and six pence a week, and paying six shillings and nine pence a week rent; that he and his wife live together, and that "we have no other source of income except my own wages and money sent to me from time to time by my said son." It appears from the record that he has three other sons who are married, besides a married daughter, so that he has reared a considerable family upon the wages he has received, and he tells us that he received during the war period an advance in his wages, and that he and his wife are entitled to a certain old age pension, which he has not been drawing, out of patriotic motives toward England. Much of the affidavit deals with matters since the death of the son, and he tells us in his affidavit of April, 1918, that owing to war prices "I and my wife could not have lived in ordinary decent comfort without the assistance we received from my said son who was in the habit of sending to me sums of ten pounds per quarter," and that the "Money so sent to me was of great assistance to me and was spent exclusively in absolute necessities for our maintenance." But none of this comes to the matter in question; we are nowhere told that the decedent, in the year between September 19, 1916, and September 19, 1917, "supported,

either wholly or in part," the claimant, and without this fact there is nothing to build upon. The most that can be inferred from the affidavit is that the claimant is an honest and industrious Englishment holding a humble job, paying him a little better now than in years past, and that his son in America was in the "habit of sending to me sums of ten pounds per quarter," but whether this habit persisted during the year in question is not disclosed, and there is no suggestion in the affidavit that the claimant was dependent upon these sums in that year. His affidavit speaks of the present time (April, 1918), some seven months after the son's death, for he tells us that "I am still engaged in the same works and I am now earning, with overtime and war bonus, an average of one pound fifteen shillings per week, but with my present rent seven shillings per week and the increased cost of coal, light, food, shoes and clothing due to the war I and my wife could not have lived in ordinary decent comfort," etc.; but what the conditions were between the dates above mentioned is not shown, nor does it appear that any contributions were made during that time. It appears from another affidavit in the record that the claimant had worked for his then employers twenty-seven years, and it is entirely obvious that he was receiving relatively the same compensation during 1916-17 that he was during all his life, and it requires some evidence to show that with a grown up family he was dependent upon these contributions of his son for the support of himself and his wife.

We find no evidence in the case which meets the requirements of the statute in reference to the support of the claimant, and as neither of these claims are within the provisions of the law, as the record stands, the award should be reversed, and the claim dismissed. All concurred, except John M. Kellogg, P. J., dissenting. Award reversed and claim dismissed.

An unmarried immigrant was crushed to death by a paper machine. His father, aged fifty-seven, lived in Italy. In proof of the father's dependency upon the deceased son, another son testified that he had seen his brother enclosing bills in a letter to the father and produced express receipts found in the deceased's trunk. The Appellate Division affirmed an award to the father unanimously and without opinion: *Bianco v. Diana Paper Co.*, Death File, No. 3135, May 24, 1917; 181 App. Div. 908, Nov. 14, 1917. For want of evidence of dependency, the Appellate Division reversed the award to a father living in Italy and remitted the claim in *Minardi v. Acheson Graphite Co.*, Death Case, No. B-208, May 27, 1918; 187 App. Div. 912, Jan. 8, 1919. The affidavits of a father, living in Italy and aged sixty-three, to effect that he was dependent upon his son who had been killed in America, were entirely unsupported by other evidence and the Commission, which had granted death benefits to the deceased employee's widow and child who were with him in New York, refused to grant death benefits to the father: *Comi v. Smith & Sons*, S. D. R., vol. 12, p. 559, Bul., vol. 2, pp. 93, 102, Jan. 24,

1917. A mother and two daughters living in Greece claimed death benefits on account of their son and brother killed in America by a falling tree; they had difficulty in proving dependency because of a translation of the word drachmas as dollars but finally received awards: *Stagurnos v. Tunnessassa Lumber Co.*, S. D. R. vol. 14, p. 687, Bul., vol 3, p. 80, Jan. 24, 1917. Their awards were afterwards reversed on grounds other than dependency: *Tsangournos v. Smith*, 183 App. Div. 751, July 2, 1918.

A citizen of Austria-Hungary met with death by industrial accident in New York, February 19, 1917. Claim of death benefits was made for his alleged wife and child living in Europe. The United States had severed diplomatic relations and mail service with Austria-Hungary. Because of this lack of communication the Commission decided to hold the case in abeyance until such time as proof might be forthcoming: *Grubesich v. Valley Mills Co.*, S. D. R., vol. 14, p. 666, Bul., vol. 3, p. 54, Oct. 18, 1917. A colored missionary and his family, residing in St. Kitts, British West Indies, purposed migrating to the United States. They were not American citizens. The eldest son, aged twenty, came to New York in advance and secured employment. He was killed by an elevator accident. His father claimed compensation as a dependent, alleging in a letter to the Commission that the son had been sending him five dollars per week. An aunt of the youth corroborated this statement. Correspondence between father and son was put in evidence. The Commission made an award which it commuted to \$1,114.22 under § 17. Upon appeal, the insurance carrier protested that there had been no showing of the father's financial condition and that proofs were otherwise inadequate. The Attorney-General replied that the father's allegations of dependency were sufficient and that it might be assumed that a colored clergyman is always in need of support, clergymen in general being dependent upon their congregations, their relatives and others for contributions. The appeal involved the question of incidentalness as well as the question of dependency. The award was affirmed by the courts without opinion, except a minority opinion in the Appellate Division relative to incidentalness: *Hogan v. Edwards Engineering Co.*, Case No. 56857, April 11, 1918; 186 App. Div. 921, Nov. 13, 1918; 226 N. Y. Rep. —, Mar. 11, 1919. For repre-

sensation of claimants residing in foreign countries by their consuls residing in New York and for further consideration of the competency of evidence, compare *Pinco v. St. Lawrence Pyrites Co.*, S. D. R., vol. 19, p. 514, Bul., vol. 4, p. 149, Apr. 9, 1919. The question of payment of awards to aliens is further noticed below, page 189.

3. *The word "or" in Workmen's Compensation Law, § 17.*—An Italian laborer was suffocated in a sand bank in Brooklyn. The Commission awarded death benefits to his father, aged seventy-eight, and his mother, aged seventy, residing in Italy. Upon appeal, the Appellate Division divided upon the question whether the word "or" in the expression "father or mother or grandfather or grandmother," in Workmen's Compensation Law, § 17, as amended by L. 1916, ch. 622, limited death benefits of nonresident aliens to but one of these four possible dependents or permitted an award to each of them. The majority of the court held that the legislature intended an award to each. The prevailing and dissenting opinions are as follows:

CASELLA v. McCORMICK, 180 App. Div. 94, Nov. 14, 1917.

KELLOGG, P. J.: Section 17 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of 1916, chap. 622) does not grant any compensation; it is a limitation upon grants otherwise made. Section 16, subdivision 4, as thus amended, provides a compensation of twenty-five per cent of the average wages "for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the accident." Dependency at the time of the accident is the controlling feature there. Section 17 provides that non-resident aliens shall have the same compensation as resident aliens, except that dependents residing in a foreign country are limited. It omits any provisions for brothers and sisters and does not provide for all dependent fathers, mothers, grandfathers or grandmothers. The compensation is limited to those who, for the period of one year prior to the accident, have been supported in whole or in part by the employee. Here "support," in whole or in part for the year, is the controlling feature. I cannot feel that the use of the word "or" is intended to restrict the compensation to one parent, if both have been supported for the time stated. The "or" is probably used to cover the same ground as the word "each" in the previous section. That is, the compensation of twenty-five per cent is not for both parents but for each one. Otherwise it is difficult to tell which one is to receive the award, and if the award is to the grandfather and he dies, apparently the dependent grandmother is left without support.

To cover the legislative intent "or" is frequently construed to mean "and." I can find no intent in this provision to omit either the grandfather or the grandmother, and feel that they are both included. The sec-

tion, however, in effect, limits the compensation to one-half the amount which residents would receive. If both grandparents were supported by the employee, the award to each would be based upon twelve and one-half per cent of the wages; otherwise one is to receive twelve and one-half per cent of the wages and the other nothing. If they lived together, the compensation would amount to only six and one-fourth per cent for each — one-quarter of what a resident alien would get under similar circumstances. The section I think contemplates that a non-resident parent or grandparent shall receive one-half of the compensation provided for a resident. I favor an affirmance.

All concurred, except LYON, J., who dissented, with opinion, in which SEWELL, J., concurred.

LYON, J. (dissenting):

The important question presented by this appeal is whether the State Industrial Commission was justified in making an award to each of the parents of the deceased, both of whom were dependent alien non-residents, or whether the award should have been limited to the father only.

Giovanni Babino came to his death in June, 1916, as the result of accidental injuries arising out of and in the course of a hazardous employment in which he was that day engaged at the city of Brooklyn, N. Y. He left no widow or child. His father and mother were aliens residing in Italy. Both were dependent upon him for support, which he had furnished them wholly or in part for more than one year prior to the date of the accident. The finding of these facts by the Commission was fully warranted by the evidence. To an award made to each of the parents of twenty-five per cent of the average weekly wage of the deceased, this appeal has been taken by the employer and the liquidator of the insurance carrier.

Section 17 of the Workmen's Compensation Law, entitled "Aliens," provided, "Compensation under this chapter to aliens not residents * * * of the United States * * * shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or, if there be no surviving wife or child or children, to surviving father or mother, or grandfather or grandmother, whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the accident, and except that the Commission may, at its option, or upon the application of the insurance carrier, shall, commute all future installments of compensation to be paid to such aliens, by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission."

Had the father and mother been residents of the United States and dependent upon the deceased at the time of the accident, each, under the circumstances proven, would doubtless have been entitled to an award of twenty-five per centum of the wages of the son during dependency. However, the intention of the Legislature to discriminate between resident dependent parents and alien non-resident dependent parents is manifest. An award to the former class is to be made "for the support of *each* parent, or grandparent" (§ 16, subd. 4), while an award to the latter class is "to surviving father or mother, or grandfather or grandmother." (§ 17.) Furthermore, as to the former class the lump sum payment to the dependents of a deceased employee

is the full commuted amount of the periodical payments (§ 25), while as to the latter class only one-half of the commuted amount is to be paid. (§ 17.)

The contention of the respondents can be sustained only by construing "or" to mean "and." If the word is entitled to that construction in section 17, no good reason is apparent why it should not receive the same construction in section 16, and an award be required to be made "for the support of each parent and grandparent," nor why the construction should not be made applicable to other portions of the law.

The fact that separate claims were presented through the office of the Italian consul, one on behalf of the mother in January and the other on behalf of the father in March in no way affects the decision or the priority of the claims which were heard together as one proceeding. The language of section 17 is not ambiguous, and should receive the natural and logical construction.

The award should be reversed and the proceeding remitted to the Commission. SEWELL, J., concurred. Award affirmed.

A painter was killed instantly by a fall. The Commission awarded death benefits to his father, aged seventy-nine, and his mother aged sixty-seven, residing in Greece. It found the deceased employee's average weekly wage to have been \$17.31. It apparently intended to make a separate award to each parent but the wording of its ruling was unusual. Instead of making award of \$4.32¾ weekly to the father and \$4.32¾ weekly to the mother, it made award to the father and the mother "at the rate of \$4.32¾ weekly." The case was appealed to, argued and affirmed without opinion in the Appellate Division upon the assumption that it involved precisely the same point of interpretation as the Casella case (Case No. 34631, Mar. 20, 1918; 185 App. Div. 900, July 2, 1918); but upon further appeal, the Court of Appeals held that the Commission had made an award of but twenty-five per cent to the father and mother conjointly and that therefore the appellant had no grievance. The *per curiam* opinion of the court is as follows:

SKARPELETZOS v. COUNES & RAPTIS CORP., 224 N. Y. Rep. 606, Oct. 15, 1918.

Per Curiam: This appeal is upon the assumption that the state industrial commission has made an award of \$9.655 per week, \$4.32¾ to the father and \$4.32¾ to the mother. The notice of the award sent by the state industrial commission to the parties so states. The award, however, as made by the commission is of \$4.32¾ weekly to the father and mother.

As the award is conclusive and the total amount which the insurance carrier is obliged to pay is \$4.32¾ weekly, it is immaterial to it whether it is payable to the father alone or to the father and mother. The amount is correct, being twenty-five per cent of the weekly wage, and it is unnecessary

for us now to determine to whom it should be paid, as this appeal involves the amount only.

The order, therefore, should be affirmed, without costs. HISCOCK, Ch. J., CHASE, COLLIN, CUDDERBACK, HOGAN, McLAUGHLIN and CRANE, JJ., concur. Order affirmed.

In sequence to the Court of Appeals decision, the Commission corrected the error in its findings by making an award of \$4.32 $\frac{3}{4}$ to each parent. The case was then put upon appeal a second time and affirmed in Appellate Division May 7, 1919, upon authority of the Casella decision, the same two justices dissenting as in that case.

In a third case involving the same point of interpretation, *Pifumer v. Rheinstein & Haas*, above, page 128, the Appellate Division has briefly reaffirmed its Casella decision but has reversed the award for shortcomings of dependency evidence.

WAGES AS THE BASIS OF COMPENSATION

(Workmen's Compensation Law, § 3, subd. 2, §§ 14-16, 101, 102, 113)

Earlier commission rulings and court decisions under this topic, with the texts in a few cases, have been given in Bulletin 81, pages 328-334. This bulletin traces further development of some of those cases and presents later cases.

A. Three Methods of Determining Annual Average Earnings.—Each of the first three subdivisions of Workmen's Compensation Law, § 14, presents a separate method of ascertaining the wage basis of compensation. Insurance carriers have now and then urged the Commission to use one method in preference to another or have appealed from its rulings on the ground that it has not employed the method proper for the particular case. Usually computation under subdivision three has been for their advantage. The first and second methods cover occupations in which work is regular or continuous; the third, occupations in which work is irregular or seasonal. The measure of regularity and continuity, as stated in the section, is approximately three hundred working days per year. The context of the section plainly indicates that the Commission is to use the second and third methods only when the first fails, and the third only when the first and second fail. It is "the theory of the Compensation Law that Compensation shall be based wherever practicable upon the wage earning capacity of the injured man and not on the amount actually earned by him for services only a portion of the time," says Commissioner Lyon (*Bacon v. Townsend & McCarthy*, S. D. R., vol. 11, p. 638, Bul., vol. 2, p. 66, Dec. 27, 1916.) Even though the injured employee has worked during the year preceding his accident for no other employer than the one in whose employ he has been injured and the actual wages received by him day by day, as well as the number of days and hours of his labor, can readily be ascertained and added up to the last cent and hour, still the Commission must apply methods one and two in preference to method three if the conditions or circumstances of the occupation substantially permit of employment in it continuously and throughout the year.

These points are established by the following court decisions:

An employee had been working for his employer only two weeks at the time of fatal injury. His wages were \$1.80 per day. During the year preceding the accident he had worked about seven months for one other employer who had paid him \$1.25. His work had been irregular because of ill health. The insurance carrier suggested \$1.52½, the mean between \$1.25 and \$1.80, as a more than fair basis for compensation, but the court upheld the Commission's award at the rate of \$1.80, saying:

BYLOW v. ST. REALS PAPER Co., 179 App. Div. 555, Sept. 13, 1917, *in part*.

This was the average daily wage received in that employment by an employee of the same class working the year through, although in previous employments by other employers the deceased had received a smaller sum. Computed upon the basis of compensation prescribed by subdivision 2 of section 14 of the Workmen's Compensation Law, which is applicable in this case, the amount of the award was correct.

In *Cohen v. Rothstein & Pitofsky*, S. D. R, vol. 9, p. 302, the case of a piece worker, working and earning irregularly, the Commission based its award solely upon the ground that :

The daily wage of the employee was reported to the Commission by the employer and by the employee to be the sum of six dollars per day, making the Commission rate twenty-three dollars and eight cents for the average weekly wage.

Upon appeal by the insurance carrier, the Appellate Division reversed the award and remitted the case to the Commission because it had not found from the entire facts and conditions. The text of the court's opinion is as follows:

COHEN v. ROTHSTEIN & PITOFSKY, 176 App. Div. 35, Dec. 28, 1916.

COCHRANE, J.: The single question presented is the basis upon which compensation has been computed. Under section 14 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) "the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits, and shall be determined" by one of the methods indicated by the subsequent provisions of the section. Both the employer and employee in their reports to the Commission stated that the wages of the employee were six dollars per day. This was clearly wrong. He was not a day worker but a piece worker in the occupation of making cloaks and suits for his employer. The question of his earnings was subsequently made the subject of investigation and litigation before the Commission, when the employer submitted a verified abstract from the payroll showing the actual weekly earnings of the claimant covering the period of a year before the accident. His total earnings for the

year were only five hundred and eighty dollars and only in one week of that year did they amount to as much as six dollars a day. This was not contradicted or in any way disputed by the claimant.

In their award the Commission have not made any finding as to the actual earnings or average weekly or annual earnings, but have merely found that "the daily wage of the employee was reported to the Commission by the employer and by the employee to be the sum of \$6.00 per day, making the compensation rate \$23.08 for the average weekly wage," and on this basis have fixed the award at \$15 per week. In other words, the Commission has awarded the claimant at the rate of \$780 per year, although for the entire year previous to his accident he only earned \$580. The reports made to the Commission were entitled to consideration, but are not conclusive, and when it appears that they are founded on an inadvertence or are inaccurate they should be disregarded. The effort of the Commission should have been to determine the average weekly wages of the claimant in accordance with the facts and according to conditions as they actually existed and not according to some theoretical conditions which had they existed might have increased the earnings of the claimant. Why the Commission adhered to these reports in the face of uncontroverted evidence that they were clearly erroneous is beyond our comprehension. The Commission has not found from the entire evidence the average weekly wages of the claimant as it should have done and made that the basis of the award, but on the contrary has merely found what was reported to the Commission by the employer and the employee. There should be a finding in accordance with the facts as to the average weekly wages of the claimant and that should be made the basis of the award.

It is suggested by the Attorney-General that the employer and employee made an agreement under section 20 for the payment of compensation in which agreement it was stated that the daily wages were six dollars. Said section 20 (as amd. by Laws of 1915, chap. 167) requires the Commission to examine the report of such agreement and approve the same if proper to do so and that such approval shall constitute an award. The agreement in question was made with reference to that statutory requirement and contained a provision that it should not be binding unless approved by the State Industrial Commission. The Commission does not seem to have given its approval and consequently the agreement was ineffectual. The Commission could not in justice or fairness approve it after it became apparent that it was based on a gross inaccuracy in respect to a material fact.

For the reason that there has been no determination by the Commission as to the average weekly wages of the claimant the case must be remitted to the Commission for determination on that point.

The award should be reversed and the matter remitted to the Commission for further consideration. All concurred. Award reversed and matter remitted to the Commission for further consideration.

Having reheard the case the Commission discovered new facts showing that part of Cohen's earnings for the year preceding had been omitted in determining his wage and made award under method three. Accidents to clothing workers, timber cutters, salesmen on commission and other piece workers are compensat-

able according to their actual earnings: *Fiocca v. Dillon*, S. D. R., vol. 7, p. 399; *Claremont v. DeCoss*, S. D. R., vol. 7, p. 463; 175 App. Div. 952; 220 N. Y. Rep. 671; *Sullivan v. Preston*, S. D. R., vol. 10, p. 566; 177 App. Div. 110; *Tsangournos v. Smith*, S. D. R. vol. 14, p. 687, Bul., vol. 3, p. 80; 183 App. Div. 751; *Gurnett v. Ross Co.*, S. D. R. vol. 13, p. 535, Bul., vol. 2, p. 126; 181 App. Div. 910.

If an injured employee has worked either less or more than six days a week for a substantial part of the year preceding his accident, methods one and two are inapplicable to his case and method three comes into play. Three hundred, the multiplier under methods one and two, approximates the number of working days in a year for workers who get one day of rest per week and holidays. The Commission and the courts do not seem to have determined exactly how many days less or more than three hundred will bring a case under method three. The Prentice decision following holds that seven days work per week for practically the entire year before the accident exceeds the standard set by methods one and two; the Leesman decision, that two hundred and seventy-four days per year complies with it; and the Littler decision, that thirty weeks per year falls short of it.

Besides placing seven day workers under method three, the Prentice decision approves of the multiplier three hundred and thirty-two determined upon by the Commission for such workers, instead of the multiplier three hundred established by methods one and two. The text is as follows:

PRENTICE v. NEW YORK STATE RAILWAYS, 181 App. Div. 144, Dec. 28, 1917.

COCHRANE, J.: This appeal involves the proper application of section 14 of the Workmen's Compensation Law (Consol. Laws chap. 67; Laws of 1914, chap. 41), in a case where the claimant has worked seven days a week for practically an entire year before the accident. The section provides methods for determining the average annual earnings and the average weekly wages as a basis upon which to compute the compensation. Subdivisions 1 and 2 of the section provide that in cases included within such subdivisions the average annual earnings shall consist of 300 times the average daily wage or salary. The number 300 used in those subdivisions is not an arbitrary selection but was evidently selected because it bears an approximately close relation to the number of working days in a year, Sundays and holidays excluded. Manifestly, where an employee works seven days a week for substantially an entire year, the method of determining his average annual earnings indicated in either subdivision 1 or 2 would be an injustice to him, just as much as it would be an injustice to the employer to apply those

contemplates is that we shall find what his capacity to earn was rather than his actual earnings, and then presuming that his capacity would have remained the same for the future weeks, base compensation on that. Now the deceased's capacity to earn money of course is determined not by the number of days which he was able to secure employment, but by the rate of his pay for the days when he did work and such is the exact wording of the law, namely, "his average annual earnings shall consist of three hundred times the *average daily wage* or salary which he shall have earned in such employment *during the days when so employed*." Having determined the average wage earning capacity, per day, of a man who worked substantially the whole of the year preceding the injury, there is, I think, a conclusive presumption that the injured man, but for his injury, would have worked 300 days per year during the term of disability, or so long as compensation is payable, and this is the basis of an award under the statute.

What the legislators apparently had in mind when they adopted the rules laid down in section 14 was to make a rule somewhat arbitrary in itself, which would work out average justice and be simple and easy of application in the multitude of cases which come before the Commission. Of course a healthy and ambitious workman might work more than 300 out of 313 working days of the year, and such a workman who is put on the basis of 300 working days receives somewhat less compensation than his actual earnings would warrant, whereas the workman who works for any reason less than 300 days in the year, provided he works a sufficient number of days to make a finding that he has worked substantially the whole year proper, receives some advantage over his actual earnings. It is probable, moreover, that the Legislature foresaw the administrative difficulties which would confront this Commission if some simple and easily applied rules were not adopted, making it unnecessary to take voluminous testimony in each case to arrive at the injured workman's actual earnings.

It is difficult to see how a Commission passing on 60,000 cases a year, as this Commission does, could possibly go into the determination of the earnings of employees, if every case had to be tried out on the actual facts. The statute, therefore, makes a very easy and simple rule based on the actual earnings of the injured man for the preceding year, if he has worked substantially all the time during that year, and if not, on the average earnings of another workman in a similar employ and in the neighborhood who has worked substantially all the year.

In my opinion the award already made has brought out the correct result whether it be based on an average wage of four dollars and six cents per day for the days actually worked, or on a larger wage which was admitted to be correct by both the employer and employee, and I advise that the award be confirmed.

Leesman was a shorer in the building trade. He had lost a week during the preceding winter on account of snow. No further appeal was taken in his case. On the same day that it approved the award to Leesman's widow under method one, the Appellate Division approved an award to a bricklayer named Littler under method two. In this case, the appellants undertook

to show by conflicting estimates of witnesses as to time lost on account of weather that steady work was impossible in the bricklayers' occupation and that, therefore, methods one and two were inapplicable. The employer appealed to the Court of Appeals which reversed the order of the Appellate Division upon the ground that the bricklayers' trade falls short of the three hundred days "standard of steady employment" and remitted the proceeding to the Commission for computation under method three. The opinion of the Court of Appeals is as follows:

LITTLER v. FULLER Co., 223 N. Y. 369, May 7, 1918.

POUND, J.: Littler, the claimant, was a bricklayer. At the time he was hurt he was working for George A Fuller Company. It was constructing a residence at Great Neck, L. I., two miles from the railroad station. The workmen, who came out by train had refused to remain on the job unless the employer would furnish free transportation to and from the work from and to the railroad station. The employer hired an automobile truck to take the employees, morning and night, to and from their work. At the end of the day's work on May 22, 1917, when the truck was making its trip to the station, it went into the ditch. Littler was thrown off and injured.

The industrial commission properly held that the injuries arose out of and in the course of Littler's employment. The vehicle was provided by the employer for the specific purpose of carrying the workmen to and from the place of the employment and in order to secure their services. The place of injury was brought within the scope of the employment because Littler, when he was injured was "on his way * * * from his duty within the precincts of the company." (*Matter of De Voe v. N. Y. State Railways*, 218 N. Y. 318, 320.) The day's work began when he entered the automobile truck in the morning and ended when he left it in the evening. The rule is well established that in such cases compensation should be awarded. (*Donovan's Case*, 217 Mass. 76; *Cremens v. Guest, Keen & Nettelfolds*, [1908] 1 K. B. 469; *Stewart & Son v. Loughhurst*, [1917] A. C. 249.) The case would be different if at the time of the accident claimant had been on the railroad train on his way to or from Great Neck.

The average weekly wage of Littler was computed by the commission under subdivision 2 of section 14 of the Workmen's Compensation Law (Cons. Laws, ch. 67) with the result that the award is based on annual earnings of three hundred times his daily wage. No finding that bricklayers work substantially the whole of the year was made. The evidence is to the effect that they average about thirty weeks of employment at their trade in each year. Three hundred days' work in the year is the standard of steady employment. "The average weekly wages of an employee shall be one-fifty-second part of his average annual earnings." (§ 14, subd. 4.) The award should not exceed two-thirds of the earning capacity. Average annual earnings are computed under subdivisions 1, 2 or 3 of section 14 as the case requires. If the nature of the employment does not permit steady work during substantially the whole of the year the annual earning capacity of the injured employee in the employment is the proper basis of compensation. (§ 14,

subd. 3.) The true test is this: What were the average weekly earnings, regard being had to the known and recognized incidents of the employment, including the element of discontinuousness? (*Anslow v. Cannock Chase Colliery Co.*, [1908] A. C. 435.)

In *Matter of Minniece v. Terry Brothers Co.* (223 N. Y. 570) the question was as to the average earning capacity of the injured man as a brick moulder. It did not appear that brick moulders in the locality did not work substantially the whole year. The computation was properly made under section 14, subdivision 2, on the basis of the occupation in which Minniece was engaged at the time of the accident, rather than on the basis of his actual earnings in the year preceding.

The order of the Appellate Division should be reversed and the proceeding remitted to the state industrial commission to compute the average weekly wage of claimant on the basis of his actual annual earning capacity.

HISCOCK, Ch. J., COLLIN, CUDEBACK, CARDOZO, CRANE and ANDREWS, JJ., concur. Order reversed, etc.

In *Ridout v. Rodgers & Haggerty*, the case of an expert mason noticed above, page 39, the employer upon appeal raised the point of application of method three in place of method one, citing the decision of the Court of Appeals in the Littler case, but testimony appeared to show that Ridout had been working regularly for Rodgers & Haggerty and award to Ridout was affirmed by the Appellate Division and the Court of Appeals upon basis of the wages at time of the accident.

B. Inclusion of Sundays.—In cases in which an injured employee returns to work from his period of disability on Monday, the Commission instituted the practice of counting the Sunday immediately preceding the Monday of return as a compensatable day: *Pirk v. Buffalo Forge Co.*, S. D. R., vol. 8, p. 492, May 10, 1916. Upon challenge of this reckoning by an insurance carrier, the Appellate Division reversed an award with instructions to the Commission to exclude Sundays in cases where the injured employees have not been regularly working seven days a week. The Court's opinion is as follows:

BEERS v. BEERS BROS., 180 App. Div. 760, Dec. 28, 1917.

KELLOGG, P. J.: The question is whether the claimant is entitled to compensation for the Sunday preceding the Monday on which he went to work. By subdivision 1 of section 14 of the Workmen's Compensation Law, applicable to this case, the average annual earnings consist of three hundred times the average daily wage. The subdivision contemplates that the wages are earned in three hundred days and, therefore, excludes Sundays. In the absence of evidence that the employee usually worked Sundays, he is not entitled to compensation for that day. The agreement of the parties by pro-

viding for one week and four days recognized the fact that he did not usually work Sundays. Under section 20 (as amd. by Laws of 1915, chap. 167) the Commission should have approved of the agreement.

The award is, therefore, modified by awarding compensation for one week and four days, and as modified affirmed. All concurred. Award modified by awarding compensation for one week and four days, and as modified affirmed.

Sunday work by regular seven day workers is compensatable upon authority of the decision in *Prentice v. New York State Railways*, above, page 143.

C. *Two or more employments within the year preceding.*—If an injured employee has two or more employments during the year at different rates of wages, his case is compensatable upon the wage of the employment in which he was engaged at the time of his accident. In *Minniece v. Terry Bros. Co.*, the Appellate Division and the Court of Appeals have sustained without opinion an award to the widow of a brickyard employee who worked part of the year as a common laborer at one dollar and forty cents per day and part of the year as a moulder at two dollars and sixty-five cents per day: 179 App. Div. 949, July 3, 1917; 223 N. Y. Rep. 570, Mar. 19, 1918. The accident happened while he was working as a moulder at two dollars and sixty-five cents. The Commission based its award upon this rate in accordance with an opinion of Commissioner Lyon in which he held that method two was applicable instead of method one and distinguished such cases from cases where employees receive wage increases without change of employment. The opinion is as follows:

MINNIECE v. TERRY BROS. CO., S. D. R., vol. 11, p. 625, Bul., vol. 2, p. 42,
Nov. 22, 1916.

LYON, Commissioner.: It is the claim of the insurance carrier that the rate of compensation must be determined under subdivision 1 of section 14 of the Compensation Law, on the theory that the deceased worked substantially the whole of the year immediately preceding his death in the same employment, and that, therefore, his average annual earnings must consist of 300 times his daily average wage for the whole year. This is based upon the proposition that the deceased "worked in the employment in which he was working at the time of the accident, * * * during substantially the whole of the year immediately preceding his injury." If "working in the employment" in subdivision 1 of section 14 is to be taken to be synonymous with "working for the same employer" this position would probably be correct, but I do not think that the two terms are synonymous. I think "employment" as used in this subdivision is intended to cover the same class or kind of work. Clearly Mr. Minniece had two employments with the same employer during a

portion of the year, one that of a moulder at a comparatively high wage in the brick yard, and the other as a common laborer at a lower wage. I do not think that it can be said that, under the circumstances, Mr. Minniece was employer during substantially the whole of the year immediately preceding his injury in the employment in which he was injured, and, in my opinion, the question must be determined not under subdivision 1, but under subdivision 2 of section 14; that is to say, the compensation in this case must be based upon the "average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in a similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed."

The position taken by the insurance carrier that the injured employee should have his compensation based upon his average earnings during the year has in it certain elements of fairness. It does not seem to me, however, to comport with the intent of the Compensation Law which bases compensation upon the hazard of the employment in which the injured workman was injured. Mr. Minniece received his injury not while under the risk of an ordinary laborer, but while distinctly under the risk of a moulder in a brick yard. It is claimed by the insurance carrier that this position is not in accordance with a decision recently made by our Deputy, in the case of Frank John v. West Bros. In my opinion, the two cases are not covered by the same rules at all. In the John case the injured workman was an operator of a machine and worked from May 22, 1915, to May 11, 1916, at the rate of sixteen and one-half cents per hour. On May 18, 1916, his wages were increased to twenty cents per hour and he was injured on May 22. It appeared that during the year immediately preceding his injury he had worked 270 days at sixteen and one-half per hour and 3 days at twenty cents per hour. Our Deputy took the average of his wages during the days which he worked and multiplied it by 300 and divided by 52 to get his average weekly wage—the precise thing which the insurance carrier claims should be done in this case, but there is a clear distinction between the cases in my opinion. In the John case the injured workman worked at the same employment and on the same machine and doing the same work during the whole of the year immediately preceding his accident. He did not change his employment at all during the year, and the Deputy well said: "the only change being in the wage rate received. There was no break in the continuity of employment between the time when he received the one dollar and sixty-five and the twenty cent rate," and our Deputy therefore decided that the case fell within subdivision 1 of section 14 of the act, with which decision I am in thorough accord.

The present case, however, is that of a man who during the year immediately preceding his accident was in two different employments, one, that of a common laborer for about five months in the year, and the other, of a skilled artisan for about seven months, who was injured while in the exercise of his duties as a skilled workman. Inasmuch as the record of his services during the year immediately preceding his injury discloses the fact that he did not work substantially the whole of the preceding year in the same employment it follows of necessity, I think, that his wage must be determined under subdivision 2 of section 14, and not under subdivision 1. It follows that the award already made should be sustained unless the insurance carrier is able to show that the average daily wage or salary of an employee working as a

moulder in a brick yard in the same or neighboring place, received for substantially the whole of the year immediately preceding his injury, a wage less than two dollars and sixty-five cents per day, in which case the matter should come on for further hearing.

D. Different day and night rates.—A longshoreman bruised his shins the second night of his employment by a stevedoring company. His rate of pay was fifty cents per hour.. He had done no work for the company in the daytime but had worked elsewhere at the day rate of thirty-three cents per hour. The Commission held that the wages he was receiving at the time of the accident constituted the basis of compensation and awarded him three weeks compensation for "work at night at the rate of fifty cents an hour on the basis of ten hours counting a day's work." Upon appeal, the Attorney-General pointed out that an award at forty-one and a half cents an hour, the average between the night and the day rate, would yield the same compensation; namely, fifteen dollars per week. The amount involved was small and the carrier withdrew the appeal: *Anderson v. Smith & Sons Co.*, S. D. R., vol. 9, p. 346, July 10, 1916; — App. Div. —, Feb. 15, 1917.

E. Increase of wages within the year preceding.—In a later case, Commissioner Lyon has applied the principle of the Johns award, noticed in his Minniece opinion, with the following statement:

CAMERON V. ACHESON GRAPHITE Co., S. D. R., vol. 14, p. 683, Bul., vol. 3, p. 77, Nov. 15, 1917, *in part*.

Some question is raised as to the rate of compensation. It appears that the deceased had his wages raised two or three times during the year immediately preceding the accident, although he did not change the nature of his service. It is stated that from June 30, 1915, to January 1, 1916, his wage was \$3.25 per day; from January 1, 1916, to May 30, 1916, \$3.38 per day; from May 30, 1916, to July 17, 1916, \$3.58 per day, and from July 17, 1916, to October 9, 1916, \$4.10 per day. I think, under section 14 of the Compensation Law, the total amount of earnings during the year immediately preceding his accident must be worked out on this basis, and when the total for the year has been ascertained, it must be divided by 52 to get the weekly wage; that is to say, his actual earnings during the year preceding his accident must be figured out day by day, so as to get an average of his daily wage, which multiplied by 300 and divided by 52 would give his weekly wage. It will be noticed that this will be considerably less than the earning power at the time of the accident, and it may be said that under the decision in the case of *Minniece v. Terry Bros.*, decided by the Commission in November, 1916, and subsequently affirmed by the Appellate Division, the rate at the time of acci-

ters in return for their services; compare *Zubradt v. Shepherd Estate*, S. D. R., vol. 13, p. 509; 180 App. Div. 20; and *Gandy v. Bass Holding Co.*, S.D.R., vol. 14, p. 561, Bul., vol. 2, p. 204. Details of the Zubradt case are given above, page 40. Salesmen's commissions may figure in computation of their pay: *Gurnett v. Ross Co.*, S.D.R., vol. 13, p. 535, Bul., vol. 2, p. 126; 181 App. Div. 910. Winnings of automobile racing may be part of a chauffeur's compensation: *Dearborn v. Peugeot Auto Import Co.*, S.D.R., vol. 7, p. 413; 175 App. Div. 957.

Wage calculations may include tips. Knowledge and acquiescence of the employer as to the receipt of tips by his employee justifies such inclusion. Both employer and employee profit by the practice. In *Sloate v. Rochester Taxicab Co.*, the Court of Appeals has affirmed an award based on tips. Its decision was without opinion: 221 N. Y. 491. The Commission's grounds for making the award are given in S.D.R., vol. 8, p. 498. The Appellate Division's reasons for approving the award are as follows:

SLOATE V. ROCHESTER TAXICAB CO., 177 App. Div. 57, Mar. 7, 1917.

KELLOGG, P. J.: The only question presented by this appeal is whether in determining the average weekly wages of the employee the tips received by him can be considered. It was stipulated that "there was a custom existing in the City of Rochester whereby users of taxicabs, upon paying their fare, gave to the drivers gratuities or tips, which is an amount in addition to the fare, and for the personal use of the driver; that such custom was known to the employer at the time he employed Warren Sloate to enter his service; that the average amount of tips so received * * * was the sum of 85¢ a day, which sum he was allowed to keep for his own use, and was not required to account to his employer for the same."

The regular wages of the deceased employee, paid by the employer, was twelve dollars a week; the tips averaged five dollars and ten cents a week, making the total earnings seventeen dollars and ten cents a week, which the Commission adopted as the basis of the award. Upon the argument each party, apparently with approval, referred to the English case of *Penn v. Spiers & Pond, Ltd.* (1 B. W. C. C. 401), where it was held that the tips received by a waiter in a restaurant car were a part of his earnings to be taken into consideration in fixing the basis for compensation.

The appellants distinguish the *Penn* case from this case by referring to the terms of the English act which bases the compensation upon earnings, while our Workmen's Compensation Law, at section 14, provides: "Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits, and shall be determined as follows," making the average weekly wages the basis upon which the compensation is computed. The word "wages," as defined by subdivision 9 of

section 3 of the law, "means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer." It is urged that these tips were received, not from the employer as wages, but from the patrons of the taxicab, as a gratuity or gift to the driver.

We must give further attention to section 14. In three of its five subdivisions it speaks of the "average annual earnings" and the "annual average earnings" of the employee, indicating that the Legislature saw no broad distinction between the word "earnings" and the word "wages," and under the facts of this case no distinction between them is apparent. The employer and the employee knew that an average of about eighty-five cents per day would be received from tips, and clearly the compensation paid by the employer was based upon that assumption. If the employee had turned the tips over to the employer, as probably would have been his duty in the absence of an understanding to the contrary, the wages of the employee undoubtedly would have been seventeen dollars and ten cents a week. If the employee receives from the employer twelve dollars and retains the five dollars and ten cents tips, he is getting through or from the employer seventeen dollars and ten cents per week, and if the employer paid the employee seventeen dollars and ten cents a week and the tips were turned over to the employer, the result to each would be the same. Neither the employer nor employee contemplated that the employee should receive but twelve dollars per week for his services; each expected that he would receive on an average seventeen dollars and ten cents per week.

The employee could not have received the tips if the employer had not put him in the way of getting them, and we may well conclude that the tips were an advantage received from the employer similar in effect to board, lodging or rent furnished in addition to the money wages paid. Many times a guest at a hotel, a passenger upon a sleeper or a person receiving service from the employee of another, is glad to recompense a pleasing manner or an extra service by a reasonable tip; but according to the present custom tips are not usually the voluntary act of the person who gives them. The employee with the knowledge and consent of the employer, furnishes a service which compels the payment of a tip, and if the tip is not paid the service is so grudgingly and unsatisfactorily given that the person served is willing to pay it the next time. The person rendering the service considers that the tip is his as matter of right and involves no particular favor; an extra large tip may be appreciated, but the ordinary tip is considered a payment of money actually due. The usual tips have come to be considered a part of the cost of the entertainment at a hotel, upon a sleeper or public conveyance, and it is realized both by the person paying and receiving them that it is a part payment of the wages which the employer compels the person served to pay. In effect, therefore, the employer and not the employee alone is benefited by the tip usually paid. It is common knowledge that porters on sleeping cars are employed at inadequate wages and that the employer and employee recognize that the great part of the service rendered by the employee is to be paid by the patrons of the company. The same is true as to waiters in the restaurants and the attendants at the hat stands, the bell boys and others serving patrons at hotels. The tip is so usual and the amount so uniform that the employer

and employee realize about how much in addition to the tips it will be necessary for the employer to pay the employee to give him reasonable compensation. The whole theory of tipping, as at present understood in the usual practice, is a payment made in order to get reasonable service, and is an exaction made or permitted by the employer so that his patrons shall help him pay the wages which are fairly due from him to his employee. The custom and the manner in which the payment of tips is enforced and practiced leads inevitably to the conclusion that in substance the tips received are a part of the wages of the employee, and are advantages received by the employee from the employer as a part recompense for services rendered.

The court should treat these tips in the same manner in which the employer and employee treat them as a part of the compensation to be received by the employee for the services rendered the employer — a part of the wages, a part of the average annual earnings of the employee. We conclude that the award should be affirmed. Award unanimously affirmed.

The Appellate Division has affirmed an award based upon a sleeping car porter's tips in *Bryant v. Pullman Co.*, text of which appears below, page 220, and the Commission has awarded compensation based upon tips to a summer hotel waitress in *Perlis v. Lederer*, S. D. R., vol. 19, p. 507, Bul., vol. 4, p. 146, Mar. 11, 1919.

The Commission has refused to make allowance for alleged tips of a doorkeeper in *Devereaux v. 150 East 72nd St.*, S. D. R., vol. 18, p. 568, Bul., vol. 4, p. 53, Nov. 12, 1918.

Citing the Sloate decision as authority, the Appellate Division has held with opinion in *Ciarla v. Solvay Process Co.*, that bonuses paid by employers to their employees are wages. The Court of Appeals has affirmed the Appellate Division's order without opinion: 226 N. Y. Rep. —, Mar. 11, 1919. The Commission's reasons for their inclusion are given in S. D. R., vol. 16, p. 469, Bul., vol. 3, p. 230. In its brief the appellant insurance carrier drew distinctions between tips and bonuses. Unlike tips, the bonuses in this case, it declared, formed no part of the wages "under the contract of hiring in force at the time of the accident" (§ 3, subd. 9); bonuses are gifts or gratuities which the employer grants or withholds at will. In reply, the Attorney-General argued that the bonuses were voluntary modifications of the original contract by the employer. The Appellate Division's opinion, sustaining the inclusion, is as follows:

CIARLA V. SOLVAY PROCESS Co., 184 App. Div. 629, Nov. 13, 1918.

LYON, J.: The question involved upon this appeal is whether the claimant is entitled to have certain bonuses paid him during the year of his employment immediately preceding the injury considered as part of his wages.

Oswald Ciarla, under the name of Antonio Silvaggio, began work for the Solvay Process Company May 17, 1915. He continued until his death August 7, 1917. During the year immediately preceding his death there were paid to him certain bonuses known as "production" bonuses, aggregating \$127.98. The payments were made to him in monthly sums based upon a certain determined percentage of his wages, as a gift and not as a part of his contract of employment. During January, 1917, there was paid him by the company a "special" bonus, amounting to \$26.13, computed upon the basis of eight per centum of the wages paid him during 1916. There was also paid him by the company a "service" bonus of one and a half per cent upon the wages paid him during the first year of his employment, amounting to \$4.90. All these bonuses, aggregating \$159.01, were paid voluntarily by the company and in no wise as part of its agreement to pay the deceased for his services as an employee. The claimant urges that she is entitled to have these sums considered as part of his wages in making an adjustment of the compensation to which she as widow is entitled. The company disputes this claim.

For the "production" bonus the company issued the following certificate:

"The Solvay Process Company, Bonus for August, 1916.

"The Directors of the Company hereby announce that the Company will pay to all its employees not under Participation Agreement a special bonus for the month of August, 1916. By applying at the Paymaster's office September 12, 1916, the bonus may be obtained. Thus voluntarily paying this bonus, the Directors desire to recognize the present emergency conditions of work and to encourage each employee to make his work as efficient and economical as possible, eliminating all waste both of material and effort.

(Signed) F. R. HAZARD,

"President.

(Signed) JOHN D. PENNOCK,

"General Manager."

The notice accompanying the July, 1917, bonus was in practically the same form, to which there was added: "It has been noticed of late that absences from work without excuse have increased very much. Operation of the plant and construction cannot proceed economically unless employees attend faithfully and constantly to their duties. Unless a good excuse for absence is given to the foreman in advance, the company may be obliged to withhold the bonus from those men who during a given month are absent from their work an unreasonable number of days." The "special" bonus was declared in 1916 "in recognition of the faithful and efficient work done by its employees during the past year under unusual and emergency conditions." No notice was posted as to the "service" bonus.

"'Wages' means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging, or *similar advantage* received from the employer." (Workmen's Compensation Law [Consol. Laws, chap. 67; Laws of 1914, chap. 41], § 3, subd. 9, as amd. by Laws of 1917, chap. 705.) These bonuses were paid "to encourage each employee to make his work as efficient and economical as possible, eliminating all waste both of material and effort." They were paid in order to keep the men, and as wages.

The cases of *Sloat v. Rochester Taxicab Company* (177 App. Div. 57) and *Skailles v. Blue Anchor Line, Ltd.* (4 B. W. C. C. 16) are in point and hold that voluntary gifts to an employee are properly considered as wages.

The award should be affirmed. All concurred, except Woodward, J., dissenting. Award affirmed.

The bonuses in the Ciarla case were irregular as to time and amount. A regularly paid bonus of ten per cent appears to have been included by the employer in his calculation of the wages of his employee in *Wilkes v. Rome Wire Co.*, Death Case 35746, Dec. 14, 1917, and June 11, 1918; 184 App. Div. 626, Nov. 13, 1918.

H. Minor's expected wage increase.—In determining the average weekly wages of injured minor employees the Commission may allow for expected increase (Workmen's Compensation Law, § 14, subd. 5). Instances of such action are given in Bulletin 81, pages 330, 331.

In the case of an eighteen year old boy who had suffered permanent partial injuries, the Appellate Division approved the Commission's allowance for probable increase of wages, saying:

CARKEY v. ISLAND PAPER CO., 177 App. Div. 73, Mar. 7, 1917, *in part*.

As to the right of the Commission to make an anticipatory award, the holding of the State Industrial Commission was undoubtedly correct. While subdivision 9 of section 3 of the Workmen's Compensation Law defines "wages" as meaning "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident * * *," and the first paragraph of section 14 provides that "except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation * * *," both clauses must be considered as qualified by subdivision 5 of section 14, which provides "If it be established that the injured employee was a minor when injured, and that under normal conditions his wages would be expected to increase, the fact may be considered in arriving at his average weekly wages."

At the time of receiving these injuries the claimant for about three months had been filling the position of fourth hand or backtender of a paper machine in a paper mill. The wages then commonly paid by the mill to the fourth hand were one dollar and sixty cents per day; to the third hand one dollar and seventy-five cents per day; to the second hand two dollars per day, and to the first hand, who had charge of the machine, three dollars and fifty cents per day. The superintendent of the employer's mill testified that he was favorably impressed by the claimant; that he was a very bright boy, a good worker and willing to work, and that to a backtender who took hold and wanted to learn the chances for advancement were good. It further appeared that at a neighboring paper mill, backtenders received two dollars and seventy-five cents per day. The action of the Commission in advancing the average

weekly wage to fourteen dollars and forty-two cents was fully justified by both the law and the facts.

It also approved of allowance for expected increase to a fifteen year old girl who lost portions of the fingers of her hand in a laundry mangle, saying:

BARRANGER v. CLARK, 184 App. Div. 695, Nov. 13, 1918, *in part*.

It is urged, likewise, that the State Industrial Commission erred in fixing the probable wages of this minor at \$12 per week as the basis of this award. But she was fifteen years of age, was then in the high school, and was preparing to learn telegraphy, and we see no good reason why she might not be expected to earn at least twelve dollars per week within a reasonable length of time if possessed of both hands unimpaired.

In cases of temporary disability, however, the Appellate Division has laid down the rule that allowance must not be made for increase expected to occur after expiration of the recovery period. A fourteen year old boy hurt the tips of his fingers in a cutting machine. The court said:

IDE v. FAUL & TIMMINS, 179 App. Div. 567, Sept. 13, 1917, *in part*.

As to the second proposition, that the Commission should not in fixing compensation have taken into consideration the expected increased earning power of the claimant and have granted him increased compensation upon that basis, the Commission found, as before stated, that while the claimant was earning but four dollars and fifty cents per week, under normal conditions, his wages would be expected to increase to about the sum of twenty-one dollars or twenty-two dollars per week by the time he arrived at the age of twenty-one years. The Commission thereupon fixed the average weekly wage of claimant at twelve dollars and ninety-eight cents and upon that basis awarded him compensation at the rate of eight dollars and sixty-five cents weekly for a period of thirty-eight weeks.

We think the Commission was not justified in making this award. Had the injury in fact resulted in permanent partial disability, as it was treated by the Commission, a very different question would be presented, but under the circumstances the Commission was not warranted in taking into consideration expected increase of wages beyond the anticipated period of the claimant's disability. However, any probable increase of earning capacity under normal conditions during the period of such disability might doubtless properly have been taken into account. In the case of *Carkey v. Island Paper Co.*, (177 App. Div. 73; 163 N. Y. Supp. 711) the claimant had suffered permanent partial disability and an anticipatory award was properly made.

Recent instances of allowance for minors' expectation of wage increase are: *White v. Argus Co.*, S.D.R., vol. 15, p. 632, Mar. 13, 1918; 186 App. Div. 924, Nov. 13, 1918; *Palletiere v. Germania*

Life Insurance Co., S. D. R., vol. 16, p. 461, May 8, 1918; *Solitar v. Neuglass & Co.*, Death Case, No. 33580, Oct. 16, 1918; — App. Div. —, May 7, 1919; and *Ten Broeck v. Levenson & Cohen*, S. D. R., vol. 18, p. 587, Bul., vol. 4, p. 71, Dec. 11, 1918.

Instances of refusal to allow for such expectation are: *Smith v. Bartle Mfg. Co.*, S. D. R., vol. 19, p. 458, Bul., vol. 4, p. 143, Feb. 25, 1919; and *Finch v. Sullivan*, S. D. R., vol. 19, p. 500, Bul., vol. 4, p. 148, Mar. 11, 1919.

I. *Loss of hand, arm, foot, leg or eye.*—Workmen's Compensation Law, § 15, subd. 5, permits a maximum compensation of \$20 per week for loss of a hand, arm, foot, leg or eye under § 15, subd. 3. If an employee loses one of these members and by the same accident incurs other injuries that disable him totally and permanently, his case falls under § 15, subd. 1, and his maximum compensation according to § 15, subd. 5, may not exceed \$15. The Commission has so held in *Knerr v. Asbestos Protected Metal Co.*, S.D.R., vol. 12, p. 589, Bul., vol. 2, p. 106, Feb. 21, 1917, the case of a highly paid workman who lost the use of his legs through severance of his spinal cord.

The Commission interpreted the amendatory clause "Partial loss and partial loss of use" in § 15, subd. 3, to mean relative to the \$20 provision of § 15, subd. 5, that partial loss of a hand, arm, foot, leg or eye entitles an employee to compensation at the \$20 maximum when his wages are as high as \$30 per week; but the Appellate Division modified the award in the case in hand from \$20 for 183 weeks for partial loss to \$15 for 244 weeks for total loss: *Phonville v. N. Y. & Cuba Steamship Co.*, Case No. 69787, Aug. 9, 1918; 187 App. Div. 912, Jan. 8, 1919. Upon further appeal, the Court of Appeals reversed the Appellate Division's order and affirmed the Commission's award, with *per curiam* opinion as follows:

PHONVILLE v. N. Y. & CUBA STEAMSHIP CO., 226 N. Y. Rep. —, April 22, 1919.

Per Curiam: The industrial commission has found that the claimant has lost the use of seventy-five per cent of his right hand. His weekly wages being \$35.09, it awarded him \$20 a week for 183 weeks. Unanimously approving the findings of fact the Appellate Division altered this award to \$15 a week for 244 weeks. In this it erred. The act fixes but one rate of compensation for injuries. The workman is to receive two-thirds of his weekly wages not exceeding a certain sum. The extent of his injuries limits not the amount of these

payments but the time during which they are to continue. If for the loss of a hand that time is 244 weeks, for the loss of three-fourths of the hand, it is 183 weeks. The weekly compensation for the loss of a hand, arm, foot, leg or eye is not to exceed \$20 a week. Permanent loss of the use of any such member is equivalent to the loss. The same measure applies to it. In other cases \$15 is the limit. In 1917 an award was authorized for the proportionate loss of the use of a hand. Clearly the compensation for such proportionate loss is intended to be some fraction of the amount allowed for the total loss. The weekly limit is \$20 not \$15.

Because of the unanimous affirmance no other questions need be considered by us.

The order of the Appellate Division should be reversed and the award of the State Industrial Commission affirmed, but without costs.

HISCOCK, CH. J., CHASE, HOGAN, CARDOZO, POUND, McLAUGHLIN and ANDREWS, JJ., concur. Order reversed, etc.

J. Receipt of wages by injured employee during period of incapacity.—This topic is treated under "Disabilities," above, page 38.

PAYMENT OF COMPENSATION — DEPOSIT OF PRESENT VALUE WITH STATE FUND, LUMP SUMS, ETC.

(Workmen's Compensation Law, § 16, subd. 2: §§ 17; 20-a; 25-27; 33; 53; 54)

The Workmen's Compensation Law provides under § 33 that "compensation and benefits shall be paid only to employees or their dependents" and under § 25 that these beneficiaries shall be paid periodically with continuance of the same interval that the employer has been using for payment of the injured employee's wages, unless the Commission deems a different interval advisable. Section 25 also empowers the Commission to "commute such periodic payments to one or more lump sum payments" but adds a proviso that "the same shall be in the interest of justice." Section 16, subdivision 2, provides for two years compensation in one sum to a widow who remarries. Section 17 empowers the Commission to commute all future payments to "aliens not residents (or about to become non-residents) of the United States or Canada" and commands it to effect such commutation "upon application of the insurance carrier." Section 33 as amended by L. 1919, ch. 498, provides that disability compensation, in case of death of an injured employee to whom not to exceed two hundred and fifty dollars is due, shall be paid directly to the surviving wife, husband, child, children or dependents, the practice hitherto having been to pay such accrued compensation to the next of kin.

A. *Deposit of present value with state fund.*—As originally enacted, § 25 required insurance carriers other than the state fund to pay all compensation to the Commission, apparently in aggregate sums, and the Commission to disburse the same to the injured employees or their beneficiaries in accordance with its awards, as limited by the periodic payment and lump sum provisions of the law. The Legislature struck this requirement of § 25 out in 1915 but left untouched provisions of § 27 empowering the Commission, in its discretion, to require an employer or

an insurance corporation to pay to it "an amount equal to the present value of all unpaid compensation" of an award, if "the nature of the injury makes it possible to compute the present value of all future payments with due regard for life contingencies," the employer or insurance corporation to be thenceforth discharged from any further liability, and payment to the injured employee or his beneficiaries to be assumed by the Commission.

Interpreting § 27, as amended to establish an aggregate trust fund by L. 1916, ch. 622, to mean not only that it could require an employer or insurance corporation to pay to it the present value of a single or particular award but also that it could, by rule or resolution, require classes or groups of employers or corporations to automatically pay to it the present value of awards as fast as made against them, the Commission, on May 31, 1916, directed every mutual insurance company and every self-insurer in the State to pay into the state fund the present value of every award of death benefits. Simultaneously it formulated and adopted a set of rules to govern calculations and payments. Four-fifths of the mutual insurance companies and self-insurers complied with this direction. One hundred and fifty-one of them had paid in \$620,664.40 and forty-five of them were due to pay in \$209,375 when an appeal of one of the forty-five, the New York, Ontario and Western Railway Company, as self-insurer, reached the Appellate Division in the case of an order directing it to pay in \$5,734 for the benefit of the widow and children of Louis Adams, one of its employees.

Upon argument of the Adams case before the court, the Commission contended that whole groups of cases were intended to be covered by § 27 in order to obtain the benefit of the law of averages for the aggregate trust fund established by it; that the present value provisions of § 27 had no relation to the lump sum provisions of § 25 and did not interfere with its periodic payment plan; and that the employer in this particular case was stopped by a written agreement to pay in present values, which agreement had been entered into by it as a condition of the Commission's permitting it to be a self-insurer.

The Appellate Division decided, however, that the Commission's order conflicted with the provisions of § 25 limiting lump

sum payments to cases not conflicting with the "interest of justice" and to cases involving the possibility of computing "present value." It disapproved of the particular mortality tables used by the Commission. It said also that application of a general rule or order to all cases of a certain class "would defeat the theory of the statute which is periodical compensation." The Commission's "award" was in form of a letter of instruction to the railway company relative to the Adams claim. The court reversed "the decision of the Commission." Full text of its opinion is as follows:

ADAMS v. NEW YORK, ONTARIO AND WESTERN RY. Co., 175 App. Div. 714, Nov. 29, 1916.

COCHRANE, J.: The theory of the Workmen's Compensation Law is periodical payments of compensation or death benefits. Such payments may extend throughout the life of the injured person or for a shorter period depending on the nature of the injury. (See Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 15, as amd. by Laws of 1915, chap. 615, and Laws of 1916, chap. 622.) They may also in case the injury causes death extend throughout the life of a surviving wife or dependent husband as the case may be, provided the wife does not again remarry or the dependent husband does not become independent. (§ 16, as amd. by Laws of 1914, chap. 316, and Laws of 1916, chap. 622.) In other words, payments may be made in installments during the life of a person entitled thereto or for shorter periods according to the nature of the case. But in any event the primary purpose and the general scheme and plan of the statute is that such payments shall be periodical and at brief intervals. That clearly appears, not only from said sections 15 and 16, but also from other sections, including section 25 (as amended by Laws of 1915, chapter 167), which is entitled "Compensation, how payable," and provides as follows: "Compensation under the provisions of this chapter shall be payable periodically by the employer, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award; but the commission may determine that any payments may be made monthly or at any other period, as it may deem advisable." Said section 25 then contains some matter not here important and concludes as follows: "The commission, whenever it shall so deem advisable, may commute such periodical payments to one or more lump sum payments to the injured employee or, in case of death, his dependents, provided the same shall be in the interest of justice." It was not the purpose of this last quoted provision to destroy the general scheme of the statute establishing periodical payments and permit the Commission in every instance to commute periodical payments into a lump sum payment. Rather it was the purpose to provide for particular and exceptional instances. It was recognized by the Legislature that there might be individual cases where justice would be promoted by a deviation from the principle of periodical payments and it was desired to place in the hands of the Commission authority to deal with such individual cases and to provide for one or

more lump sum payments as the circumstances of that particular case might seem to require. That such was the purpose of the statute is clear from the qualifying expression therein contained, "provided the same shall be in the interest of justice." There should be something taking the case out of the ordinary rule to justify the Commission in making an exception thereto. The exception must be "in the interest of justice" and should not depend on the whim or caprice of the claimant or the employer, nor should it depend on an arbitrary ruling of the Commission. Each case should be considered by itself and in each case it should be apparent that there is some circumstance or some feature thereof which differentiates it from the general rule and makes it apparent that such differentiation is "in the interest of justice." The Commission would not be justified in making a sweeping rule applying to all cases or to all cases of a certain class because that would defeat the theory of the statute which is periodical compensation.

I have thus discussed the provision for commutation under section 25 (as *amd. supra*) because it has a direct bearing on the interpretation to be placed on section 27 (as *amd. by* Laws of 1916, chap. 622) under which the decision complained of herein was made and which so far as herein material is as follows: "If an award under this chapter requires payment of compensation by an employer or an insurance corporation in periodical payments, and the nature of the injury makes it possible to compute the present value of all future payments with due regard for life contingencies, the Commission may, in its discretion, at any time, compute and permit or require to be paid into the state fund an amount equal to the present value of all unpaid compensation for which liability exists, together with such additional sum as the Commission may deem necessary for a proportionate payment of expenses of administering the fund so created, such moneys to constitute an aggregate trust fund; and thereupon such employer or insurance corporation shall be discharged from any further liability under such award and payment of the same shall be assumed by the trust fund so created." Section 25 provides in certain cases for the payment of a lump sum to the injured employee or in case of death to his dependents, whereas section 27 provides for the payment of such lump sum into the state fund, which fund then becomes liable for the periodical payments. The phraseology of the two sections is somewhat different, but their purpose is substantially the same except that under one section the lump sum payment goes to the injured employee, or in case of death his dependents, whereas under the other section the lump sum payment goes to the state fund. The amount of the payments is the same under either section and it can make no difference to the employer or insurer who receives the payment. The two sections are to be read together, therefore, and each is to be construed in the light of the other, and each is to be regarded as supplementing the other. What has been said in regard to the meaning and effect of section 25 applies also to section 27. It is not the purpose of either section to break down the theory of periodical compensation. It was not the purpose of the Legislature to authorize the Commission to emasculate this feature of the law or to virtually repeal the provision that "compensation under the provisions of this chapter shall be payable periodically by the employer, in accordance with the method of payment of the wages of the employee at the time of his injury or death, and shall be so provided for in any award." That stands as the general policy of

the law and the Commission is without power to repeal it or authority to ignore it except in particular cases. The Commission has by an omnibus resolution destroyed this theory of the law in all death cases where the employer is insured in a mutual compensation insurance company or is a self-insurer. If the Commission can do this it can pass a resolution requiring the payment of a lump sum into the State fund or to the injured employee or his dependents in every case and thereby destroy absolutely the theory of periodical payments and accomplish a repeal of an important feature of the law. We do not think that was the intent of the statute. The purpose of sections 25 and 27 is the same. Particular cases may arise where payment to the employee or his dependents or payment into the State fund of one lump sum may be in the interest of justice. But such cases are exceptional and must be dealt with as they arise. No sweeping set of rules can be enunciated to apply to all cases. Section 25 requires that such a determination shall be "in the interest of justice," and section 27 requires that it must be "possible to compute the present value of all future payments with due regard for life contingencies." This latter provision in the statute implies that there are cases where the present value of future payments cannot be properly computed. The Commission is not at liberty to guess at the present value of future payments regardless of the contingencies which may arise. The meaning of the statute is that the situation and conditions must be such that the present value of future payments may be arrived at on a scientific basis and with an approximate approach to certainty and fairness and to the monetary equivalent of the payments which the statute requires to be made periodically in the future.

In the present instance a computation of the present value of the periodical payments has been made based on "the Survivorship Annuitants' Table of Mortality" and the "remarriage rate of the Dutch Royal Insurance Institution." This table and rate have received no recognition by the courts of this State and are not sanctioned by any statute of the State. The Carlisle table is in general use and has been for many years, and its reliability has received judicial sanction. But not so with the tables adopted by the Commission. It may be observed in this connection that if the present value of the award made to the widow in this case on the assumption that she shall receive it during her life to be computed according to the Carlisle table, and to this be added the entire periodical payments awarded to the two infant children until they shall arrive at the age of eighteen years, the entire amount will be less than what the Commission has directed the appellant to pay into the State fund based on the tables which it has adopted. This is assuming that the widow will not remarry and that the two children will both reach the age of eighteen years, and is making no deduction whatever for the present payment of these installments which by the award are extended over periods until the two children shall reach the age of eighteen years. Clearly such a direction is neither "in the interest of justice" as required by section 25, nor has the Commission properly computed "the present value of all future payments with due regard for life contingencies" as required by section 27. If the present value of future payments is to be computed it should be in a manner analogous to the custom which prevails in this State and in the courts thereof. And if no method has in this State been established or adopted for computing the present value of future payments, the duration of

which may depend on the remarriage of a person, and if it may be difficult or even impossible in view of that fact in the case of a widow to compute such present value that simply confirms the interpretation we are placing on this statute that it was not designed to give the Commission power in all cases to direct the payment of a lump sum but only in exceptional cases. No injustice or harm can usually result from the periodical payment plan enunciated by the statute.

It follows that the decision of the Commission requiring the appellant to make this payment into the State fund cannot be sustained for the reason that such decision does not appear to be "in the interest of justice" nor does it appear that the Commission has properly computed "the present value of all future payments with due regard for life contingencies." Both of such facts should appear in order to sustain in any case a determination of the Commission which is a departure from the general rule declared by the statute.

Our conclusions are that no set of rules can be devised to apply indiscriminately to all cases or to a certain class of cases; that the meaning of the statute is that only in exceptional cases should its policy of periodical payments be departed from; that each case must be considered with reference to its own circumstances; and that in each case the circumstances must be such as to make it appear that the departure of the Commission from the theory of periodical payments is in respect to such individual case "in the interest of justice" and the circumstances must also be such as to make "it possible to compute the present value of all future payments with due regard for life contingencies."

The decision of the Commission should be reversed. All concurred, HOWARD, J., in result. Decision reversed.

Upon further appeal, the Court of Appeals affirmed the Appellate Division's order of reversal with a brief memorandum opinion of Judge Cuddeback which based the higher court's action upon but one of the points upon which the lower court had based its action; namely, upon the impossibility of computing the "present value." Section 27, it said, does not provide for the contingency of a widow's remarriage. Judge Pound dissented with opinion distinguishing between lump sum payment and deposit of present value and approving the mortality and remarriage tables adopted by the Commission. The two Court of Appeals opinions are as follows:

ADAMS v. NEW YORK, ONTARIO & WESTERN RY. Co., 220 N. Y. Rep. 579,
Jan. 30, 1917.

CUDDEBACK, J.: The order appealed from which required the deposit in the state fund by the employer and self-insurer of the money to meet the future payments of an award was properly reversed at the Appellate Division, for the reason that section 27 of the Workmen's Compensation Law (Cons.

Laws, ch. 67), which requires such deposit, does not apply to an award made to a widow. It does not contemplate and fails to provide for weighing or determining the contingency of the widow's remarriage—which would bring about a cessation of the payments to her.

The order appealed from should be affirmed, with costs against the state industrial commission.

POUND, J. (dissenting): It must be remembered that we are construing a workmen's compensation law with its usual incidents. The scheme of the statute is reasonably comprehensive. Section 25 provides that the commission may, in the interest of justice, award to the injured person, or to the beneficiaries in case of death, a lump sum in lieu of periodical payments. Section 27 covers cases only where periodical payments are awarded and payment thereof is assumed by the State fund by a deposit of the present value thereof in trust. One lump sum payment is made under section 25 and the case is closed. Periodical payments are continued under section 27 for the full period of liability. Death is a personal injury within the meaning of the statute (*Crapo v. City of Syracuse*, 183 N. Y. 395) which makes it possible, under section 27, to compute the present value of future payments, "with due regard to life contingencies." The contingency of remarriage in case of widows comes plainly within the spirit of the statute as well as its letter, and the statute clearly means that due regard must be given to it. Every reason for permitting the present value of all future payments to be computed in cases of life interests applies to life interests subject to the contingency of remarriage. Actuarial science determines the probabilities of remarriage from experience tables, as the expectation of life is determined. The industrial commission may (§ 67) adopt reasonable rules to carry into effect the provisions of the law and the collection, maintenance and disbursement of the state insurance fund. The Northampton table of mortality rests upon the observations of the population of a single English town. It was long in use under the General Rules of Practice. The same is true of the Carlisle table from which the value of life estates is computed in our courts to this day. (General Rules of Practice, LXX.) In the present perfected stage of vital statistics the probable number of widows of a given age out of a given number who will remarry in a given period may be determined with essential accuracy as any other life contingency may be determined. The remarriage table of the Dutch Royal Insurance Institution, which governs the awards and payments under the provisions of the Dutch Compensation Law, was properly adopted by the commission as the only experience table of the kind applicable to our conditions, and it will serve until it is corrected by local experience.

The order of the Appellate Division should be reversed and that of the industrial commission affirmed.

HISCOCK, CH. J., CHASE, COLLIN, HOGAN and CARDOZO, JJ., concur with CUDDEBACK, J.; POUND, J., reads dissenting memorandum. Order affirmed, etc.

By amendments to § 27, the Legislature of 1917 undertook to overcome the effect of these court decisions in the Adams case. It eliminated the proviso that had suggested the impossibility of computing present value under some circumstances and named

certain mortality and remarriage tables as authoritative. It inserted other clauses supposedly designed to override any contrary provisions of the law and to permit the Commission to act relative to classes or groups of cases by omnibus resolutions. It elaborated the provisions of the section relative to an aggregate trust fund.

After the passage of this act amendatory of § 27 the Commission obtained from the Appellate Division an affirmation of its power and authority to require payment into the state fund "of the present value of unpaid death benefits in cases in which awards were made prior to July 1, 1917," the date upon which said amendatory act became effective: *Matter of Resolution State Industrial Comm.*, 181 App. Div. 962, Dec. 28, 1917; 224 N. Y. 13, May 28, 1918.

A year after passage of the amendatory act, on May 21, 1918, the Commission, by issue of a general direction and prescription of a set of rules, renewed its efforts to collect into its aggregate trust fund the present value of death benefit awards made by it against mutual insurance companies and self-insurers. This new order affected all death benefits for accidents occurring during the six months immediately following the going into effect of the amendments of L. 1917, ch. 705, to § 27 and required payment of them into the trust fund on or before July 31, 1918.

Appeals were taken to the Appellate Division from the order. In the first case to receive its attention the appellant employer and insurance carrier confined their brief to an argument that it was impossible to compute the present value of awards to the dependent relatives named in Workmen's Compensation Law, § 16, subd. 4, because of the absence and impossibility of actuarial tables determinative of the duration of dependency. Numerous contingencies, they declared, might make a mother cease to be dependent, such as increase of her wages, remarriage, support by her other children or receipt of a large devise or gift. They won their case. The Appellate Division reversed the Commission's decision with brief opinion as follows:

BAILEY v. COLUMBIA ROPE Co., 184 App. Div. 718, Nov. 13, 1918.

JOHN M. KELLOGG, P. J.: By subdivision 4 of section 16 of the Workmen's Compensation Law, an award to a dependent mother is only payable during her dependency.

In *Adams v. New York, Ontario & Western R. Co.* (175 App. Div. 714; 220 N. Y. 579) it was held that the Commission could not commute future payments directed to be made to a widow during widowhood. After that decision it was provided, by chapter 705 of the Laws of 1917, that commutations under section 27 shall be upon the basis of the Survivorship Annuitants' Table of Mortality and the Remarriage Tables of the Dutch Royal Insurance Institution. That amendment was intended to permit the commutation of an award payable to a widow during widowhood, and to fix a basis for such commutation. But that basis would not apply to an award during dependency. Neither would a life table furnish any basis for such commutation. It is evident that the Commission treated the award in this case as one payable during life, but by subdivision 4 of section 16 of the Workmen's Compensation Law it continues only during dependency. The Commission cannot determine that such an award is of value equal to a life award and compute it on that basis. The appeal, therefore, is governed by the *Adams* case.

The decision should be reversed. All concurred. Determination reversed.

The Bailey case was argued and decided in prospect of more general and more important decisions to follow in pending cases of death benefits to widows and children not contingent upon dependency. These decisions were forthcoming on January 8, 1919. The same briefs and a single opinion cover them all. The briefs of the appellant employers rest upon the *Adams* decision, which they declare has been offset only in part by the amendments to § 27. They also attack the constitutionality of § 27, a line of attack which did not figure in the *Adams* case. In reversing the Commission's decision a second time, the Appellate Division is of opinion that if the Commission's construction of § 27 is correct, said section is clearly unconstitutional. It holds, however, that the Commission's construction is incorrect, though much of its lengthy opinion deals with constitutional aspects. It says that there is nothing in § 27, notwithstanding the Legislature's amendments, "which permits the Commission to make an omnibus order like the one in question, discriminating against certain employees and certain kinds of insurance." The opinion in full is as follows:

SPERDUTO v. N. Y. CITY INTERBOROUGH RY. CO., 186 App. Div. 145, Jan. 8, 1919.

JOHN M. KELLOGG, P. J.: This is an appeal from a determination of the State Industrial Commission, June 28, 1918, requiring the appellant, a self-insurer, to pay in cash to the Commission the alleged present worth of the weekly payments directed to be made by an award of March 14, 1918, to a widow during widowhood and to minor children during dependency. *Adams v.*

New York, O. & W. R. Co. (175 App. Div. 714; 220 N. Y. 579) held that such a direction could not be made with reference to an award to a widow, but after the decision of that case section 27 of the Workmen's Compensation Law was amended by chapter 705 of the Laws of 1917, and the action of the Commission is based upon that amendment. We reversed the determination in the *Adams* case upon the ground that there was no legal basis upon which the Commission could determine when, if ever, the widow would remarry, and that sections 27 and 25 should be read together, and that the payment of a gross sum was only authorized in exceptional cases where the Commission found in its discretion that the interest of justice so required. The Court of Appeals affirmed our decision upon the first ground stated, without considering the second ground. Its decision did not destroy the effect of our decision in that respect. It was content to rest its decision upon the one ground.

In *Matter of the Adoption of a Resolution Requiring the Payment into the State Fund of the Present Value of Death Benefits Pursuant to the Provisions of Section 27 of the Workmen's Compensation Law, as Amended by Chapter 705 of the Laws of 1917* (181 App. Div. 962), the Commission asked this court to determine whether the amendment of 1917 applied to awards made before its enactment, and we concluded it did. The Court of Appeals (224 N. Y. 13) dismissed the appeal upon the ground that the resolution presented no matter which the court could pass upon. We are, therefore, free to consider the effect of section 27, as amended, as applied to the facts in this case.

The Commission duly made an award of death benefits of four dollars and twenty-one cents per week to the widow, who was then about forty-one years of age, during widowhood, and one dollar and twenty-nine cents per week to each of the four children during dependency. The awards to the children, under the act, terminated respectively when they became eighteen years of age. Upon the remarriage of the widow she receives under the act, two years' compensation in one sum. The award to each child was ten per cent of the weekly wage, and upon the death of the widow, any surviving child was thereafter to receive fifteen per cent instead of ten per cent. The Commission has not changed the award, and it stands as its final judgment, and the mandate of the statute, as to the amount which the appellant must pay, and which the widow and children shall receive.

May 21, 1918, the Commission adopted a resolution that every mutual association and every self-insurer shall on or before July 31, 1918, "pay into the aggregate trust fund of the State Insurance Fund the present value as of that date of the future installments of compensation under every award against such carrier for death claims arising from accidents occurring between July 1, 1917, and December 31, 1917, both inclusive, together with the necessary expense loading thereon," and further provided the manner in which the computation should be made. On June 28, 1918, pursuant to that resolution, the Commission directed the appellant to pay into the State Insurance Fund \$5,456.11, which it determined was the net present value of the future installments, together with loading for administration expenses four per cent (\$218.24), making the total, \$5,674.35.

The employer had duly qualified as a self-insurer, and no question was raised as to its ability to meet its obligations as such. No findings of fact

and conclusions of law were filed as required by section 23 of the act. There was no hearing or inquiry as to the facts, upon notice, and the defendant did not have a day in court. The determination appealed from, therefore, must rest solely upon the resolution, as the arbitrary act of the Commission, based upon no fact with reference to this case except that the defendant is a self-insurer. It is evident that the determination singles out the self-insurer and the mutual insurance association, and arbitrarily requires them to pay a gross sum, while no such requirement is made of the stock companies or the State Insurance Fund. The terms of the section permit the commutation of all death benefits and other compensation for a period of 104 weeks or more; the resolution applies only to death claims for accidents occurring between July 1, 1917, and December 31, 1917. In cases of total permanent disability section 15 allows to the injured employee two-thirds of the weekly wages for life, which may equal or be greater than the weekly payments to a widow, and may continue for many years. It is difficult to understand why the self-insurer and the mutual association were not required to commute the payments for such an injured employee.

These considerations make it clear that the resolution was not based on any possible feeling of insecurity as to the payments to be made by the self-insurer and the mutual association.

If the Commission may make such discrimination, the question still remains whether it may act arbitrarily, or whether its discretion must be moved by some fact in the particular case, as we held in the *Adams* case. Also whether the determination is not an illegal interference with the defendant's property rights.

The amendment to section 27, made in 1917, it is claimed avoids the effect of the decision in the *Adams* case. It provides: "Depositing future payments. If an award under this chapter requires payment of death benefits or other compensation by an insurance carrier or employer in periodical payments, the Commission may, in its discretion, at any time, any provision of this chapter to the contrary notwithstanding, compute and permit or require to be paid into the State fund an amount equal to the present value of all unpaid death benefits or other compensation in cases in which awards are made for total permanent or permanent partial disability for a period of one hundred and four weeks or more, for which liability exists, together with such additional sum as the Commission may deem necessary for a proportionate payment of expenses of administering the fund so created." The moneys so paid constitute an aggregate and indivisible fund; the employer is to be discharged from further liability, and this fund is to be kept separate from other moneys of the State Fund and the State Fund is not liable for any losses or charges against such special fund. The section also provides: "All computations made by the Commission shall be upon the basis of the survivorship annuitants' table of mortality, the remarriage tables of the Dutch Royal Insurance Institution and interest at three and one-half per centum per annum."

The Commission has exercised very extraordinary powers, which entirely change, in the case of the self-insurer and the mutual insurer, the plan of payment fixed by the Legislature in compensation cases. The theory of the law is that the business, in an easy way, by periodical payments, must bear the losses sustained by the employee or his dependents, and that the losses

shall be paid in substantially the manner in which the wages were paid, but that the Commission may, in a given case, commute the payments to one or more lump sums in its discretion and in the "interest of justice." The Commission has proceeded upon the theory that the Legislature has substantially given it the power to reverse section 25 and arbitrarily to make new laws in certain cases—a power which the Legislature has not the authority to give.

If the Commission has correctly construed section 27, it is clearly unconstitutional. But the courts will hesitate in construing a statute in a way which makes it unconstitutional, and will go to the limit of construction in sustaining it. Every reasonable intendment is in favor of its validity. There is nothing in the section which permits the Commission to make an omnibus order like the one in question, discriminating against certain employees and certain kinds of insurance. The clause in the section that the Commission may commute one or more awards by one or more resolutions, may be construed as meaning that the Commission may hold a hearing on notice, inquire into the facts as to an insurer which may have several awards against it, upon facts similar in their nature, and that an investigation and a separate trial in each of such cases is not necessary. It may have other proper construction, but it was not intended to permit the Commission arbitrarily to change the Workmen's Compensation Law and commute awards without notice and without hearing, based solely on the kind of insurance accepted.

By section 50 of the act the employer may furnish one of three kinds of insurance: (1) Subdivision 1 provides for insurance in the State Fund; (2) subdivision 2 for insurance in a stock company or mutual association authorized by law to transact such business, or (3) subdivision 3 by the employer qualifying, with the approval of the Commission, as a self-insurer. The Commission has the right to revoke the consent at any time for cause shown. It seems idle for the statute to provide for three kinds of insurance unless each insurer is to stand in the same position, with equal liability and responsibility. The payments under the act are to be the same without regard to the kind of insurance furnished. If an extra burden is placed upon the self-insurer and the mutual association, solely because they are such, it is an illegal discrimination and without effect. When United States four and one-quarter per cent bonds are selling at a discount; when the best railroad companies in the country cannot borrow money at six per cent and, as a favor and in the interest of the public, the government is advancing necessary money to them at six per cent, there can be no question but that computing the value of the award on a basis of three and one-half per cent interest, and requiring cash payment within a few days, is a heavy burden. Weekly payments of a small amount are not a serious burden upon a self-insurer, but the requirement that the present value of all future payments shall be made in cash at once would be ruinous. Laying aside all other considerations, if a sum is payable each week by a business to a woman during her widowhood, it is a grievous burden to compel it to pay the present value of such payments at once in cash. A government, a bank, insurance company, corporation or individual cannot ordinarily pay at once the cash present value of all its obligations payable in the future. Credit is the life of business. The extent of the burden cast upon the appellant as a

self-insurer by the determination is not the only consideration; an important fact is that it is required to liquidate its liability in a manner different from that required of other employers and insurers, and such requirement is based solely upon the fact of self-insurance.

If the Commission may be justified, in any case, in casting such a burden upon an employer, there must be facts and circumstances in the case, and shown in the findings which move and compel its discretion in that respect. Its action cannot be arbitrary. It is said that such commutation makes the employee more secure. The same may be said of insurance in a stock company. But it is not entirely clear that the employee is made more secure. That is a question which the future alone can determine. Disaster may overtake the special fund, unwise investments may be made, and the section expressly provides that losses in this fund shall not be made up from the State Fund, so that if there is a deficiency in this fund the employee must suffer. If, for any reason, the determination or the section should be held invalid as to the employee, then the insurer might be liable under the original award, thus exacting double compensation. It is urged that subdivision 3 of section 50, as amended in 1917, provides that the Commission may require an agreement upon the part of the employer to pay any awards commuted under section 27 of the act into the special fund of the State Fund, as a condition of self-insurance. That does not mean that the employer must observe every arbitrary and illegal act of the Commission, but only its lawful acts. The appellant, upon filing the securities and proofs required by the Commission, qualified and was accepted as a self-insurer, June 27, 1914. The Commission did not require, and then had no power to require, such an agreement.

Many times it is necessary for the court to determine the probable duration of a life, and it refers to the mortality tables to enable it, with or without other evidence, to determine the question. Such tables, from their public nature and general use, are treated as some evidence, but are not absolutely conclusive. The court may take into consideration any other facts proper to be considered. There are exceptional cases where, by long usage, the courts use certain well-known tables to determine approximately the value of life and other interests. The use of such tables for compulsory adjustment are substantially limited to cases where the court is called upon to marshal assets, or distribute funds in court, which have been brought there in regular course, and the adjustment is a mere incident to the distribution or division. The Code of Civil Procedure and the General Rules of Practice provide that where funds are paid into court to be invested for the benefit of a life tenant, a tenant by the curtesy or in dower, the investment shall be at the expense of such person, but if he is willing to take a gross sum, it may be computed by the use of the mortality tables, with an interest basis of five percentum. (Rule 70; Code Civ. Proc. §§ 1569, 1617, 2717.) In marshalling the assets of insolvent insurance companies, and in like cases, the courts, in distributing them, compute contingent interests upon the basis of mortality tables. But these are cases where the moneys are actually in the court and the distribution is made necessary by that fact. I know of no case where the court can compel a life tenant, or person entitled to receive an annuity, to receive, or the remainderman to pay, a gross sum in lieu of the life estate, unless such payment is necessary in

order to marshal and distribute funds already in court. It cannot compel funds to be brought into court solely for the purpose of the liquidating of future contingent payments.

In dealing with the individual the State is not all powerful. There are still certain limitations upon its right to interfere with the individual and his property. A person who is competent to do business, and who meets his obligations and does not violate the law cannot be deprived of his property against his will except under the authority given by the State Constitution to condemn real property for public use. If he has the life use of certain money, the State, under ordinary circumstances, cannot compel him to take a gross sum in lieu of it, or if he is required to pay a certain sum to an individual during the life of that individual, the State cannot compel him to anticipate the payment by a gross sum. The rights of parties as fixed by contract and by judgment should stand. If the payment of money depends upon the life or remarriage of a widow, the payor has the benefit of the chance that she may die or remarry at an early date and relieve him of the other payments, and any act of the State which deprives him of that benefit and gives it to the State or another is an invasion of his legal rights. The award of the Commission, unappealed from, is a final determination of the rights of the parties. The Commission, without being called to action by any particular fact, arbitrarily determines that the assumed present value of this class of awards must be paid into the special fund, and that the appellant shall not have the benefit which may come from the death or remarriage, but that such benefit shall inure to the special fund. There is no good reason manifest why such order should have been made. If the State concludes that it is unwise to permit an employer to qualify as a self-insurer, the act should be amended. The Commission should not amend it indirectly by its arbitrary discrimination against such insurers. The State or its Commission cannot speculate in the lives or marriage of individuals, or deal in contingencies. If there were a just doubt about the ability of the appellant to meet future payments, additional security may be required at any time. If the amount of the present value of the awards were to be deposited in the fund as security, with the right to the insurer to receive the equitable part of the fund released from time to time by the children dying, arriving at eighteen years of age or ceasing to be dependent, or the widow remarrying or dying, the objections to the statute as it is construed by the Commission would be less forcible. But the commutation made is not for the benefit of the employer or the employee, but for the benefit of the State Fund administered by the Commission.

The appellant is not only required to pay the value of the future payments, but is required to pay four per cent in addition for the purpose of administering the fund. We know of no case where a remainderman is compelled to pay the full value of the life estate and an addition of four per cent for the handling of the fund. Rule 70 of the General Rules of Practice provides that the life tenant must pay the expense of handling the fund paid into the public treasury for his benefit.

There is no certainty that any widow will remarry. It depends upon so many different and obscure circumstances that a guess can hardly be hazarded. The age, personal appearance, attractiveness, means, acquaintances, opportunity, the personal wishes of the woman, her health, and so many other

considerations enter into the question that there is no substantial basis for a judgment in a particular case whether or not she will remarry. We infer from section 27 that the Dutch Royal Insurance Institution is willing to take chances and wager upon the remarriage of a widow. There is a general understanding that, for a proper consideration, certain companies are willing to wager against any contingency. These are not insurances against an event which must happen, and the time of its happening is the only uncertain question, but are pure gambles whether or not certain things will or will not happen. On the question of remarriage of widows, appellant is solely interested in this particular widow, and it has bound itself to pay to her a certain sum during her widowhood. The continuance of the payments depends upon this widow, and not upon a certain average which may be arrived at as to widows in general. It is a mere guess as to whether this widow will remarry, or when she will remarry, if such an event happens. Here the Commission not only has assumed to fix the value of the future payments to the widow, but also of the payments to each of the children, based upon a probable death under eighteen years of age and continued dependency. It must have calculated when the lump sum representing two years' payments will be paid to the widow if she remarries, and when, if ever, the interest of any of the children will be increased one-half. If the statute is confined to special and extraordinary cases where a hearing on notice shows that the interest of justice requires a commutation, we are not condemning it. We are only holding that its proper construction cannot justify the resolution or the order in question.

Certain computations, based upon the payments to be made to the widow, show: The payments during widowhood on a three and one-half per cent interest basis with an allowance of two years' pay upon remarriage would give a value of \$3,536.18; upon a five per cent interest basis of \$3009.54, and upon a six per cent interest basis of \$2,694.29. If the payments to the widow are to be during her natural life, the commutation on the basis of three and one-half per cent would be \$3,928.56; on a five per cent interest basis it would be \$3,263.86, and on a six per cent interest basis, \$2,924.88. These figures demonstrate that the interest of justice did not require the commutation in question and that an unreasonable and unjust burden has been cast upon the appellant. I favor reversal.

All concurred, except COCHRANE and H. T. KELLOGG, JJ., dissenting. Determination reversed.

The decisions of the Appellate Division in the following cases rest upon the Sperduto opinion and are of the same date: *Liinamaa v. Johnson*, Case No. 20877, Aug. 2, 1918; 187 App. Div. 911; *Schoor v. Colonial Printing Co.*, Case No. 70163, May 21, 1918; 187 App. Div. 912; and *McGuire v. Yonkers R. R. Co.*, Case No. 63220, May 21, 1918; 187 App. Div. 911.

In its opinion in the Sperduto case the Appellate Division points out that the part of its opinion in the Adams case which bases decision upon points other than the impossibility of comput-

ing "present value" is still authoritative, the Court of Appeals having based its decision in the Adams case solely upon the impossibility of calculating the present value of an award to a widow because of the contingency of remarriage. "Payment of a gross sum," the Appellate Division still holds, "is only authorized in exceptional cases where the Commission finds in its discretion that the interests of justice so require."

Upon appeal of the State Industrial Commission from the Appellate Division's order in the Sperduto case, the Court of Appeals dismissed the appeal with opinion in which it holds that appeal from a notice, such as the direction to pay present value into the state fund in the Adams and Sperduto cases, presents nothing which the courts can review, appeals being limited by Workmen's Compensation Law, § 23, to "awards" or "decisions" of the Commission.

For guidance of the Commission, the court appends some remarks as to the nature of, and the method of revising "awards." It declares also that it does not mean to intimate that § 27 is a valid enactment. The opinion is as follows:

SPERDUTO v. N. Y. CITY INTERBOROUGH RY. Co., 226 N. Y. 73, Mar. 18, 1919.

McLAUGHLIN, J.: The respondent is, and during the times referred to was, a self-insurer under the Workmen's Compensation Law. Some time prior to the 6th of March, 1918, one Angelo Sperduto, while in its employ, received an injury which resulted in his death, for which, on the 14th of March, 1918, an award of compensation was made to his widow and dependents. The award directed that certain payments be made, per week, to the widow during widowhood, and to the dependents during dependency.

On the 21st of May, 1918, the Commission passed a resolution to the effect that every mutual compensation insurance company and every self-insurer should, on or before July 31, 1918, pay into the state fund, as a special fund, under the terms of section 27 of the Workmen's Compensation Law, as amended by chapter 705 of the Laws of 1917, the present value as of that date of the future installments of death benefits under every award against such carrier for death occurring as a result of accident happening between July, 1, 1917, and December 31, 1917, inclusive.

On the 28th of June following, the commission, by its cashier, sent to the respondent a notice which referred to the claim by number, and read, in part, as follows:

"**GENTLEMEN.**—Pursuant to the requirements of a resolution of the State Industrial Commission, dated May 21, 1918, you are hereby instructed to pay into the State Insurance Fund, under the terms of section 27 of the Workmen's

178 COURT DECISIONS ON WORKMEN'S COMPENSATION LAW

Compensation Law, the following amounts in respect of the above numbered award:

Net present value of future installments of compensation.....	\$5,456 11
Loading for administration expense (4 per cent.).....	218 24

Total to be paid in.....	<u>\$5,674 35</u>
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'This amount is required to be paid on or before July 31, 1918.'

After the receipt of this notice, the employer served a notice of appeal which read, in part, as follows:

"Please Take Notice that New York City Interborough Railway Company, the above named employer and self-insurer, hereby appeals to the Appellate Division of the Supreme Court, Third Judicial Department, from a decision and award of the State Industrial Commission, Bureau of Workmen's Compensation, made herein and dated June 28, 1918, whereby New York City Interborough Railway Company, the employer and self-insurer, is instructed to pay into the State Insurance Fund under the terms of section 27 of the Workmen's Compensation Law, the following amounts, in respect of this award." Then follow the amounts directed to be paid.

The Appellate Division considered the notice sent out by the cashier as a determination or decision and reversed it. The attorney-general appeals to this court.

Section 23 of the Workmen's Compensation Law (Cons. Laws, ch. 67) permits an appeal from an award or decision of the commission. This notice was neither. The appeal, therefore, presents nothing which this court can review and must be dismissed.

While the appeal does not bring up for consideration the validity of the resolution adopted May 21, 1918, we think, for the guidance of the commission, it is proper to state that if it did, the same result would follow. The award made was in the nature of a judgment. It finally and conclusively determined the rights of the parties under the Workmen's Compensation Law. It could not be substantially changed, as proposed in this case, without notice to the parties interested and an opportunity given them to be heard. After such notice and opportunity, before a different method of payment could be fixed, the award previously made either had to be vacated or modified, and that could not be done by an omnibus resolution like the one adopted. In saying this, however, we do not mean to intimate that section 27, as amended by chapter 705 of the Laws of 1917, is a valid legislative enactment. That question is not before us and we do not consider it.

The appeal should be dismissed, without costs. HISCOCK, Ch. J., CHASE, COLLIN, CUDEBACK and CRANE, JJ., concur; HOGAN, J., concurs in result. Appeal dismissed.

Following the decision of the Court of Appeals in the Sperduto case, the Commission took counsel relative to disposition of the large sum that had been received by it from the employers and

carriers by way of deposits to cover future payments. The questions involved and its proposed solutions of them are set forth in the following correspondence with the Attorney-General:

NEW YORK, (April, 1919).

HON. CHARLES D. NEWTON, *Attorney-General, Albany, N. Y.*

Dear Sir:—The recent decision of the courts in the matter of Sperduto has raised some very troublesome questions for this Commission, both with regard to the present status and the future conduct of the fund known as the Aggregate Trust of the State Insurance Fund, and with respect to the future policy of this Commission relative to the security which it shall require from employers in the State of New York desiring to carry their own insurance.

Following the order made by this Commission in May, 1918, calling in the present value of various death claims, in pursuance of section 27 of the Compensation Law, and thus establishing the aggregate trust contemplated by that section, there was paid into that fund from various employers of labor who were uninsured a large sum of money, to wit the sum of \$325,289.99. In addition to this amount, the Somet Solvay Company and the Solvay Process Company, following the explosion had at their plant, asked for permission to pay the awards into that fund, and that permission was granted them. These companies paid in \$287,265.93 and \$25,005.10 respectively, making a total sum received by the Commission for the aggregate trust, of \$637,561.02. From this aggregate trust we have paid out from time to time in bi-weekly payments to injured employees amounts aggregating \$32,031.61.

The questions which now confront the Commission and upon which we desire your opinion are as follows:

First. What is the legal duty of the Commission in view of the decision in the Sperduto case in reference to the moneys paid into the aggregate trust fund under the order of May 21, 1918, and specifically, in your opinion, should the moneys paid in be returned pro-rata to the parties from whom received, less the payments heretofore made by the Commission on account of the awards against such parties?

Second. In view of the decision of the court in the Sperduto case is the plan hereinafter suggested for safeguarding the payment of awards for long term periods or death benefits to injured workmen or their beneficiaries by employers who are permitted to carry compensation for themselves legal?

As bearing upon these questions we call your attention to the following facts:

Several of the self-insurers who paid in moneys to the special fund have since been placed in the hands of receivers, and if the money is returned the injured employees for whose benefit the money was paid in may, in the future, have difficulty in collecting the amount of the awards due them.

The Court of Appeals in the Sperduto case dismissed the appeal from the order of the Appellate Division on the ground that the appeal to the Appellate Division was taken from the order of the cashier and not from the order of the Commission, and therefore that there was nothing before the court for consideration. And the court in its memorandum for the guidance of the

Commission announced that if the appeal had been taken from the order of the Commission the result would have been the same for the reason that the order was improper because no notice had been given to the employers or opportunity afforded them to be heard before the manner of the payment of the said awards was changed by the Commission. We have therefore no authoritative opinion of the appellate courts upon the constitutionality of the provisions of section 27 under which the order of May 21 was attempted to be made.

After going over the matter carefully we are of the opinion that the moneys paid into the aggregate trust which covers about 150 different cases, most of which are death cases, gives a sufficient spread to constitute an insurance unit, and that we already have a sufficient amount of money paid into this fund to insure the solvency of the fund for the purpose of paying out the awards already composing it.

You will notice by looking at the Appellate Division's decision in the *Sperduto* case that the particular difficulty found with the case was that the award was called in without the employer having the opportunity of being heard upon the wisdom or the necessity of calling it in. In the case of the payments actually made into the aggregate trust, however, they were paid in without protest and the employers acquiesced in our order, so that it would seem as if they had waived the right to raise the point that the present value of the awards were commuted without notice to them. This being so, have we a legal right to retain the money and pay the awards out on the basis upon which these moneys were originally paid in? I have no doubt that most of the employers who paid in the moneys would be perfectly willing that we should retain the same and make payments according to the original intention, but what would be the situation of the Commission in case some widow married in the near future, thus cutting the award down to two years' commutation and releasing a considerable part of the money paid in, if the employer should demand of the Commission to have the money so released repaid to him? Could the Commission legally retain the balance of the money from such a claim in order that the overplus on such a case might be used to make up the deficiency in the case of another widow who lived far beyond the allotted period of life. Of course, if the insurance carriers and employers could withdraw from this fund all the overplus in the cases of widows marrying within a short period and leave nothing with which to piece out the long term payments due to widows who do not remarry, or who live beyond their expectancy of life, the solvency of the fund could not be established.

Assuming that your answer would be that the Commission can legally retain the moneys and assure the solvency of the fund by resisting the claim of the employer for a reimbursement in the case of a widow marrying, we come to still another question which is perplexing the Commission very much.

I take it that you are already aware of the reasons which actuated this Commission in calling in these death payments from self-insurers into the aggregate trust. The Commission has always felt that it had a peculiar duty to safeguard payments of compensation to the injured employees of concerns carrying their own insurance in the State of New York, and the object of setting up the aggregate trust was to safeguard such payments. Subdivision

3 of section 50 of the law allows us, after we have satisfied ourselves of the ability of the employer to pay compensation for himself, to demand and receive securities in addition as a further security for the payment of compensation. It was felt by the Commission that by taking a small amount of liquid securities from each self-insurer the payments to injured workmen could be reasonably well safeguarded for all short term injuries, if it were possible to remove from the risk of the employer's business sufficient assets to care for the long term payments like death benefits. With this idea in view and supposing that section 27 of the law gave us the right to thus require, as a condition of self-insurance, the payment into the aggregate trust of death benefits, the Commission adopted the policy of requiring from self-insurers in every case, the deposit with the Commission of liquid securities equal in amount to what would be six months' premium in the State fund, if they were insured in that fund, with a minimum of \$5,000 in each and every case.

The following method of fixing our policy with reference to self-insurance suggests itself, and we would like your opinion upon its legality and feasibility. We feel that we shall have to require from self-insurers very much larger deposits of securities than heretofore. You probably know that under the provisions of the Labor Law, the method of making rules governing factory conditions under what is known as our Industrial Code, is, for the Commission to formulate certain rules governing industries and then hold public hearings upon these rules, giving notice thereof in the public press, and after hearing all that is to be said on all sides of the question, the Commission then revises the rules and when so revised and adopted, they have the force of law under the Labor Law.

The plan which we now have in mind is somewhat similar, namely, to formulate a rule which will cover all future applications for self-insurance, requiring every self-insurer to deposit with the Commission, instead of securities equalling six months' premium in the State Fund, securities equalling a year and a half or two years' premium (the exact period is not just now material), with a minimum for every self-insurer of say \$15,000. This, of course, would be extremely burdensome to many employers and would result in their having to put up enormous amounts of securities with us. In order to obviate this hardship, it is suggested that an optional plan be offered in the same rule, like the following:

Let any employer wishing to carry his own insurance have the right, instead of putting up the additional securities, to still continue on the basis of our former rule, namely, deposit with the Commission securities equivalent to six months' premium with a minimum of \$5,000, on his electing in writing and agreeing in a contract as a condition of being allowed to carry his own insurance, that he would pay into the Aggregate Trust the present value of all death benefits and all compensation running for more than 104 weeks. This would have the additional benefit of continually adding to the Aggregate Trust and widen the spread of the risk, making the fund all the more solvent. If this were thought wise, it would probably be best in the case of every death of an employee of an employer adopting this method of insurance and in the case of every such claim for compensation running for more than 104 weeks, to send out in our notice of the hearing on the original award, a definite statement that on the conclusion of the hearing if an

award were made at all, there would be an immediate order that the present value of the award should be paid into the Aggregate Trust of the State Fund. This would certainly meet the court's objection that these awards could not be called in without notice and would save the necessity of changing the award after it is once made.

The Commission is of the opinion that the alternative plan suggested would meet the objections heretofore found by the courts to the plan adopted by the Commission. There is, however, one danger involved in adopting this plan against which we would have to guard ourselves, and that is, that in the event the contract to pay in the commuted values of the awards is held not to be binding upon the employers the result would be disastrous to the fund. In this connection we call attention to the fact that in the Adams and Sperduto cases there were such contracts which the court held to be unenforceable, and we would specifically like your opinion upon the following question:

In case the plan above suggested is adopted by the Commission and a contract as above set forth is entered into by the employers to pay in the commuted values of awards which contract is entered into as a condition of being granted the privilege of paying compensation for themselves, would such contract be legally enforceable?

If it were thought best to make the rule applicable to employers already carrying their own insurance, notice of the hearing on the rule itself could be given them by mail, so that they would know that their continuing to carry their own insurance would be contingent on their either putting up much more security, or making a definite binding contract to pay in death benefits, as a condition of being allowed to remain uninsured.

Do you think the reasoning of the Appellate Division in the Sperduto case makes it impossible for us to rescind a right of self-insurance already granted, except on proof, and a finding that the self-insurer is insolvent or in imminent danger of insolvency?

I am sorry to have burdened you with such a long letter but the matter is giving the Commission a good deal of anxiety and I do not see how it could be properly set before you in any shorter space.

We should be glad to have your views in full at as early a date as possible, because it is necessary that we should adopt some policy as speedily as possible.

Yours very truly,

EDWARD P. LYON,

Commissioner.

April 5, 1919.

Hon. EDWARD P. LYON, 230 Fifth Avenue, New York City.

DEAR MR. LYON.—Your letter of inquiry in reference to the future policy of the Commission as to the aggregate trust fund received.

As to the first question which you propound, would say that I do not see any legal objection to your retaining the moneys already paid in to the aggregate trust fund under the order of May 21, 1918. Neither the Appellate Division nor the Court of Appeals have indicated that section 27, under which it was paid, was unconstitutional or illegal, although those objections were strongly urged in the Sperduto case. The Appellate Division is also

on record on the question certified to it, deciding that the law is constitutional and retroactive. The only fault found by the courts upon the action of the Commission seems to be one of procedure only.

In view of the facts stated by you in reference to employers who are or may become insolvent in cases where a lump sum has been paid in and in view of the fact also that a sufficient amount has been paid in to constitute an insurance proposition, it seems to me your policy of retaining the amounts paid in will better protect dependents than to return it.

Your plan for requiring the larger amount of securities as a condition of self-insurance seems to be within your jurisdiction and authority, and is also, I think, the optional plan of allowing those who do not wish to deposit so large an amount to sign a contract which will bind them to pay into the aggregate trust fund the present value of all death benefits and compensation running for more than 104 weeks. Such agreement, I think, should also bind them to make this payment when the original award is made after a hearing. Such a contract, I take it, would be enforceable only in the same manner as an award is enforceable, and subject to the right of appeal by the employer or insurance carrier. No procedure or contracts, or anything that could be done can prevent appeals being taken and questions raised, even if such questions are frivolous.

I am inclined to think that in case of a refusal to put up additional or adequate security, you would have the right to rescind self-insurance already granted as well as on the ground that the self-insurer is insolvent or in danger of insolvency.

Very truly yours,

CHARLES D. NEWTON, *Attorney-General*.

BY E. C. AIKEN, *Deputy*.

P. S. The writer of the foregoing letter, after conference with the Attorney-General, wishes to add that these questions are mostly upon a matter of policy for the Commission to decide, and that the responsibility is upon the Commission. While this office is desirous of giving such opinion as it can upon the subject presented, we feel that neither this office nor the courts are infallible and that a subject upon which there has been so much litigation may lead to differences of opinion.

The Commission has under consideration, August, 1919, proposed rules offering self-insurers the alternative of depositing large amounts of securities or of paying in the present value of death benefits and long term disability awards. Laws of 1919, ch. 629, has inserted in Workmen's Compensation Law, § 25, a provision empowering the Commission to request employers or carriers to make deposits with its treasurer for payment of awards by it.

B. *Lump sum payments*.—Relative to commutation of compensation to lump sums, cases are divisible into three classes (1)

Those in which commutation is impossible; (2) Those in which it is inadvisable; (3) Those in which it is advisable.

1. *When commutation impossible.*—The compensation law limits compensation in certain classes of cases to fixed periods of time. For permanent partial disability, such as the loss of an eye or a finger, it fixes a certain number of weeks. In such cases it is easy to commute payments. But in other classes of cases the amount of the compensation depends upon contingencies such as the duration of life of the injured employee or of his wife or of his dependent relatives. Because of the law's remarriage provision, the contingency is twofold as concerns his wife. The court has held in *Bailey v. Columbia Rope Co.*, the text of which is given above, page 169, that it is impossible for lack of actuarial tables to compute the present value of an award to a mother or other dependent.

Since it is impossible to compute present value, it follows that it is impossible to commute a dependent's award to a lump sum.

Prior to amendment of L. 1917, ch. 705, to § 27, adopting the remarriage tables of the Dutch Royal Institution, the courts held that it was impossible in New York State to compute the present value of an award to a widow: *Adams v. N. Y., Ontario & Western Ry. Co.*, above, pages 163, 167. Under such impossibility, it was impossible to commute a widow's award to a lump sum. In its opinion in the *Sperduto* case, above, page 170, the Appellate Division has attacked the use of mortality tables for computing present value of compensation to totally permanently disabled employees, to widows and to minor children, notwithstanding adoption of such tables by amendment of § 27.

In the case of an employee who had severed his spinal cord by a fall and incurred partial paryalsis, the Commission refused to commute the award to a lump sum. It based its action upon an opinion of Commissioner Lyon, the reasoning of which may be compared with the reasoning of Justice Kellogg in the *Sperduto* case. The pertinent part of Commissioner Lyon's opinion is as follows:

KNERR v. ASBESTOS PROTECTED METAL Co., S. D. R., vol. 12, p. 589, Bul., vol. 2, p. 106, Feb. 21, 1917, *in part*.

Turning now to the second claim advanced by the claimant's representative, I find it equally impossible to grant a lump sum in this case, for the reason that there is no possible basis upon which a lump sum can be figured. The

last clause of Section 25 is as follows: "The Commission, whenever it shall so deem it advisable may commute such periodical payments to one or more lump sum payments to the injured employee or in case of death his dependents, provided, the same shall be in the interests of justice." I take it that this expression, "in the interests of justice" must be held to apply as well to the insurance carrier as to an injured employee. The specific request made by the representative of the injured man, it seems to me, emphasizes the lack of justice which a compliance with his request for a lump sum would produce. If the rate were increased to \$20 per week it would bring to the injured man approximately \$1,000 a year. The representative of the claimant asks for a present lump sum payment of \$5,000 and that the case be then kept open. This would be based on the proposition that the injured workman would live at least for five years, while it is very evident, from all the testimony in the case that the man will disappoint all expectation if he lives as long as one year. In no event is there any basis that I can see for commuting this award into a lump sum, except on the life tables. To take the case of an injured workman who is confessedly in such physical condition on account of his injury that he probably will not live longer than a few months and commute his compensation on the average duration of lives of people of his age is, it seems to me, so manifestly contrary to the whole spirit of the Compensation Law that the proposition answers itself. It is probable that on the life tables it would be found that this man according to his age, would have an expectation of life of from twelve to eighteen years, while the testimony in the case makes it probable that he will not live as many months. It seems to me, therefore, that the case, as it stands, gives no basis whatever upon which the Commission can make a lump sum payment, small as his weekly payments are, as compared with his necessities. Any increase of weekly payments of course would have to be made by drawing forward into his present payments, payments which would only accrue after his death.

The reason given for desiring a lump sum payment defeats itself. The Compensation Law contemplates paying a workman who is permanently totally disabled a certain rate of compensation during his life time. There is no probability, it may perhaps be said, there is no possibility, that the claimant will ever cease to be totally disabled. He must, therefore, draw compensation every week as long as he lives. The law certainly does not contemplate giving him double compensation at the beginning of his disability, to leave him with none at the end. Yet every dollar now added to his weekly stipend must be taken from future payments somewhere, unless the insurance carrier is to be made to pay more than the law demands.

The provision for lump sum payment was clearly not intended either to increase the amount which an insurance carrier is to pay or deplete future payments, in the case of total permanent disability, in order to care for an injured man at a higher present rate. It is not even suggested that additional care and expense will tend to shorten the period of disability, or that any use can be made of a lump sum payment that will produce additional revenue. In fact it is the pressing, present need of claimant which is the basis of the application. Great as that need is, I do not see how it can be met at a rate higher than that set forth in the law. I, therefore, advise that an award be made at the rate of \$15 per week and that the request for commutation and payment in a lump sum be denied.

The opinions of the Appellate Division relative to the omnibus resolutions for deposit of present values in the state fund, in the Adams and Sperduto cases, have led the insurance carriers to attack individual awards of lump sums as unconstitutional and as not "in the interest of justice": *Dodd v. 461 Eighth Avenue Co.*, S. D. R., vol. 16, p. 427, Apr. 8 and Nov. 12, 1918; and *Berman v. Reliance Metal Spinning & Stamping Co.*, Case No. 200174, Dec. 13, 1918. The Appellate Division affirmed awards in these two cases, May 7, 1919. Upon this score, the concluding words of the opinion of the Court of Appeals in *Sweeting v. American Knife Co.*, above, page 75, may not be insignificant. Says the Court of Appeals:

It is not important that a lump payment is exacted. That may be done in other cases (Workmen's Compensation Law, Sec. 27). The payment is not made by the employer himself, if he insures in the state fund, except to the extent of the premium which he pays for his insurance (§§ 50, 53). It is a charge upon the fund. He may, of course, be a self-insurer, or pay his premiums to an insurance company (§ 50), but that is only at his option.

2. *When commutation inadvisable.*—Deputy Commissioner Archer has said in regard to lump sum payments that "the single and only test is the good of the recipient which will always satisfy the interests of justice;" he has set forth the Commission's attitude and policy relative to lump sum payments in Bul., vol. 1, no. 5, pp. 2, 3. Periodic payment is chiefly designed to prevent the crippled employee and his dependents from becoming public charges. The theory is that in most cases the compensation beneficiaries cannot be entrusted with care of the comparatively large sums of money derived from lifetime awards or even from loss of members. The law and its administrators look with disfavor upon lump sum payments. In the third year of the law's operation the number of lump sum and final adjustment awards was 5,180 out of a total of 58,562 compensatable cases. This is a proportion of about one to twelve.

3. *When commutation advisable.*—In a paragraph entitled "In the interests of justice" Deputy Commissioner Archer says:

It is obvious that each case embraced in this definition stands on its own merits and it would be difficult to recite all the causes for which awards are granted in the "interest of justice." Here are some of them: To

purchase a business; to lift a mortgage; to buy a home; to enter a partnership; to pay tuition; to send a sick child to the country; to visit parents residing abroad or in a distant state; to succor the old age of parents or other senile dependents; to pay a hospital bill; to pay a just and embarrassing debt; to purchase tools; to pay rent or for fuel, etc., etc.

Elsewhere he says:

Where the awards are small and the disability of definitely short duration payments which may become due after the award is granted may well be made in a single payment. This for obvious reasons.

Where the claimants conform to a fine type of thrifty men who would likely know no dependency even were there no compensation benefits or who give other evidences of thrift, payments should be made. In such cases the opportunity for a distinct betterment of conditions is offered and should be encouraged.

In cases in which a reputable employer interests himself in the welfare of his injured workmen and seconds an application for a lump sum payment it may well be made. The attitude of the employer is somewhat a guarantee that he will see the matter through.

Where sentiment through sympathy would support a small business in a community in which the injured is known, a lump sum award should be granted.

Lump sums should be given to aliens who are non-residents or who are about to become non-residents of the country. Every reason supports this, for abroad the award is worth more, our own states will have discharged their duties to the injured and a more suitable environment will likely be found in native scenes. There is justification for discounting the present values of such claims.

Lump sum payments should seldom be withheld when they go to support children in school. Through education the disability may be turned into a blessing. However, it may be said that an education may be paid for in installments, but experience teaches that the periodical benefits to children are too small for this purpose, but when confined to a more limited period they prove sufficient.

In the granting of lump sum awards administrators of the law are bound to take cognizance at least mentally, of the different characteristics of various races. It is seldom indeed that the representatives of certain races will lose or waste their awards if made in lump sums, but on the other hand will proceed to turn them into increased benefits.

He instances also the special class of cases in which the injured employee recovers so far as to be able to return to work but cannot measure up to his former standard of performance or cannot do the kind of work that he has done before the accident, the consequence being reduced earning power. These cases are apt to be endlessly troublesome and unsatisfactory to the Commission, to the

employer and to the employee, and are often closed by agreement upon lump sums.

4. *Lump sums relative to death contingency.*—An employee may have in prospect several thousand dollars compensation under the periodic payment plan yet if he dies within a brief time after his accident from some cause other than the accident he himself fails of enjoyment of almost the entire amount and his family or dependents do not inherit it. This is true even of compensation granted for a fixed period of weeks, according to the vested interest decision in *Wozneak v. Buffalo Gas Co.*, the text of which appears above, page 79. If however the entire compensation or even a substantial part of it has been commuted to a lump sum and paid to such an employee shortly after his accident, he has had the enjoyment of a much larger amount and he leaves what he does not spend to his heirs or legatees.

5. *Lump sum awards to citizens — illustrative cases.*—A cabinet maker cut his forearm while operating a machine. The accident severed a nerve. He lost the use of his hand. He asked for a lump sum in order to embark in the antique furniture business. He was a man of no bad habits. The Commission granted his request. The employer took appeals, citing the decisions of the courts in the Adams case. Both the Appellate Division and the Court of Appeals affirmed the lump sum award: *Fawcett v. Lag-enbacker Bros.*, Claim No. 40370, June 25, 1917; 181 App. Div. 911, Nov. 14, 1917; 223 N. Y. Rep. 680, May 14, 1918.

In a case involving sixteen employers and ten insurance carriers, it was practically necessary to employ a lump sum payment; the Appellate Division affirmed the award; *Sayers v. Bill, Bell & Co.*, S. D. R., vol. 8, p. 393, Dec. 22, 1915; 176 App. Div. 938, Jan., 1917; 181 App. Div. 907, Nov. 14, 1917; 184 App. Div. 922, May 17, 1918. Other examples of lump sum payments are *Rosenblatt v. Royal Table Co.*, S. D. R., vol. 7, p. 456, Feb. 28, 1916; and *Leiser v. General Drop Forge Co.*, S. D. R., vol. 7, p. 467, Mar. 3, 1916.

The Commission has frequently combined lump sum payments with periodic payment. The case of *Fredenburg v. Empire U. Railways* is an example. Fredenburg, a trolley motorman aged thirty-three, was severely burned by an electric current, November 7,

1914. His employer was a self-insurer. Appeal from awards to him for permanent partial and temporary total disability figured in the early history of his case: Bulletin No. 81, pages 277, 331, 333. Later, the Commission reheard an application from him for an award for permanent total disability. Having taken the testimony of six physicians, it granted his application, May 13, 1916, and awarded him bi-weekly payments of \$26.92 for life. About a year later, March 14, 1917, he asked for a lump sum of \$3600 with which to purchase a home. The Commission's actuary computed the present value of his award at \$13,553 and found that his bi-weekly payments would need to be reduced to \$19.77 in order to absorb during the life of the claim the \$3600 to be advanced to him. To enforce the lump sum payment the Commission had power to sell the securities of the self-insuring employer which were upon deposit with it. The employer being in the hands of a receiver, court proceedings were necessary in order to an approval of the payment. Some difficulty and misunderstanding arose in shifting from the basis of \$26.92 to the basis of \$19.77 bi-weekly. Members of the Commission took a lively interest in the case. Chairman Mitchell asked that the employee be advised that his use of the \$3,600 as a means of earning a livelihood would expose his future bi-weekly payments to modification at the instance of the employer. Deputy Commissioner Richards personally supervised the purchase of the home. The latest transaction in Fredenburg's case was the computation of the present value of his bi-weekly award at \$9,842.12, as of May 3, 1918, in connection with the Commission's order to all self-insurers to make payment into the state fund.

6. *Lump sum awards to non-resident aliens — illustrative cases.* — Workmen's compensation Law, § 17, discriminates against alien dependents in foreign countries in three respects (1) it conditions dependency of parents and grandparents upon support for a year prior to the accident; (2) it excludes husbands, brothers, sisters and grandchildren; and (3) it reduces payments to one-half upon commutation and makes commutation obligatory at the instance of the insurance carrier. Under decisions of the Appellate Division and the Court of Appeals the non-resident alien widow and children of an employee who has lost his life by an

industrial accident in New York may avoid the one-half commutation clause by immigrating to the United States or Canada and claiming compensation within a year after the employee's death. These decisions are open to the inference that the other relatives discriminated against can overcome discriminations against them by coming to the United States or Canada. The Court of Appeals decided the case without opinion but its memorandum says:

SPADUCCINO v. HAYES & Co., 223 N. Y. Rep. 681, May 14, 1918, *memorandum in part*.

The question narrows down to what time is to be selected as the determining point of whether the claimants or dependents are resident or non-resident aliens, appellants contending that residence should be determined as of the time of the injury and death.

The Appellate Division had handed down majority and dissenting opinions in the case. They are as follows:

SPADUCCINO v. HAYES & Co., 180 App. Div. 37, Nov. 14, 1917.

LYON, J.: The single question presented by this appeal is as to the authority of the State Industrial Commission to rescind a commuted award and restore an award which directed periodical payments.

In September, 1915, the claimant's husband, who was working in Rome, N. Y., sustained accidental injuries arising out of and in the course of a hazardous employment which resulted in his death in February, 1916. His widow and only child were at these times aliens and resided in Italy. In September, 1916, the widow and child came to this country, and a few days after her arrival in the city of New York she filed a claim for compensation. In October, 1916, the State Industrial Commission duly made an award to the widow and child payable in regular bi-weekly sums. In November, 1916, the widow appeared before the Commission and testified that she did not intend to remain in this country. Thereupon the Commission, upon the request of the insurance carrier, commuted the future payments of compensation at the present value, and directed that the same be paid in a lump sum on the basis of fifty per cent thereof as of December 15, 1916. Later it appeared to the Commission that the widow had changed her mind as to returning to Italy and had decided that she and her child would remain in this country. The Commission thereupon on January 4, 1917, made findings and entered an award of that date corresponding to the original award, stating therein that in commuting the payments of compensation to a lump sum the Commission had acted upon an error of fact and that the resolution of commutation, and the commutation were thereby rescinded. From such decision and award this appeal has been taken.

Section 25 of the Workmen's Compensation Law provided that compensation under the act should be payable periodically in accordance with the

method of payment of wages of the employee at the time of his injury or death, although the Commission might require payments to be made at any other periods as it might deem advisable, and also might whenever it should so deem advisable commute such periodical payments to one or more lump sum payments to the injured employee, or, in case of death, his dependents, providing the same should be in the interest of justice. Section 17 provided that compensation to aliens not residents (or about to become non-residents) of the United States or Canada should be the same in amount as provided for residents, except that the Commission might, at its option, or upon the application of the insurance carrier should, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission.

The evident purpose of the provisions of section 25, regulating the times of payment of compensation, was not only for the convenience of the employee and dependents by requiring the payments to be in general made with the usual frequency of the payment of wages, but also to guard against the liability of unfortunate or improvident employees or dependents becoming charges upon public charity. As to non-resident alien dependents, or aliens about to become non-residents, the latter danger did not exist, hence the propriety of the provisions of section 17, providing for the making of commuted payments. After the claimant had determined to remain a resident of this country neither she nor the appellants had longer any right to insist upon the payment of the commuted award which she had obtained upon the application of the insurance carrier and under the representation that she was about to return to Italy and reside there. At the time the Commission rescinded the award no payment had been made thereon, nor any appeal taken therefrom, nor had the rights of any third party intervened, so far as appears. The payment of the award in a lump sum would not only have been most unwise, but the Commission was fully justified as matter of law in rescinding the award. Section 74 of the Workmen's Compensation Law provided that the power and jurisdiction of the Commission over each case should be continuing, and that the Commission might from time to time make such modification or change with respect to former findings or orders relating thereto, as in its opinion might be just. The broad powers given to the Commission by this section were in keeping with the general scope of the law, and were ample, we think, to justify the Commission in rescinding an award which had been procured under an error of fact for which the Commission was in no way responsible.

The decision and award appealed from should be affirmed.

All concurred, except KELLOGG, P. J., who dissented, with memorandum, in which SEWELL, J., concurred.

KELLOGG, P. J. (dissenting):

At the time of the award the widow and child were non-resident aliens and, therefore, under section 17, the Commission, upon the application of the insurance company, was required to commute the award to one-half the amount which would be paid to a resident. Under section 25 an award may be commuted at the discretion of the Commission, in the interest of

justice. Under section 17 an award to a non-resident alien must be commuted on a fifty per cent basis.

The right to death benefits depends upon the situation at the time of the death or injury. I think the fair meaning of section 17 is that the benefits payable to an alien who was a non-resident at the time of the death, or to an alien who becomes a non-resident at any time thereafter, must be commuted on a fifty per cent basis. It is true the section says the compensation shall be the same in amount as provided for residents, and the ordinary provision is that the payments shall be made periodically and the Commission may, in the interest of justice, commute them. But section 17 makes an exception to the rule that a non-resident alien shall receive the same amount as a resident in providing that the amount payable to a non-resident must be commuted by paying to him one-half of the commuted amount. Technically the section contemplates that the original award shall be in the same amount to each but that the award to the non-resident must be commuted on a fifty per cent basis at the request of the insurer. However the result is arrived at, the effect is that the non-resident alien can under the statute receive but one-half the amount which a resident alien receives.

The question, therefore, is, can a non-resident beneficiary, by becoming a resident after the death, double the amount of the compensation which the insurance carrier must pay? I think the rights of the beneficiaries were fixed in this case at the time of the death and at the time of the original award, and that it was immaterial thereafter to the Commission and the insurer whether the beneficiaries remained in this country or returned to Italy. I, therefore, favor a reversal and a restoration of the commuted award. SEWELL, J., concurred.

Award affirmed.

Under national war legislation of 1917, a compensation award due and payable to a non-resident "enemy" or "ally of enemy," as defined in the Federal Trading with the Enemy Act, must be reported to the Alien Property Custodian by the insurance carrier and by the compensation bureau; the Commission develops the facts and holds such cases in abeyance until the Federal Government indicates otherwise; upon declaration of war stay of concurrent payments was made. For action of the Commission relative to certain Austro-Hungarian dependents compare *Grubersich v. Valley Mills Co.*, S. D. R., vol. 14, p. 666, Bul., vol. 3, p. 54, Oct. 18, 1917. The question of awards to claimants living in foreign countries is further noticed above, page 127.

C. Deductions for advance payments.—An employer may supply his injured employee with funds in advance of a possible agreement or award; amounts so advanced will be deducted from compensation payments if an agreement or an award is made later and if the employer has meantime, within forty-eight hours of their

issuance, forwarded to the Commission receipts for such advances made out upon the Commission's prescribed form: Workmen's Compensation Law, § 20-a. The making of such advance payments may be due to sympathy for the injured employee or to other motives or causes. Under the title, "Private Insurance Contracts," below, page 238, instances are given in which payments under the compensation laws of New Jersey and Connecticut have been credited upon awards under the compensation law of New York. When third parties, because of their responsibility for injuries, have paid moneys to injured employees, the employers or insurance carriers are entitled to deduction of the amounts of such moneys from compensation awards made later. This is true even when such payments have been made to avoid sentence of imprisonment in consequence of criminal prosecution: *Dietz v. Solomonwitz*, S. D. R., vol. 12, p. 555, Bul., vol. 2, p. 102, Jan. 24, 1917; 179 App. Div. 560, Sept. 13, 1917. Other third party instances of advance payment are: *Matta v. Dennings Point Brick Works*, Death File, No. 14895, Oct. 25, 1917; 182 App. Div. 907, Jan. 18, 1918; 224 N. Y. Rep. 596, Oct. 1, 1918; and *Maley v. O'Boyle*, S. D. R., vol. 10, p. 612, Oct. 25, 1916. For text of the Appellate Division's opinion in the Dietz case and notices of the Matta and Maley cases see Bulletin No. 87, Part 1, pages 278-283.

D. *Fees for medical services, legal services, etc.*—Bills for legal services and for medical services and supplies are governed by Workmen's Compensation Law, § 24. They are collectible in the same manner as periodic or other awards to injured employees or their beneficiaries, that is by summary proceedings and under the penalties provided in § 26. The Appellate Division has so held in the leading case of *Goldflam v. Kazemier & Uhl*, 181 App. Div. 140, Dec. 28, 1917. The subject of fees, with texts of the *Goldflam* and other opinions has been presented above, pages 21-27.

IDENTIFICATION OF THE EMPLOYER

(Workmen's Compensation Law, § 3, subds. 3, 4 and 5)

Behind or antecedent to the definitions of employer, employee and employment in Workmen's Compensation Law, § 3, subds. 3, 4 and 5, lies the general and older law of contract. In certain compensation cases the Commission and the courts have to determine whether or not a contract of employment exists and in certain others who the parties to the contracts of employment are. Subjects that have required particular attention are: (1) Independent contractors; (2) Agency for employing; and (3) General employers versus special employers. Where doubt has existed as to whether the person injured by an industrial accident is an employee or an independent contractor the subject has been treated as one of coverage and has been presented under that topic in Bulletin 81, pages 59-74, and Bulletin 87, Part 1, pages 53-56.

A. *Agency for employing.*—Where no doubt exists that the injured person is an employee rather than an independent contractor, compensation may yet hinge upon the question whether or not he has been in the employ of the owner or proprietor of the property or business with which his work has had to do or in the employ of an independent contractor whose contract relates to such property or business; that is, upon the question whether or not an intermediary between himself and the owner or proprietor has been a mere agent of the owner or proprietor or an independent contractor. Judicial precedents appear to have determined that subcontractors are usually independent contractors as concerns responsibility for or on behalf of their subordinates; so that compensation may hinge upon the question whether or not an intermediary between the injured employee and the general contractor is a mere agent of the general contractor or is distinctly a subcontractor. The Appellate Division affirmed an award against a subcontractor unanimously and without opinion in the carpentry contracting case of *Hadden v. Stanton*, S. D. R. vol. 9, p. 294, June 5, 1916; 177 App. Div. 938, Mar. 7, 1917. The case turned upon the fact that Stanton made a profit of one dollar per day upon Hadden's labor. In the timber-cutting in-

dustry the work is piece work and an injured employee is often removed by one or two intermediaries from some general contractor, the custom being to divide and subdivide forestry tracts among groups or teams of workmen with a spokesman or a go-between for each group. The theory underlying the granting and affirmation of compensation against the party higher up in these cases seems to be that the intermediaries or go-betweens are employees who have been authorized by their employers, either expressly or in accordance with custom, to secure or to act as spokesmen for workmates upon the tracts they are to clear and that such additional workers are fellow employees of the spokesman with no particular subordinate relation.

The earliest court opinion in these timber cutting cases, the minority opinion of Justice Woodward in *Claremont v. DeCoss*, has been given in Bulletin 87, Part 1, pages 54-56. Besides attacking the dependency of the claimants, Justice Woodward held in that case that the injured workman was not an employee but a member of a partnership of independent contractors. The majority of the Appellate Division and the Court of Appeals sustained the award to Claremont without opinion, on the ground that he was an employee, the memorandum of the Court of Appeals declaring:

CLAREMONT v. DeCoss, 220 N. Y. Rep. 671, Mar. 20, 1917, *in part*.

The sole question on this appeal is whether or not there was any testimony before the commission upon which it might determine, against substantial evidence to the contrary, the relation of master and servant existed between DeCoss and Claremont, deceased. Appellant claims decedent was an independent contractor.

In the next case, *Peake v. Lakin*, the Commission had found that an intermediary between Peake and Lakin, one Mallory, who engaged Peake for the job, "was expected to take on whatever assistance he needed," but was not the boss of his assistants: S. D. R., vol. 9, p. 290, May 31, 1916. The Appellate Division and the Court of Appeals affirmed the Commission's award against Lakin without opinion, except for a dissenting opinion in the Appellate Division as follows:

PEAKE v. LAKIN, 176 App. Div. 917, Dec. 29, 1916.

Appeal from an award of the State Industrial Commission, made on the 31st day of May, 1916.

Award affirmed. All concurred, except LYON, J., who dissented in memorandum, in which COCHRANE, J., concurred.

LYON, J. (dissenting): I do not think the evidence and the findings of the Commission warrant treating Peake as an employee of Lakin. The contract was let by Lakin to Mallory to cut, peel and deliver the bark on the cars for five dollars per ton. Mallory made an arrangement with Peake and another to assist him in the work. Had Lakin paid Mallory the contract price upon the completion of the job, and Mallory have neglected to pay Peake, the latter could not have recovered pay for his services from Lakin. The mere fact that Mallory was expected to take on whatever assistants he might need, would apply to any contract where concededly the contractor could not be expected to do the work singlehanded. The facts seem to be substantially the same as in the case of *Bobbey v. Crosbie* (8 B. W. C. C. 236), in which it was held that there was no contract of service between the claimant and the alleged employer. I think the award must be reversed. COCHRANE, J., concurred.

The memorandum of the Court of Appeals in the Peake case, 221 N. Y. Rep. 496, May 8, 1917, cites Mallory as declaring:

"We (three men) were working under a partnership agreement and there was no boss, each doing his share of the work."

In a third case, the Commission set forth the relations of contractors and workmen in the timber-cutting industry, as follows:

SULLIVAN V. PRESTON, S. D. R., vol. 10, p. 566, Sept. 5, 1916, *in part*.

On the 25th day of June, 1913, William and George Preston entered into a contract with the J. & J. Rogers Company, a corporation whose office was at Ausable Forks, Clinton county, N. Y., under which the Prestons undertook to cut upon the land of the said company all the spruce and balsam pulp wood of a quality suitable for the making of first quality sulphite pulp on that portion of lots 27, 28 and 29, Township No. 12, Old Military Tract, in the Indian Pass, so as to do an equal portion each year of the most expensive lumbering and deliver the same to the amount of 3,000 cords on or before the 1st day of April, 1914, at the Indian Pass pond, and the balance of the wood on the above described territory to be delivered at the rate of from 4,000 to 5,000 cords each year until the whole tract shall be denuded of such lumber. The wood was to be cut in lengths of four feet with other specific directions in respect of the size and shape of the lumber. The Prestons were to construct their roads through the woods so as to be able to make delivery to the streams running to the pond. The wood was to be placed on skids alongside the various roads, and there measured by the wood agent of the Rogers Company. The contract price was four dollars and fifty cents per cord of wood fully delivered. Payment was to be made on the basis of two dollars and sixty cents a cord for the wood piled on the job, i. e., on the skids beside the road, in monthly payments, as per measurements, except during the months of April, May and June of each year, the balance to be paid each year according to the amount delivered at the pond aforesaid,

twenty-five cents per cord, however, being retained as protection and guaranty for the fulfillment of the contract above mentioned.

The cutting of the wood in the Adirondacks is governed by custom among the lumbermen as to the hiring of help and the periods of work. The custom is substantially as follows: The men in the lumber districts are all well known to each other and their individual capacities and efficiency are also well known. Any of the lumbermen may take a contract to cut a strip of wood at so much per cord for the delivered wood. He then goes to other lumbermen of his acquaintance of known capacity in the business of cutting lumber and engages them to cut various strips of the tract which he has undertaken to cut. These men work in teams of two called "partners." These partners undertake to cut a strip and put the wood alongside of the road in order that the general contractor may gather it up for delivery. These partners may then offer a portion of their strip to other partners, usually at a price a trifle less than they, themselves, are to receive, and these new partners may in turn offer a portion of their strip to additional men, and this method goes on *ad infinitum*. This custom was the method used by William and George Preston for having the work done under their contract with the Rogers Company. They, themselves, established a camp in the woods with several men working in it. Some of the men worked on the construction of the roads by the month and some of the men worked in the cutting of the wood and piling of the wood alongside the road. In order to increase their facilities for performing the contract and for cutting the wood, they engaged Musgrove & Wood to cut a strip of the wood. Musgrove & Wood in turn established their camp and proceeded to cut wood, they, themselves, doing the work, and they in turn engaged Sullivan and Will Roberts to cut a small strip. Musgrove & Wood were acting as "partners" and Sullivan and Roberts were acting as "partners," i. e., they divided evenly between them the total receipts for the wood cut. There were other camps on the tract of land similar to the Musgrove & Wood camp, cutting wood for Prestons. Prestons were to pay Musgrove & Wood three dollars and fifty cents per cord for the wood put upon the river bank and Musgrove & Wood paid Sullivan two dollars per cord for wood piled on the side of the road. The price for the actual cutting of the wood varied in the district from one dollar and fifty cents to two dollars, according to the difficulty of the particular job. Preston Bros. established a camp at which it boarded its men. The men who worked on the road received so much a month and board. The men who worked in cutting the wood received so much a cord and if they boarded in the Preston camp, would pay the Prestons a certain amount for board. Musgrove & Wood had a camp about three rods from the Preston camp and the same arrangements prevailed. These camps operated what was called a "van" from which supplies were furnished to the men, such supplies consisting of axes, saws, rubber shoes, tobacco, etc. Musgrove & Wood ran a van and purchased their supplies at Lake Placid, and if they ran short would purchase from the Preston camp. There was no profit made on these supplies. The van was run for the convenience of the men. The men working on the tract embraced in the Musgrove & Wood undertaking were paid by means of orders drawn on the Prestons and signed by Musgrove & Wood. These orders were delivered to the men against wood cut and placed along the road and duly measured and certified to by the wood agent.

Preston Bros. paid these orders and charged them against any money that was due to Musgrove & Wood. The men who would take the smaller tracts to cut were known as "little bosses," that is, all person cutting wood under the Prestons were known as "little bosses." Owing to the fact that these men were all skilled in cutting wood, there was little supervision required of their work. They were told the length and sizes into which the wood was to be cut. Any one of the men could take on men to cut a portion of his tract and no objection would be raised unless the man taken on was known to be inefficient and undesirable. There were no specific hours of work for any of the men and all that was required of the men was that they should cut the tract designated in the manner designated. All these men working in these lumber camps, including the "little bosses," are actually engaged in the cutting of lumber or the hauling of lumber and are all in the employ of William and George Preston, and the custom above outlined is merely a method for obtaining facilities and increasing facilities in the lumber business. Thomas Sullivan was an employee of William and George Preston within the Workmen's Compensation Law.

Upon appeal, the Appellate Division held that the subdivisions into groups of woodsmen "do not amount to the creation of sub-contractors in the sense that it relieves the general contractor from the liability of affording compensation." The court's unanimous opinion is as follows:

SULLIVAN V. PRESTON, 177 App. Div. 110, Mar. 7, 1917.

WOODWARD, J.: The claimant was injured while working on a lumber job at Indian Pass, North Elba, N. Y., and the question on this appeal arises as to the employer — whether the claimant was working for Preston Brothers, who had a contract with the J. & J. Rogers Company to clear a tract of pulp wood, or whether he was in the employ of Musgrave & Woods, who are claimed to have been subcontractors and the employers of the claimant. The State Industrial Commission has made an award for forty-eight and one-half weeks at fifteen dollars per week and continued the claim for further hearing. The insurance carrier and Preston Brothers appeal from the award, and urge the single point that the claimant was not the employee of Preston Brothers.

It must be conceded that the evidence is not conclusive as to the relationship existing between Preston Brothers and the claimant, but the State Industrial Commission, which is authorized to make conclusive findings of fact in reference to claims of this character, has held that the Preston Brothers were the employers within the meaning of the statute, and, as there is some evidence upon which this finding may rest, we are not authorized to disturb the same. Preston Brothers had the general contract, and, while there appears to be a custom of subdividing the track to be cleared among small groups of men, it is evident from the record before us that these subdivisions into groups do not amount to the creation of subcontractors in the sense that it relieves the general contractors from the liability of affording compensation to those who are injured in the work. Preston Brothers were the only ones who had taken out insurance, indicating their understanding

of the liabilities incurred and we are of the opinion that this award should not be disturbed.

The award should be affirmed. Award unanimously affirmed.

In a fourth case, *See v. Luther*, Claim No. 19265, June 20, 1917; 181 App. Div. 910, Nov. 14, 1917, the conditions were similar to those of the Claremont, Peake and Sullivan cases and the Appellate Division's decision was unanimous and without opinion.

Opinions in some later cases, however, one of which is a timber cutting case, hold that the evidence of such authorization or agency for securing additional help must be clear and explicit and set up a presumption that the intermediary is a subcontractor with the status of independent contractor. In the first of these cases, a builder employed a painter for a house that he was erecting; the painter, without the knowledge of the builder, took on a helper; fall of a scaffold mortally injured the helper; the Commission found that the painter, in engaging the helper was acting as the agent of the builder, and awarded death benefits to the helper's widow and children. In reversing the award the Appellate Division comments in a general way upon the law of contract and its relation to the Workmen's Compensation Law and denies that the case presents any competent evidence of agency for the purpose of taking on a helper. The question of the painter's having been an independent contractor, it says, does not figure; the vital question is whether the builder actually contracted for employment of the helper. The opinion was written by Justice Woodward, who wrote the dissenting opinion in the Claremont case noticed above. Its text is as follows:

KACKEL v. SERVISS, 180 App. Div. 54, Nov. 14, 1917.

WOODWARD, J.: An award has been made to the claimant, the remarried widow of Norman J. Wesley, and two minor children, by the State Industrial Commission, and the appellants urge before this court that the relation of employer and employee did not exist between Scott Serviss and Wesley, and we are of the opinion that this contention must be held to be sound, notwithstanding the conclusions of fact of the State Industrial Commission, basing its decision on *Matter of Rheinwald v. Builders' Brick & Supply Co.* (168 App. Div. 425). In view of the discussion of this court, including the dissenting opinion, in *Matter of Bargey v. Massaro Macaroni Co.* (170 App. Div. 103), and the subsequent affirmation of the order (218 N. Y. 410), we are forced to hold that *Matter of Rheinwald v. Builders' Brick & Supply Co.*

(*supra*) must be deemed to be limited in its scope to the particular facts of that case, and that it may not be extended to cases not coming within its exact facts. Whatever may have been our individual views they must yield to the authority of the court of last resort, and it may well be that in determining what constitutes a contract of hiring or of agency the common-law rules apply, in order to keep the statute within the limits of constitutional power. While the right to contract is not without limitations, the broad constitutional provisions, which were under review in *Matter of Jacobs* (98 N. Y. 98) and the cases which have followed it, make it evident that a contract dealing with the rights of individuals must have regard to the right to "life, liberty and the pursuit of happiness," and that these contracts must find support in the law in the same manner as other contracts. The Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd.) does not cover all contracts of employment; it attempts to provide only for the hazardous occupations enumerated in the law, and when, in the constitutional amendment of 1913 (Art. 1, § 19) it is provided that "nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health, or safety of employees," it uses the word "employees" in its ordinary sense; it recognizes the subsistence of a contract of employment, which presupposes an employer capable in law of making a contract. The existence of the fact of a contract is essential to the operation of the Workmen's Compensation Law; without such a contract the statute has no operation whatever, and with it it deals only with a specified body of workers, and no attempt is made, so far as we discover, to make a different rule for determining what is a contract of employment between persons within or without the special groups. In other words, the question whether there is a contract of employment is jurisdictional, and due process of law requires that this fact shall be determined judicially; that the rules which apply to contracts generally shall be applied in determining whether the contract which must underlie the operation of the Workmen's Compensation Law exists, and this is a question of law depending upon established facts. Parties themselves may not make that a contract which the law says is not a contract (*Industrial & General Trust, Ltd., v. Tod*, 180 N. Y. 215, 225), and it is doubtful if the Legislature would have the power to make that a contract of employment between persons to engage in operating a blast furnace which would not be a contract as between persons who were to operate a farm. However this may be, the Constitution makes no definition of "employer" or "employee" different from the common-law understanding of these words; that they constitute a contractual relation, and all the provisions of the Workmen's Compensation Law start from the foundation of such a contract, and regulate the compensation to be paid for injuries growing out of such contract employment.

If we are right in this, then the jurisdictional fact of a contract of employment must be established by due process of law; by evidence which would be required to establish any other contractual relation. The question here is not whether there is evidence to show that Davis was an independent contractor, but whether Scott Serviss entered into a contract for the employment of Norman J. Wesley, and there is absolutely no competent evidence of any such contract. The Commission, in its conclusions of fact, finds that "Norman J. Wesley had been placed at work painting by Edward B. Davis.

Davis was to be paid a lump sum for painting the outside and inside of the house," and in this the Commission accept as true the testimony of Mr. Serviss. It then continues, that "the daily wage of Norman J. Wesley would have to be deducted from this lump sum. * * * The lump sum was, in an economic sense, wages and not profits. His (Davis') status was the same as a piece worker; and in reality he was a journeyman wage earner, securing employment at wages a little higher than the prevailing rate on account of tools which he possessed and which he used in his employment, and to pay for the wear and tear thereon. In placing Norman J. Wesley at painting, Edward B. Davis was the agent of Scott Serviss, their employer. Both Norman J. Wesley and Edward B. Davis were the employees of Scott Serviss within the meaning of the Workmen's Compensation Law."

But where is the evidence of agency on the part of Edward B. Davis? Concededly he had agreed to paint the house in the manner described for a lump sum, and the wages of Wesley were to be deducted from that lump sum, and Davis does not pretend that he had any authority from Serviss to hire Wesley; his testimony is that Wesley came to his house and told him that "Mr. Serviss had spoke to him in regard to helping me do some work, and he wanted to know when I was going to do it," but whether this work was the work in question does not appear from this hearsay testimony. Opposed to this is the positive sworn testimony of Mr. Serviss (accepted as true by the Commission) that he never saw the decedent, Norman J. Wesley, until he saw him at the hospital after the accident occurred, and that great pressure was brought to bear upon him to induce him to hold himself as the employer of Wesley by the attending physician. Assuming that agency could be established by the declarations of the supposed agent, there is no attempt on the part of Davis to claim that he was authorized to hire Wesley; his effort is by the vaguest kind of hearsay testimony to show that Mr. Serviss employed Wesley. The commissioner who conducted the hearing says: "I conclude to accept Serviss' version of the whole affair, that he hired Davis to do the job at \$40.00, and furnish tools, ladders, scaffold, brushes, etc., Serviss to furnish the paint, and Davis hired Wesley, and that Davis had control of the work, except as to the result," yet the Commission finds as conclusion of fact that Davis was the agent of Serviss to employ Wesley. There is not a suggestion of evidence in the case in support of the theory of agency; that is expressly negatived by Davis in his claim that Wesley was hired by Mr. Serviss, and the commissioner says, in his report, "It is true that Serviss may never have had a talk with the decedent, Wesley, or never had seen him until at the hospital as he says and did not hire him but that he was hired by Davis to go on the job. I accept that version," but at the same time it is held that the claimant is entitled to compensation because Davis was the agent of Serviss in employing Wesley. The only person living who knows whether there was an employment by Serviss testifies positively that there was not, and this is accepted as true, but by a process of reasoning, finding no support in the testimony, it is concluded that Davis, while agreeing to do the work for a lump sum of forty dollars out of which it is conceded that Wesley's pay was to come, became the agent of Serviss to employ Wesley; that while Davis put Wesley to work, and was the person in control of all of the details of the work, except as to results, he was still the agent of Serviss in the employment of Wesley. Davis knows nothing of this

alleged agency; with all of his evident anxiety to get under the protection of the statute, it never occurred to him to put forward the theory that he was acting for Serviss in the employing of Wesley—he says Wesley told him Serviss had talked with him about helping do some work, and no one accepts this as true.

If we apply the rule of *Matter of Rheinwald v. Builders' Brick & Supply Co.* (*supra*) in all its scope it does not go to the extent of holding that an employee to do a specific piece of work for a fixed sum is by reason of such employment the agent of the employer to hire such labor as he may see fit in carrying out the work. Such a contract, in the absence of other provisions, is limited to the personal service of the person employed; it is not a general agency to employ other persons to do the work, unless the person is, in fact, a subcontractor.

The finding of fact that Davis became the agent of Serviss in the employment of Wesley is wholly without evidence to support it, and may not be sustained.

The award should be reversed and the claim dismissed. All concurred. Award reversed and claim dismissed.

Two weeks after its decision in the Kackel case, the Appellate Division handed down a decision in a case involving two traveling salesmen, one of whom had been held by the Commission to have been agent of the firm that furnished their goods for employment and control of the other who was injured by the overturning of an automobile. The majority of the Commission had made award against the firm with opinion that it was the employer but Commissioner Sayer had dissented with opinion that the salesman alleged to have acted as intermediary was really the employer: *Benjamin v. Rosenberg Bros.*, S. D. R., vol. 13, p. 525, Bul., vol. 2, pp. 126, 147, Mar. 13, 1917. The firm consisted of three brothers and the salesman said to have been the intermediary was a fourth brother not a member of it. He was not insured under the compensation law while the firm was. The firm acknowledged itself to have been the employer and declined to join the insurance carrier in appeal from the award. These and other circumstances of the case tended to arouse suspicions and to discredit the evidence. Upon appeal, a brief majority opinion of the Appellate Division, written by Justice Kellogg, held that the court could do nothing else than affirm the award since the law made the Commission's decisions final as to credibility of witnesses; but a minority opinion, written by Justice Woodward, held that the court had the right of review, attacked the evidence of agency, and presented views of contract between employer and

employee and its relation to the Workmen's Compensation Law similar to those he had expressed in the majority opinion in the Kackel case. The majority and minority opinions are as follows:

BENJAMIN V. ROSENBERG BROS., 180 App. Div. 234, Nov. 28, 1917.

KELLOGG, P. J.: The Commission has found that the claimant was an employee of Rosenberg Brothers and the testimony, if believed, clearly shows that such was the fact. In my judgment the evidence is not convincing; the transaction is suspicious. It seems that the claimant and his witnesses were trying to swear a liability upon the insurance company when none in fact existed, and if this were a case where we could review the facts I would vote to reverse the award. The Commission saw the witnesses and we have not seen them. The mandate of the law that we cannot review the determination of the Commission on a finding of fact, if there is evidence to sustain it, precludes a further consideration of the case. The only question involved in the case is the credibility of the witnesses. The words of their evidence fully comply with the law and cover the situation. The credibility of a witness is a question of fact and rests with the trier of the facts, and we cannot reverse the award because we believe the testimony is untrue. Under the restraint of section 20 of the Workmen's Compensation Law I favor an affirmance.

All concurred, except WOODWARD, J., dissenting in opinion, in which SEWELL, J., concurred.

WOODWARD, J. (dissenting): An award has been made to the claimant, Philip J. Benjamin, for injuries received on June 19, 1916, and the questions presented upon this appeal relate to the underlying problem of whether the claimant was an employee of the firm of Rosenberg Brothers, who were insured by the United States Casualty Company, which latter company contests the liability. It is claimed on the part of the insurance company that the evidence does not disclose that the claimant was an employee of Rosenberg Brothers, and the questions which it presents upon this appeal are (1) whether when the evidence as to the relation of master and servant between a claimant and a carrier's insured is both uncertain on the oral testimony and impeached by business records and the conduct of the parties, an award made by the State Industrial Commission on such evidence, coupled with a ruling that the claim comes within the Workmen's Compensation Law, should be allowed to stand; and (2) whether a finding that a claimant is an employee of a carrier's insured is one of fact precluding an appeal by the carrier to this court.

The Workmen's Compensation Law was concededly designed to regulate the relations of employer and employee; it was to take the place of the common-law rules in respect to the relations of master and servant, and proceeds upon the theory that the primary relation exists. In other words, until the fact of the relation of employer and employee is established, the statute has no operation whatever; it does not assume to deal with any other relation in life. Section 2 provides that the compensation "shall be payable for injuries sustained or death incurred by employees engaged in the following hazardous employments," and section 3 defines "employee" as meaning "a person engaged in one of the occupations enumerated in section two or who is in the service of an employer whose principal business is that of carrying on or

conducting a hazardous employment upon the premises," etc., and an "employer" is "a person . . . employing workmen in hazardous employments," while "employment" "includes employment only in a trade, business or occupation carried on by the employer for pecuniary gain." (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], §§ 2, 3, as amd. by Laws of 1916, chap. 622.) There must be an employer and an employee; there must be a contract relation existing, and then whatever occurs is regulated by the Workmen's Compensation Law, in so far as the compensation for injuries is concerned. We do not, however, find any provision of the act which permits the Commission to presume that this relation exists, or which permits a finding of such relation without competent evidence to support the finding. The provision of section 21 of the act that "In any proceeding for the enforcement of a claim for compensation under this chapter, it shall be presumed in the absence of substantial evidence to the contrary 1. That the claim comes within the provisions of this chapter; 2. That sufficient notice thereof was given," does not meet the requirement. That relates only to the claim, and there can be no legal claim upon the insured or his carrier unless the relation of employer and employee existed at the time of the accident; that is a condition precedent to any right to make a claim which is presumed to be within the requirements of the statute. That is a jurisdictional fact upon which the power of the Commission to act at all depends, and while it is not to be doubted that the Commission has the power primarily to determine that question, we think it may not be determined as a conclusion of fact, but must depend upon findings of fact which support the conclusion of law that the relation exists. When it is once shown that the relation of master and servant exists, it may be presumed that the accident happened in the course of the employment, and that the employment was of the hazardous character defined in the act, and that the claim "comes within the provisions of this chapter." But whether the relation exists is a mixed question of fact and law; it is a conclusion of law growing out of the established facts, and this conclusion of law is one which may be reviewed by this court.

It is not every award or decision of the Commission which is made final and conclusive upon all questions, but only those which are "within its jurisdiction" (§ 23, as amd. by Laws of 1916, chap. 622), and no question is within the jurisdiction of the Commission until it is determined, upon competent evidence, that the relation of employer and employee exists — until it is shown that there is a contract of employment. These facts, upon which the operation of the statute depends, should be found by the Commission, not as a process of reasoning satisfactory to the Commission, but as fixed and definite facts upon which a conclusion of law may properly rest. Whatever of laxness may be permitted in the matter of determining the claim and the rights of the claimant, we think it should be held upon the jurisdictional question of an existing contract of employment, that the Commission should find the facts from which the court may properly determine that the relation exists, and these facts should find some reasonable support in the evidence, for the contract between the insurance carrier and the insured is based upon the existence of the relation of employer and employee, and the insurance carrier should be entitled to competent evidence to show that the case is brought within the provisions of its contract.

Tried by this standard, we think the conclusions of fact made by the Commission fail to show that the relation of master and servant existed between Philip J. Benjamin and Rosenberg Brothers at the time of this accident. We do not find any evidence that the firm of Rosenberg Brothers employed a salesman, Philip Rosenberg, a brother of the members of the firm. The only fair inference from the evidence is that Philip Rosenberg took goods from his brothers' firm and peddled them about the country, and that whatever profit he made upon the goods belonged to him, while he was credited with the goods which he returned. The fact that Philip Rosenberg kept an expense account, and that he was reimbursed the amount of his expenses, if this was a fact, does not show that he was an employee or agent of Rosenberg Brothers in the hiring of the claimant; it is merely an unexplained detail of the arrangement between Philip Rosenberg and his brothers, who merely sold goods to him and permitted him to make a profit upon the same over and above the cost of the goods, plus the alleged expenses of Philip Rosenberg. The Commission, in its conclusions of fact, tells us, not that Rosenberg Brothers entered into a contract of hiring with Benjamin, but that prior to a given date "it was suggested by the firm to Philip Rosenberg that he could probably sell more goods if he had some one to work with him, and Philip Benjamin was told by the firm to see Philip Rosenberg and if possible to come to some arrangement for working with him. Philip Rosenberg thereupon met Benjamin and agreed to take him on his route and pay him twenty-five dollars per week and expenses. This arrangement was to be tried out for a couple of weeks, and then, if satisfactory, to be continued. The expense of the salary and traveling expense of Benjamin was in turn charged by Philip Rosenberg against Rosenberg Brothers and allowed by them in the same manner as other expenses. The contract of employment herein was made in the State of New York." But there is no finding that the contract of employment was made within the State of New York by Rosenberg Brothers. On the contrary, it appears that the contract was made by Philip Rosenberg, not at the command of the firm, but at its suggestion. Rosenberg Brothers did not assume to say to Philip Rosenberg that he must employ Benjamin; they merely suggested to each of the parties that it might be an advantageous arrangement, and left it with them to determine whether the suggestion should be carried out. It was Philip Rosenberg who determined whether he would employ Benjamin and the amount of his compensation, and the fact, if it be a fact, that he subsequently received reimbursement for this additional expense from Rosenberg Brothers, did not make a contract of employment with that firm, which does not appear to have had any control over the employment, its terms, or its duration. In other words, Philip Rosenberg was the only man who appears to have had any power to employ or discharge Benjamin; he was the only one who appears to have had anything to do with the determination of these matters, or with the amount of the compensation, and in the absence of any evidence to show that he acted as the agent of Rosenberg Brothers in the employment of Benjamin we are unable to discover any ground for holding the insurance carrier for injuries sustained by Benjamin while in the employ of Philip Rosenberg. There were several members of the firm of Rosenberg Brothers; they appear to have known Benjamin. They had an opportunity to employ him if they saw fit, but they contented themselves merely with

advising Benjamin to see Philip Rosenberg and to make an arrangement with him if possible, and the latter appears to have entered into a contract of employment with Benjamin. The insurance carrier never contracted to become responsible for injuries to the employees of Philip Rosenberg, and its liabilities should not be increased by any strained construction of the statute, nor by any mere sophistical reasoning. If Rosenberg Brothers actually employed Benjamin the proof ought easily to be made to appear, as they seem anxious to relieve Philip Rosenberg from his liability for the injuries sustained by Benjamin. A jurisdictional fact of this importance, going to the very essence of the contract between Rosenberg Brothers and the insurance carrier, ought not to rest on mere conjecture; the conclusion of fact should be based upon definitely established facts, and these the Commission has failed to display in its record.

Without going into an analysis of the evidence, it is enough for the purposes of this appeal that the Commission has not attempted to find the facts which the courts have repeatedly held to be essential to the establishing of a contract of hiring. It has nowhere found that the contract of employment was made by and between Rosenberg Brothers and Philip J. Benjamin, or that Rosenberg Brothers had any control over the hiring or discharging of this man, or the amount of his compensation or the duration of his employment. These all appear to have been under the control of Philip Rosenberg, who is not shown to have been the agent of Rosenberg Brothers for this or any other purpose.

When the Commission has been able to discover in the evidence grounds for finding these essential facts, and has found them, it will be time enough to inquire whether the evidence supports such findings. In the meantime we are of the opinion that the award should be reversed, and the matter returned to the Commission for such further action as it may deem proper in the premises, consistently with this opinion. SEWELL, J., concurred.

Award affirmed.

Upon further appeal, the Court of Appeals noted direct testimony of a member of the Rosenberg firm and the claimant, Benjamin, as to the existence of the relation of employer and employee and affirmed the Appellate Division's order without opinion: 223 N. Y. Rep. 569, Mar. 19, 1918.

The Appellate Division, a year after the decisions in the Kackel and Benjamin cases, has applied its opinion in the Kackel case to a timber-cutting case in which a contractor, having undertaken at so much per cord to cut a tract of standing timber, subdivided it among gangs, as in the timber-cutting cases of Claremont, Peake, Sullivan and See presented above. In reversing an award to the dependents of a member of one of the gangs in this later case, the court says that all the evidence tends to show that the intermediary was an independent contractor and that the

injured man was not his partner but his employee, the inference being that such intermediary was responsible for compensation. The per curiam opinion, from which two justices dissent, is as follows:

TSANGOURNOS v. SMITH, 183 App. Div. 751, July 1, 1918.

PER CURIAM: John J. Smith made a contract with the Tunnessassa Lumber Company to cut certain standing timber into cords and to load the same upon the cars at or near Tunnessassa, Cattaraugus county. The lumber company agreed to pay Smith one dollar and thirty-five cents per cord for this wood, and Smith subcontracted this job to several other men, who in turn hired laborers. Among these subcontractors was one Peter Raptas, who was to be paid at the rate of one dollar and twenty cents per cord for the portion of the wood cut under his direction, and was to have a camp furnished by Smith for his workmen. Raptas hired James Stagurnos as one of his gang, and while the latter was at work he was struck and killed by a falling tree, and the State Industrial Commission has made an award to his dependents, not against Raptas, but against Smith and his insurance carrier. The latter appeal to this court from the award made.

An examination of the evidence fails to disclose any facts upon which this award against Smith can rest, because there is an entire failure of competent evidence to show that Smith was the employer of the deceased. All of the competent evidence in the case tends to show that Raptas was an independent contractor, and that the decedent was his employee; but the State Industrial Commission appears to have concluded that Raptas was insolvent and without insurance protection, and reached the conclusion that Smith, who had insurance upon his employees engaged in hauling the wood, was the employer.

This court, in *Kackel v. Serviss* (180 App. Div. 54), laid down the rule which must prevail until overruled, that the jurisdictional fact of a contract of employment must be established by due process of law; by evidence which would be required to establish any other contractual relation, and that in the absence of such evidence no foundation was laid for the operation of the Workmen's Compensation Law. In that case we said: "The question here is not whether there is evidence to show that Davis was an independent contractor, but whether Scott Serviss entered into a contract for the employment of Norman J. Wesley, and there is absolutely no competent evidence of any such contract." That is the situation in the case at bar; there is no evidence whatever that Smith ever entered into a contract for the employment of Stagurnos, and without this there is nothing for the Workmen's Compensation Law to operate upon, and the determination of the State Industrial Commission, not having support in the evidence, is without effect. The award appealed from should be reversed. All concurred, except JOHN M. KELLOGG, P. J., and LYON, J., dissenting. Award reversed and claim dismissed.

The question of agency for the hiring of employees sometimes figures in teaming and trucking cases. A wholesale company hired

trucks and drivers from a trucking company. The latter picked up helpers for the unloading at the docks whom it paid with funds furnished by or charged to the former. The trucking company took no profit from this transaction. A box fell upon a helper and broke his leg. The Commission held that the trucking company was not the employer of the injured man but was merely the agent of the wholesale company for employment of him and made award against the wholesale company. The Appellate Division affirmed the award unanimously and without opinion: 179 App. Div. 963, Sept. 13, 1917. The Commission's ruling was based upon an opinion of Commissioner Lyon, as follows:

VANCE v. FRAZEE & Co., S. D. R., vol. 12, p. 568, Bul., vol. 2, p. 103, Feb. 6, 1917.

LYON, Commissioner: Everybody connected with the proceeding admits that Vance is entitled to compensation. The only question to be determined is, which one of the insurance carriers should, under the circumstances, be held liable to pay. Attorneys for both insurance carriers have submitted briefs in which they argue with a good deal of force their sides of the controversy and cite numerous decisions tending to sustain their views. If the case were to be governed by the master and servant rules which control in negligence cases in actions at common law, it might be necessary to go into these arguments and examine the cases with a great deal of care. I am inclined, however, to accept the statement of the Court of Appeals in the case of Dale v. Sanders at its face value and recommend that this case be decided without going too minutely into the legal propositions advanced by the two insurance carriers and supported by these citations of authorities. The court in that case said, among other things, the following: "In negligence cases the question often arises as to the proper application of the doctrine of *respondet superior* when an employee whose negligence causes an accident is at the time in the general pay and service of one and under the control and direction of another. The latter has been held liable as a special employer when it could be said that the employee was his servant at the time of the accident in a sense and degree which served to impose liability for his negligence. (*Higgins v. Western Union Telegraph Co.*, 156 N. Y. 75; *Howard v. Ludwig*, 171 N. Y. 507.) The question who is the master, also rises at times in our employees' actions for negligent injuries. But this is not a question of responsibility for negligent injury inflicted upon strangers nor upon an employee. The doctrine of *respondet superior* has no application here nor are the rules of employer's liability for negligences controlling."

It seems to me clear that under the Compensation Law, at least, Frazee & Company must be held to have been the claimant's employer at the time the accident occurred. Had De Sapia Company been paid a larger rate per day or per week for doing the trucking to cover the payment of help for loading and unloading, the question might be different, but clearly in the present instance this was not done, for it is undisputed that Frazee & Company put into De Sapia's hands the exact sum with which to pay the claimant in this case. It is as though Frazee & Company had said to De

Sapio, "We stand ready to furnish you with the necessary additional help with which to handle the goods when they reach the pier. It would be perfectly possible for us to send a man with you to the pier, but it is much more convenient for our purposes to have a man picked up at the pier to assist you. Here is the money to pay such a man and we delegate you as our agent to secure such help and make the payment." It is of course possible to make a plausible argument in favor of the statement that Vance was the employee of De Sapio Company, if we attempt to find our way through the haze of decisions and refinements in common law actions for negligence, but laying these aside and looking directly at the purpose which the parties had in view at the time when the accident arose, it seems to me perfectly clear and logical that the party whose goods were being moved and who ultimately paid the money which the injured man received for his wages for the specific thing which the man was doing, is the party which ought to be held to be the real employer, the doctrine of agency being invoked to make the necessary connection between the employer and employee and, I therefore advise an award against Frazee & Company and its insurance carrier.

A driver for a truck owner picked up a longshoreman on the docks to help with his loading; the longshoreman hurt his hand with a skid; the Commission held that the driver had been agent of the truck owner for the employing of the longshoreman and made award to the longshoreman against the truck owner. The Appellate Division affirmed the award unanimously and without opinion: *Conley v. Hickey*, Case No. 6547, Apr. 26, 1917; 181 App. Div. 911, Nov. 14, 1917.

A scrap iron cutter lost an eye while helping to demolish a building; the majority of the Commission found that he had been hired by the foreman of the company that had contracted to do the dismantling and made award against the company; Commissioners Lyon and Wiard dissented upon opinion of Commissioner Lyon that the alleged foreman had been an independent contractor; the Appellate Division affirmed the award unanimously and without opinion: *Webb v. Joseph & Bros. Co.*, Bul., vol. 2, p. 166, May 22, 1917; 181 App. Div. 910, Nov. 14, 1917.

The Commission held a son who failed to disclose agency for his father liable for compensation: *Blank v. Tumminelli*, S. D. R., vol. 20, p. —, Apr. 30, 1919.

B. *General employer versus special employer.*—The cases presented above have turned upon the question whether one of the parties in interest has had the status of employee or of independent contractor. A second and distinct class of cases is free

from such question of employee or independent contractor but involves the fixing of responsibility for compensation upon one of two or more employers. Usually one of the employers is a general employer and another is a special employer. An employer called the general employer hires or lends his employee to an employer, called the special employer, and the employee, thus having two employers, is injured while working under the special employer. A familiar illustration is the hiring of a driver and team by one employer from another. Court decisions have determined that the employee injured under such circumstances has a valid claim against either the general employer or the special employer and that the courts will not disturb findings of the Commission determinative of the responsibility of the one or the other of them. The leading New York case to such effect is *Dale v. Saunders Bros.*, in which compensation was awarded against the general employer. The texts of the opinions of the Appellate Division and the Court of Appeals in *Dale v. Saunders Bros.*, as well as notices of earlier cases, have been presented in Bulletin 81, pages 340-347. Six or eight months after these decisions the Appellate Division unanimously handed down an opinion affirming an award against a special employer, the injured employee in this case being also named Dale. The text of the opinion is as follows:

DALE v. HUAL CONSTRUCTION CO., 175 App. Div. 284, Nov. 15, 1916.

KELLOGG, P. J.: The question is whether the injured person was in the employ of the appellant Hual Construction Company at the time of the accident. He was in the regular employ of Semon Lippert in driving his team, and had been in that employ for some time, receiving therefor from him one dollar a day and board and lodging. The construction company required the services of teams and drivers in conducting its business, but having no teams of its own, it contracted with Huntley & McGorray, two of its officials, to furnish it the necessary teams at \$6.50 a day. They did not have enough teams, and secured additional teams of one Garrity, who was in the teaming business, for which they paid him six dollars a day. Garrity, not having enough teams, secured additional teams of Semon Lippert, for which Lippert received from Garrity six dollars per day. Dale, the driver of Lippert's team, while hauling sand for the company was under the control and direction of its foreman. The company had no authority to discharge Dale, but evidently had authority to refuse to continue him and the team in its service longer.

I think the Commission was justified in determining, under the circumstances, that Dale was in the employment of the construction company at the time of the accident. Under substantially similar facts we held in

Matter of Gimber v. Kane Co. (171 App. Div. 958), on the authority of *Miller v. North Hudson Contracting Co.* (166 App. Div. 348, affirming the award in 2 State Dept. Rep. [Off.] 475), that the special employer was liable under the act. In *Matter of Dale v. Saunders Bros.* (171 App. Div. 528; affd., 218 N. Y. 59) we held that under like circumstances the owner of the team was liable as employer, and, referring to the *Gimber* case, assumed that in such cases either the general or special employer might be liable. The *Dale* case was affirmed by the Court of Appeals, thus establishing the liability of the general employer. *Hartell v. Simonson & Son Co.* (218 N. Y. 345) sustains the conclusion in the *Gimber* case, that the special employer may be required to make compensation in such a case.

The award should, therefore, be affirmed. Award unanimously affirmed.

The Appellate Division affirmed an award against a special employer unanimously and without opinion in the carpentry case of *Hadden v. Stanton*, S. D. R., vol. 9, p. 294, June 5, 1916; 177 App. Div. 938, Mar. 7, 1917. Hadden had been loaned to Stanton by the firm of Hill & Son. As noted above, two other parties figured in this case, one as general contractor and the other as owner, making five parties in all.

In two decisions of July 11, 1917, the Court of Appeals affirmed orders of the Appellate Division which were without opinion and reaffirmed its former decisions upon the subject of general employer versus special employer. One of these decisions is based upon an opinion in which the court says that the injured employee may look to either the general employer or the special employer, or to both, for compensation and that the Commission "may make such an award as the facts in the particular case may justify." The full text of the opinion is as follows:

DE NOYER v. CAVANAUGH, 221 N. Y. 273, July 11, 1917.

POUND, J.: On July 21, 1916, Joseph E. De Noyer was employed as driver of a truck by D. B. Cavanaugh, who was in the trucking business at 21st West Jefferson street, Syracuse, N. Y. The Crown Oil Company was engaged in the business of selling oil and gasoline. Cavanaugh made an arrangement with it by which he was to furnish it a horse and driver to be used in connection with a tank wagon owned by the company for the delivery of oil and gasoline, and De Noyer was employed by Cavanaugh for the purpose. While he was engaged in delivering a can of gasoline from the gasoline truck of Crown Oil Company to a store at 710 Grape street, Syracuse, N. Y., and while he was carrying the can of gasoline into the store, the gasoline exploded and his clothes took fire, causing his death. Award of compensation was made against D. B. Cavanaugh as employer.

This case is on all fours with *Matter of Dale v. Saunders Bros.* (218 N. Y. 59), in which we held that the general employer who carries on a hazardous employment is liable under the Workmen's Compensation Law for injuries

sustained or death incurred by his employees, arising out of and in the course of their employment, although at the time they were working under the direction of a special employer.

We are asked to reconcile our decision in that case with our decision without opinion in *Matter of Nolan v. Cranford Co.* (171 App. Div. 959; 219 N. Y. 581) wherein an award against the special employer was upheld on similar facts except that the general employer had but one employee and was himself an employee of the special employer and was not carrying on the business of teaming except in the sense that he furnished a truck and team of horses with a driver to the special employer. It is not necessary to distinguish the cases. They are not in conflict. Where a horse and driver have been let by a general employer into the service of another, the driver is subject to the control and, therefore, is the agent of his general employer as to the care and management of the horse. (*Pigeon's Case*, 216 Mass. 51.) Even where no property of the general employer is intrusted to the employee to be used in the special employment, the general employer pays the compensation, may direct the employee when to go to work and may discharge him for refusal to do the work of the special employer. The industrial commission, therefore, has full power to make an award against the general employer. It does not follow that by the application of this rule the special employer is not to be held in any case. The fact that a workman has a general and a special employer is not inconsistent with the relation of employer and employee between both of them and himself. If the men are under the exclusive control of the special employer in the performance of work which is a part of his business, they are, for the time being, his employees. (*Comerford's Case*, 224 Mass. 571, 573.) Thus at one and the same time they are generally the employees of the general employer and specially the employees of the special employer. As they may under the common law of master and servant look to the former for their wages and to the latter for damages for negligent injuries, so under the Workmen's Compensation Law they may, so far as its provisions are applicable, look to the one or to the other or to both for compensation for injuries due to occupational hazards (Workmen's Compensation Law [Consol. Laws, chap. 67], § 3, subds. 3, 4), and the industrial commission may make such an award as the facts in the particular case may justify. Cases like *Gibley v. State* (89 Conn. 682) and *Rongo v. Waddington & Sons* (87 N. J. Law, 396) depend upon the special meaning given to the word "employee" as defined by the statutes construed and are inapplicable here. The order should be affirmed, with costs.

CHASE, COLLIN, CARDOZO, McLAUGHLIN, CRANE and ANDREWS, JJ., concur. Order affirmed.

The other decision relates to a case in which the Saratoga County Tuberculosis Hospital had loaned a laborer to a contractor who was drilling a well upon its grounds; compensation had been awarded against the well-drilling contractor for injuries incurred by the loaned employee; the Court of Appeals affirmed the award upon authority of its contemporary decision in the De Noyer case: *Kucharuk v. McQueen*, Claim Nos. 38627 and 17895,

June 15, 1916; 176 App. Div. 923, Dec. 29, 1916; 221 N. Y. Rep. 607, July 11, 1917.

On October 23, 1917, the Court of Appeals affirmed an award against a chemical company in favor of one of the members of a partnership firm consisting of a father and three sons who were operating a garage business; the Appellate Division had held the chemical company, as special employer, responsible for compensation to the garage man's beneficiaries upon authority of its own decision in *Dale v. Hual Construction Co.* and of the decisions of the Court of Appeals in *Dale v. Saunders Bros.* and *Hartell v. Simonson & Son Co.*, the last named case being one in which a special employer had been held liable for the negligence of an employee procured by him from a general employer (218 N. Y. 345); the decisions of the courts were without opinion; full description of the relations of the parties is given in the Commission's findings: *Wood v. Tupper Lake Chemical Co.*, S. D. R., vol. 9, p. 372, July 20, 1916; 178 App. Div. 942, May 2, 1917; 221 N. Y. Rep. 660, Oct. 23, 1917.

An employer in the trucking business sent one of his drivers with a team to work with a contracting company engaged upon extensive public works. While hauling for the company, the driver was hit and injured by a piece of timber that was being handled by other persons who were employees of the company. The driver brought an action for negligence against the company as a third party. In trial court, a jury gave him \$5,000 damages but the trial court set aside the verdict and dismissed his complaint upon the ground that the relation of employer and employee existed between the company and him and that, therefore, his case was covered exclusively by the Workmen's Compensation Law. Upon appeal, the Appellate Division in the Second Department sustained the lower court's action with opinion dealing at length with the theory of employment and citing the *Dale*, *De Noyer* and *Nolan* general and special employer decisions of the Appellate Division in the Third Department and the Court of Appeals, compensation cases appealed from the Commission. Text of the opinion is as follows:

LEE V. CRANFORD CO., 182 App. Div. 191, Feb. 21, 1918.

THOMAS, J.: If the plaintiff, injured by defendant's servants, has a remedy against the defendant under the Workmen's Compensation Law, this

action may not be sustained. The jury found that the plaintiff was not in defendant's employ; the court decided that he was, and dismissed the complaint. The facts are few and simple, whatever the inferences that should be drawn. Muldoon, owning horses, trucks, and hiring drivers, from time to time made agreements with the defendant and others for the use of the outfits at agreed prices per day. The defendant was engaged in an undertaking that required the use of many teams and drivers in addition to its own horses and drivers. Besides Muldoon, there were ten or fifteen other persons with whom defendant made similar arrangements. At the outstart, defendant's superintendent told Muldoon that he needed seven or eight teams for the next day and told him where to send them, and the teams came and were distributed upon the work, and Muldoon sent his bill weekly. The teams were used in such work as the defendant's servants directed. Plaintiff had, on April 17, 1915, been employed by Muldoon for over two years, and had "been off and on with Cranford before the accident" for more than a month. On the day in question he was directed by defendant's servant to haul a load of lumber already loaded on one of defendant's trucks, to which he transferred his horses. After the lumber had been drawn to the place of delivery, and while plaintiff was standing by the horses pending the unloading, whereupon he would return to defendant's work, he was hit by a piece of timber negligently handled by defendant's servants. The driver and the team during the time for which defendant made compensation, were entirely devoted to the service of transportation. The plaintiff's hand was not otherwise put to the work. The horses merely drew loads for the defendant, usually in Muldoon's wagons, exceptionally, as in the present case, in defendant's wagon. Defendant's superintendent testified: "The foreman at the shaft gives them instructions what to do. * * * Q. He tells them where to take the stuff, or what stuff to take? A. Tells them to take a load of dirt and dump it, or take a load of lumber to the different shafts. Q. Wherever it is wanted? A. Yes, sir. * * * If a driver came there and got drunk on the job, we would lay him off. If we did not lay him off, we would call up Muldoon and tell him to send another driver up, or we would send his team back. If the driver would not do what we told him, we would send him home." It is due to the learned counsel for the appellant that notice should be taken of some views presented by him, although they may not influence the present decision. When plaintiff entered Muldoon's employment, presumably there were terms stipulated, and the law implied others not mentioned, among them that the master would use legal care to furnish plaintiff with reasonably safe wagons and horses, and so maintain them; that he would use the required care to employ properly competent fellow-servants; that he would do his duty respecting the provisions of law enacted to throw safeguards about the plaintiff. It is unnecessary to enlarge on the mutual implied duties of masters and servants or to consider the servant's assumption of the risk of his employment, and his duty to use care lest his own negligence contribute to his injury. Whatever the obligations of the plaintiff and his employer Muldoon, they existed when plaintiff left his master's premises on the morning in question, and attended the plaintiff at least until he reached the defendant's place of work. It is necessary to take a survey of that. The defendant was a contractor carrying forward within the activities of a great city a public work of much range and diversity. To it

were summoned for participation here and there, and appointed to varied occupations, men in direct employment of the defendant, and there were supplied the numerous facilities and appliances that are assembled for the complex uses of such a project. The men immediately employed, and the defendant, had the relation of master and servants, which imposed various and ever-shifting duties, and, as to third persons, each man within the scope of his employment was the defendant itself. Arrived also at such place was the plaintiff, a half dozen or more of his master's teams and drivers, and similar equipment, vehicles and men from ten to fifteen other trucking establishments. By this system all of these units, foreign to immediate hiring, reported to defendant's agents and received orders committing them to share in the work, so that plaintiff and every other driver might come in contact, hurtful or otherwise, with each and all the others, as well with the difficulties and perils of the work existing in the nature of it, or in the manner of its execution, as well, also, with the instrumentalities that the defendant had outlayed to meet the necessities and exigencies. Every workman that defendant *directly* employed became its servant. Every tool, every machine, every structure that defendant supplied, became a part of the plant. Towards all that made up the ensemble, defendant owed a duty. In such case defendant's wagons and horses must be selected with care and so maintained; every mechanical contrivance must conform to legal requirements at least so far as due care will permit. Everything that makes for a safe place to work must receive similar attention. Every servant must be selected with due regard for his competency. Every one exercising acts of superintendence may involve the defendant in liability to his employees. Every statute that regulates the relation of master and workman comes into play. Every culpable and injurious act of a servant, done in the course of his employment, makes the master liable, if the master doing the act directly would have been liable. Did plaintiff, arriving as Muldoon's servant, become defendant's servant upon entry into association in the work? Did Muldoon's horses, harness and truck become a part of defendant's plant? Look at it first as between plaintiff and defendant and defendant's servants, and then as between defendant and third persons. If plaintiff became defendant's servant, all of defendant's immediate servants, and all the teamsters present through arrangements with trucking firms, became fellow-servants. Did plaintiff take the risk of them, and did they each and all assume the risk of him, so far as the law imposes such risk? Did the master impliedly agree with each and every man connected with the affair that he had selected plaintiff as his servant and that he had used due care in his selection and that he would continue to use care? And did defendant impliedly make a similar agreement with plaintiff as to every man in the works? Did defendant agree to the care required by law as between master and servant as to his works, ways and plant, and to all that the labor laws demand? Did Muldoon's servant, sent there "off and on," impliedly agree that he would release defendant for any liability for injury through the negligence of its servants or agents, or itself, except so far as he was entitled to recover as defendant's servant? In short, did defendant become the master and plaintiff its man? The fact is that defendant did not use any care in hiring Muldoon's team, or man. It did not know whether any part of the equipment was fit for the work beyond its knowledge of the reliability of Muldoon. It did

not intend to present plaintiff as its servant and did not do so. It did not agree as to its other servants to accept Muldoon's team and the numerous other teams as its responsibilities. Plaintiff had no thought that he was becoming defendant's servant. Plaintiff, Muldoon's horses and truck were hired by agreement with their owner to draw material, put on and off the wagon by defendant's servants. Plaintiff went where his master sent him. To refuse was to be discharged. It is not a fair inference of law or fact that plaintiff impliedly agreed that the members of the great company of workmen were his fellow-servants, or that towards the work that involved tearing down and building up he stood in the relation of a servant to defendant as if he had been handed over from hand to hand like a commodity. But go further. If a third person were injured by plaintiff's negligence, would the defendant have been liable? It would have been so liable within the decision of this court in *Kellogg v. Church Charity Foundation* (135 App. Div. 839). But that decision was reversed by the Court of Appeals. In the present case it appears that the load was thrown off at Flatbush. In the course of it defendant's men let a timber hit plaintiff. Was plaintiff then defendant's servant? Shall it be said that he was not defendant's servant as to an innocent third person, but was his servant as to mere unloading? If in the *Kellogg* case the driver in going around the curve had thrown out the hospital doctor, would the plaintiff then have become the servant of the hospital? If in lifting something to the ambulance, the ambulance attendants had injured the ambulance driver, would all have become fellow-servants of the hospital? If in driving to Flatbush the plaintiff had negligently injured the two men with him, would plaintiff as to them have been defendant's servant? Is a driver defendant's servant accordingly as his negligence injures defendant's servant, or a third person? The opinion in the *Kellogg Case* (203 N. Y. 191, 195), after referring to certain facts, says: "But, as Mr. Justice RICH points out in the able dissenting opinion below, when the case was closed a very different state of facts was presented. 'The *prima facie* case had been met and overcome by undisputed evidence, which the court was not at liberty to disregard, conclusively establishing that the defendant did not own the horse drawing its ambulance, did not employ or pay the driver, and did not possess the power or right to discharge him.'" Each one of such facts appears in the present case, and if they are decisive plaintiff was not defendant's servant as to this accident. Indeed, the facts of that case and the present one are beyond distinguishment, except as to the nature and quantities of work done by Muldoon's team. In each case a man let teams to draw loads in the defendant's business, and the only order given him was to go to one place or another to receive and to deliver his load. In the *Kellogg* case it was decided by the Court of Appeals that the relation of master and servant did not exist between the driver and the defendant. But it was said "that cases may arise in which there is such active interference by the hirer with the management of the team as to render him responsible for any negligent injury which may be inflicted upon a stranger by reason of such mismanagement. (*Donovan v. Laing, etc., Construction Syndicate*, L. R. [1 Q. B. D. 1893] 629.) In that event, however, as was pointed out by Lord Justice Bowen in the case cited, the hirer becomes liable 'not as a master, but as the procurer and cause of the wrongful act complained of.'" The opinion then distinguishes *Baldwin*

v. *Abraham* (57 App. Div. 67; affd., 171 N. Y. 677), where the "testimony indicated that the defendants exercised some control over the delivery of their goods" by the hired wagons, and *Howard v. Ludwig* (171 N. Y. 507), where the driver reported each morning with the team at the defendants' place of business, there received a list of deliveries from the defendants' clerk, loaded the goods, delivered them to various customers, and thereupon returned to the stable of the contracting truckman, and where it was held such arrangement and practice created the relation of master and servant between him and the defendants so that they became liable for his negligent acts. The opinion in the *Kellogg* case proceeds: "The distinction between such cases and one like the present is well pointed out by Mr. Justice MOODY in *Standard Oil Co. v. Anderson* (212 U. S. 215). Where one furnishes another with men to do work for him and places them under his exclusive control in its performance those men become *pro hac vice* the servants of him to whom they are furnished and he is responsible for their negligence because the work is his work and they are his workmen for the time being. On the other hand, where work is undertaken to be performed by the person who furnishes the workmen through servants of his selection and he retains direction and control he remains responsible for any negligence on their part in the conduct of the work." Mr. Justice MILLER in the *Kellogg Case* (135 App. Div. 844) wrote: "The maxim *respondet superior* is applied to make men accountable for the conduct of their own affairs, and to insure such accountability the master is not permitted to deny that the servant had authority." The Court of Appeals considered that the facts did not bring the case within the maxim. In *Schmedes v. Deffaa* (153 App. Div. 819) Mr. Justice MILLER in a dissenting opinion restated the proposition: "Every man should be held answerable for the conduct of his own business, and for the agencies employed by him in this business whether animate or inanimate," and he brought the test to the inquiry whether the servant was doing the defendant's work at the time of the accident. In the *Schmedes* case a livery stable keeper undertook to fill an order from an undertaker for carriages, and, not having sufficient conveyances of his own, procured one with a driver from another stablekeeper, who directed him to report and to take the orders of the defendant. The defendant sent him to the undertaker, who directed him to go to the house where the funeral was to be held and then proceed to the cemetery. It was decided by the Appellate Division that the defendant was not liable for the negligence of the driver under the doctrine of *respondet superior*, but the judgment of that court was reversed upon the opinion of Mr. Justice MILLER (214 N. Y. 675). The record does not show the relation of the person injured to the team, but I gather that he was a third person. It was not urged that the undertaker was liable, but the question was between the owner of the team and the defendant, who had agreed to make provision for the funeral. In the opinion in the Appellate Division it was said: "It was stipulated at the trial that the horses, carriage and driver came from Naughton [the owner of the team], and the evidence showed that all defendant had to do with them was to hire them from Naughton and immediately let them to Herlich [the undertaker]. Except as the driver had been directed to go where defendant ordered, the latter had no control over the driver and no authority to employ or discharge him." By that decision it appears that if one person hire a team

and carriage and send it to an undertaker to be used at a funeral, the driver becomes *pro hac vice* the servant of the hirer, at least as to third persons. The case last cited closed the inquiry whether Lee, the present plaintiff, should be regarded as the defendant's servant as to one injured by his negligence while driving the team. But was he defendant's servant as between plaintiff and the servants who injured him? I do not extend the discussion in that regard. In *Matter of Dale v. Saunders Brothers* (171 App. Div. 528) a proprietor of a sand bank hired a team and teamster from a manufacturer of brick to draw sand from the pit, and while the teamster was loading the wagon the sand bank fell. It was decided that the driver was entitled to the protection of the Workmen's Compensation Law, and that either the proprietor of the sand pit, the special employer, or the brickmaker, the general employer, could be held liable. It appeared that the teamster was loading sand in the wagon for the purpose of carting it when he was injured, but the court said he was operating the wagon just as much as if he had been driving on the road. In that particular case Saunders Brothers, the general employers, were regarded as liable for the compensation. But the opinion states that the special employer might also be liable. The decision was affirmed (218 N. Y. 59). It was indicated by the Appellate Division that the question of *respondere superior* had little influence upon the decision. The opinion in the Court of Appeals, after concluding that the general employer was the master at the time of the accident, says: "All this seems clear, but in any event the decision of the commission is final as to questions of fact. (Workmen's Compensation Law, § 20.) The jurisdiction of this court is limited to the review of questions of law, and if any question is presented upon the facts stated as to whose employee Dale was it is one of fact only." But POUND, J., writing for the court, said: "In negligence cases the question often arises as to the proper application of the doctrine of *respondere superior* when an employee whose negligence causes an accident is at the time in the general pay and service of one and under the control and direction of another. The latter has been held liable as a special employer when it could be said that the employee was his servant at the time of the accident in a sense and degree which served to impose liability for negligence. (*Higgins v. Western Union Telegraph Co.*, 156 N. Y. 75; *Howard v. Ludwig*, 171 N. Y. 507.) The question, who is the master, also arises at times in employees' actions for negligent injuries. But the question in this case is not one of responsibility for negligent injury inflicted upon strangers nor upon an employee. The doctrine of *respondere superior* has no application here, nor are the rules of employers' liability for negligence controlling." So there might be some doubt whether in the present case plaintiff was defendant's servant, but that question does not seem to be essential in determining whether the act was applicable. In *Matter of De Noyer v. Cavanaugh* (221 N. Y. 273) claimant's intestate was driver of a truck owned by the defendant company, for the operation of which the employer of the decedent furnished a horse and driver, and his death was caused by the explosion of a can of gasoline which he was delivering in the course of his duty, and it was decided that an award was properly made against the employer. But in *Matter of Nolan v. Cranford Co.* (219 N. Y. 581, affg. 171 App. Div. 959) an award was sustained for the death of one Nolan, one of the drivers of a team furnished to the defendant by Kane, who paid the drivers their wages. The court in *Matter*

of *De Noyer v. Cavanaugh* explained that there was no inconsistency in its decision in that case and in *Matter of Nolan v. Cranford Co.*, inasmuch as employees "under the Workmen's Compensation Law * * * may, so far as its provisions are applicable, look to the one or to the other or to both for compensation for injuries due to occupational hazards, * * * and the industrial commission may make such an award as the facts in the particular case may justify." Under such ruling there should be no hesitation in determining that the plaintiff in the present action has a remedy under the Workmen's Compensation Law, in which case the present action cannot be sustained, and the judgment and order should be affirmed, with costs.

JENKS, P. J., MILLS and KELLEY, JJ., concurred; BLACKMAR, J., dissented on the ground that before plaintiff can recover compensation under the Workmen's Compensation Law it must be decided by the Commission as a question of fact that defendant was master, and that such relation did not exist.

Judgment and order affirmed on reargument, with costs.

A farmer furnished a driver and team to a lumberman; the lumberman carried compensation insurance but the farmer did not; the driver was injured by a falling log; the Commission awarded compensation against the lumberman in accordance with an opinion of Commissioner Sayer, citing the *De Noyer* decision of the Court of Appeals: *Straight v. Stearns*, S. D. R., vol. 15, p. 645, Bul., vol. 3, p. 154, Mar. 14, 1918.

A liveryman furnished a team and driver to a building contractor; the contractor carried compensation insurance but the liveryman did not; the driver was injured by a live wire; the Commission awarded compensation against the contractor in accordance with an opinion of Commissioner Lyon, citing *Dale v. Hual Construction Co.*; *Koenig v. Howes Construction Co.*, S. D. R., vol. 18, p. 555, Bul., vol. 4, p. 35, Nov. 12, 1918.

A detective bureau conducting an employment agency furnished motormen, conductors and guards to a street railway; it received from the street railway \$5 per day for each man and paid each man \$3; the guards rode inside the cars; their duty was to protect passengers and cars from violence; a car jumped the track and injured a guard; the guard sued the street railway for damages; the street railway set up the Workmen's Compensation Law as a bar; the trial court ruled that the street railway was not the guard's employer; upon appeal the Appellate Division in the First Department held that the street railway was a responsible employer, cited the *De Noyer* decision, reversed the

trial court's judgment and dismissed the complaint; the Appellate Division's opinion is as follows:

MURRAY v. UNION RAILWAY Co., 183 App. Div. 209, May 10, 1918.

PUTNAM, J.: The motorman who ran the car against this pillar was also furnished by this detective bureau. Yet unquestionably he was in the defendant's employ. Otherwise there would be no suit against defendant. Both plaintiff and the motorman were performing services for the interests of defendant. Defendant had the same authority over plaintiff as if it had directly hired him. This detective bureau was not operating this railroad. The obligation under defendant's franchise to carry passengers in certain streets of the city defendant could not delegate to another. Although for purposes of statutory compensation an injured employee's claim is favored to the extent that in certain cases he may look either to the general employer or to the special employer for such compensation (*Matter of De Noyer v. Cavanaugh*, 221 N. Y. 273; *Matter of Nolan v. Cranford Co.*, 219 id. 581), public policy requires that a public carrier like defendant, who has procured such protection to its servants, should be regarded as a responsible employer within this act. As the facts are not in dispute, we hold that plaintiff's exclusive remedy is properly under the Workmen's Compensation Law, by presenting his claim to the State Commission.

The judgment and order are, therefore, reversed and complaint dismissed, but without costs in the court below or on this appeal. Present — JENES, P. J., THOMAS, RICH, PUTNAM and BLACKMAR, JJ. Judgment and order reversed and complaint unanimously dismissed, without costs in the court below or on this appeal.

A New York City corporation and a Philadelphia copartnership consisted of the same members except a general partner, and were in the same business. The corporation loaned a cloth examiner and shrinker to the copartnership. Upon his injury, the Appellate Division sustained an award against the corporation unanimously and without opinion: *Glaxon v. Moritz*, S. D. R., vol. 19, p. 425, Nov. 15, 1918; — App. Div. —, June 30, 1919.

A member of a junk dealing company sent a boy employee to work in the yard of his brother-in-law who was also a junk dealer. Upon injury of the boy, the Appellate Division sustained an award against the company unanimously and without opinion: *Ten Broeck v. Levenson & Cohen*, S. D. R., vol. 18, p. 587, Bul. vol. 4, p. 71, Dec. 11, 1918; — App. Div. —, June 30, 1919.

Relative responsibility of the Federal government and of a private corporation under its control and operation, for injury of an employee, figures under the following subtitle.

C. Operation under Federal control.—A Pullman car struck a bumper post and threw its porter over a seat. The Pullman Company contested a claim of the porter for compensation for injuries to his back upon the ground that the United States Railroad Administration which had taken over war-time control and management of its business was the porter's employer. The Appellate Division unanimously sustained an award against the Company, with opinion, as follows:

BRYANT V. PULLMAN Co., — App. Div. —, June 30, 1919.

KELLOGG, P. J.: The accident to the claimant occurred March 17, 1918; he was a porter on the company's sleeping car. At the time of the accident, under the act of Congress and the proclamation of the President, the cars of the company were operated under Federal control. The proclamation of the President provided that the Director General of Railroads "may perform the duties imposed upon him so long and to such extent as he shall determine through the boards of directors, receivers, officers and employees" of the companies. The act of Congress (§ 10) contemplated a continuing liability of the companies, and actions against them are not inconsistent with the act or the proclamation of the President. The express business was carried on by the appellant for the government, under the proclamation of the President, until August 17, 1918, when, by a general order, the Director General assumed the management of the business under managers appointed by him.

The appellant raised no question with the government as to the effect or validity of the act of Congress or the proclamation of the President, but acquiesced in them and operated its cars as contemplated by the act. If instead of so doing it had contested the question with the government a different situation might have arisen. But, having operated its cars under the act, it cannot now raise the question that the government could not compel it to do so. That question is in the past; it did operate its cars and the claimant was its employee in that service. It was carrying on the express business by and under the direction of the Director General. In effect the government was the lessee of the cars, the company the lessor, and by the terms of the lease the business was carried on by it under government control. The question is not one of substance. If the lessee was carrying on its business through the lessor, and the latter is required to pay compensation under this award, it has ample recourse against the lessee, and undoubtedly any liability imposed upon it will be met in the adjustment of the rentals. We consider the question more one of technicality than of substance, and are prepared to hold that for the purposes of the protection of the claimant under the Workmen's Compensation Law the appellant was his employer and that the award may stand.

It is urged, however, that the award rested upon a wrong basis as to tips received by the porter which were treated as a part of his wages, and an ingenious but unsuccessful attempt is made to distinguish this case from *Sloat v. Rochester Tawwab Co.* (177 App. Div. 57). It is urged that in that

case it was understood that the tips were to be a part of the compensation. The facts in this case overwhelmingly point to the same result. It is improbable that the company could employ a porter for a dollar a day if other compensation was not in contemplation. The company puts its patrons in the hands of underpaid porters expecting that the patrons will not suffer the porter to remain underpaid but will help the company pay for the services rendered by them. Such is the common understanding.

The award should be affirmed. Award unanimously affirmed.

D. Contract between employers relative to labor.—Employers carrying on the same industrial project or carrying on closely-related enterprises may enter into such a contract relative to labor as to cast doubt upon the responsibility of the one or the other of them for compensation to their injured employees. In the case of a railroad company and a telegraph company operating under such a contract, the Commission made an award against one of them without undertaking to pass upon the labor provisions of their contract, basing its action upon the following opinion:

GALLAGHER V. NEW YORK CENTRAL R. R. Co., S. D. R., vol. 9, p. 335, Bul., vol. 1, no. 11, p. 21, June 20, 1916.

LYON, Commissioner: The claimant, on December 5, 1915, cut his finger while cutting marline from an old cable which he was assisting to remove on the premises of the railroad company. The finger subsequently became stiffened as a result of the accident. There is no question but that claimant is entitled to compensation, and little doubt but that he has lost the use of the finger. The only question seriously raised is, who shall pay the compensation.

The railroad company insists that by the terms of a contract dated June 1, 1907, running to January 1, 1936, made between the railroad company on the one hand and the Western Union Telegraph Company and the Great Northwestern Telegraph Company on the other, the burden of compensation in this case must be borne by the Western Union Telegraph Company. The contract in question provides for joint use by the two companies, upon the lands of the railroad company of poles and wires, some owned by one company and some by the other, and for maintenance and repairs of the same, with proper stipulations as to expense of maintenance and damages for injuries to workmen and others.

It may be that under the terms of this contract the ultimate burden of compensation in this case must fall upon the telegraph company. In fact I am inclined to think it must. But that is not to say that the burden of having that question decided must be borne by this claimant if, as I think, he has a perfectly clear right to compensation against the railroad company.

Gallagher was on the payroll of the railroad company. He worked on the premises of the railroad company, doing work which was, in part at least, for the interest of the railroad company and under a foreman who was also

paid by, and who reported to the railroad company. There is no evidence that Gallagher ever heard of the contract in question, and it is not probable that he would have known what it meant if he had seen it. That he looked upon the railroad company as his employer is shown by the fact that he has made his claim against that company alone. If it were a question of recovering his wages, there is no doubt but he could hold the railroad company and I think that compensation follows the same route.

It is quite possible that if he had made claim against the telegraph company, he could sustain it under the terms of the contract, but he should not be compelled to have recourse to a company as his employer, of whose relation to his work, so far as the evidence shows, he had no knowledge.

I advise an award against the railroad company, the only company in fact before the Commission.

In a later case, involving a contract of three corporations relative to labor for installing some boilers — particularly relative to union labor — the injured employee filed claims for compensation against all three corporations; Commissioner Lyon referred to the Gallagher case but undertook to determine which corporation should be held responsible on the ground that the Commission's decision against one of the corporations might be treated as *res adjudicata*: *Meens v. Thompson-Starrett Co., et al.*, S. D. R., vol. 13, pp. 553-560, Bul., vol. 2, pp. 153, 154, Apr. 13, 1917.

A subcontractor for concrete work in the erection of a garage found himself unable to carry out his contract, and the contractor had to take over the job. Thereafter collapse of the roof killed one workman and injured three, all of whom had originally been hired and paid by the subcontractor. The Commission found the contractor's insurance carrier responsible for compensation. The Appellate Division affirmed the awards unanimously and without opinion: 181 App. Div. 961, Dec. 28, 1917. The Commission based its decision upon the following opinion:

HUDEC ET AL. V. WILSON & Co., S. D. R., vol. 14, p. 555, May 14, 1917.

LYON, Commissioner: There seems to be no question but that Hudec and the three injured workmen were originally hired and paid by the subcontractor, Vorchok. The undisputed testimony, however, is that some three or four weeks before the accident occurred, Vorchok fell into financial difficulties and was unable, unassisted, to carry on his contract for the reinforced concrete. His contract with the Wilson Company was what is known as the uniform contract prepared by architects and contained the usual clause that if the one party to the contract at any time found that Vorchok could not properly and successfully carry the same out, the other party to the contract

might, on giving the proper written notice, consider the contract as at an end and himself do the work under it, rendering to Vorchok at the end, however, any surplus which might be due him beyond the expense of carrying the contract out, and holding Vorchok for any excessive payment necessary to be made beyond the terms of the contract. No written notice of desire to do this, however, was served on behalf of Wilson & Co., but instead there was an oral arrangement, acquiesced in by both, that Wilson would take up the reinforced concrete and complete the contract. I say this was the understanding, although Mr. Wilson testified that he merely agreed to guarantee the payment to Vorchok's men, but the testimony is that Vorchok from that time forth ceased to have any superintendence over the job, except that he visited the place of work from time to time and apparently O. K'd payrolls, but this in my opinion was only for the purpose of having a proper check upon the payments made by Wilson, in order to make the final settlement, pursuant to the contract. Mr. Wilson admits that he not only took over such men as Vorchok had on the job, but that he hired other men and that he had the absolute control over them and the right, if their work did not prove satisfactory, to discharge them.

There is some question raised whether Wilson intended to cover Vorchok's men by compensation insurance, but this question does not seem to be very material, because the insurance contract calls for coverage of all of Wilson's men. If the payroll audit of Wilson's men has not disclosed the fact that these men taken over from Vorchok were on his payroll, a future audit will undoubtedly be made so that the insurance carrier will be completely covered, so far as the premium is concerned for this risk, and no doubt the added expense to Wilson for carrying insurance on the men doing the reinforced concrete, will be credited to him on his final settlement with Vorchok.

I am very clearly of the opinion that under the arrangement in force between Vorchok and Wilson at the time of the accident Wilson & Co. was the employer of Hudec and these other injured workmen, and I, therefore, advise that an award be made against Wilson & Co. and the Globe Indemnity Company in all of the cases.

E. Ownership of hazardous business in doubt.—Investigation to identify the employer is occasionally necessary in the case of enterprises that have been subjected to mortgage transactions: illustrations are: *Renda v. Occuizo*, S. D. R., vol. 10, p. 581, Sept. 15, 1916, Bul., vol. 2, pp. 14, 46, Nov. 22, 1916; *Jo'st v. Broadway-Fort Washington Corp., or Lawyer's Mortgage Co.*, S. D. R., vol. 17, p. 595, Bul., vol. 3, p. 219, June 11, 1918. Questions of ownership and partnership figure in *Apra v. David & Co.*, S. D. R., vol. 16, p. 489, Bul., vol. 3, pp. 195, May 10, 1918.

F. Architects as employers.—Though the architect of a building had had something to do with the engagement of a supervisor for its construction and had paid part of his salary,

the Commission held that their relation was not that of employer and employee and denied death benefits against the architect for accident to the supervisor: *Dissosway v. Jallade*, S. D. R., vol. 7, p. 449, Feb. 17, 1916.

G. *Contractors working on the same building, etc.*—When several contractors are working at the same enterprise, the Commission may be called upon to decide which contractor is the employer of an injured employee: *Liebenberg v. Rosenthal*, S. D. R., vol. 12, p. 535, Bul., vol. 2, p. 89, Jan. 10, 1917.

PRIVATE INSURANCE CONTRACTS

(Workmen's Compensation Law, §§ 20, 54)

A. *Powers of the Commission.*—An opinion of the Attorney-General, dated August 13, 1915, holds that the Commission has power under Workmen's Compensation Law, §§ 20, 54, (1) to determine the facts in a dispute relative to cancellation of an insurance contract; (2) to award compensation directly against an insurance carrier; and (3) to bring suit against an insurance carrier for recovery of compensation. The text of the opinion has been given in Bulletin 81, pages 361–363. The power to determine the facts in a dispute relative to cancellation of an insurance contract has since been sustained by the Court of Appeals in the concluding part of its opinion in *Skoczlois v. Vinocour*, the full text of which appears immediately below.

B. *Notice of cancellation.*—Workmen's Compensation Law, § 54, subd. 5, regulates cancellation of insurance contracts by prescribing two methods of delivering a required preliminary notice and by fixing an interval of ten days between the notice and the cancellation.

1. *Methods of delivering notice.*—The insurance carrier may deliver notice of cancellation to the employer in person or may send it to him by registered mail. In the latter case, the notice will be effective if the registered letter has been dropped into the post-office, notwithstanding inconsequential errors in spelling its address, failure of the employer to receive it, knowledge of the insurance carrier that he has not received it or acceptance of a delinquent premium by the insurance carrier after its transmission. These points are established by the following opinion of the Court of Appeals which, as has been said, also upholds the Commission's claim of full power to determine cancellation disputes:

SKOCZLOIS v. VINOCOUR, 221 N. Y. 276, July 11, 1917.

MCLAUGHLIN, J.: This appeal is from an order of the Appellate Division, third department, affirming an award of the workmen's compensation commission for the death of Stanislaus Skoczlois, husband of the claimant. The appellants contend the order and award should be reversed and the claim dismissed (1) because there is no evidence to support the findings of the commission that Skoczlois died as the result of an accident arising out of

and in the course of his employment; and (2) because the policy of insurance had been canceled prior to the accident.

As to the first contention, a careful consideration of the record satisfies me that the findings made by the commission and affirmed by the Appellate Division are correct, but as to the second they are erroneous. The policy was issued on the 13th of July, 1914, and in consideration of the premium agreed to be paid (\$30.90) the company insured Vinocour against accidents to his employees for a term of one year. Under the terms of the policy Vinocour's post-office address was given at Granitville, Port Richmond, Richmond county, New York, and his place of business 17 Vedder avenue, Port Richmond, New York. Vinocour did not pay the premium at the time the policy was issued, or any part of it until after the accident to and death of Skoczlois. On the 19th of December, 1914, no part of the premium having been paid, the insurance company notified Vinocour it had elected to cancel the policy, such cancellation to take effect on December 31, 1914, at midnight. The notice was in the form of a letter, sent by registered mail, directed as follows: "Mr. Philip Vincour, Vedder avenue, Grantville, Port Richmond, N. Y." The letter reached the proper post office on the 21st of December, 1914, but was never called for by or delivered to Vinocour though the post office authorities at that place sent him several notices that a registered letter was in the office ready for delivery. It remained in the post office until January 8, 1915, when it was returned to the insurance company. On the same day that the insurance company gave notice to Vinocour it had canceled the policy it also gave notice to the commission that the policy had been canceled, and at the same time wrote it as follows: "In accordance with Sub-division 5 of Section 54 of the New York Compensation Law, we have canceled the above policy, copy of the notice of cancellation being attached hereto, which please file." The accident occurred and Skoczlois died on the 5th of May, 1915, and up to that time no part of the premium had been paid, but three days thereafter Vinocour sent a check for ten dollars to the insurance company, which it retained and applied towards the premium due at the time the policy was canceled. After making such application there still remained due \$2.35, for which it sent a bill to Vinocour, asking for payment, and at the same time informed him that the policy was canceled on the 31st of December, 1914, for nonpayment of premium.

The commission reached the conclusion, and this apparently was the view of the Appellate Division, that the attempt on the part of the insurance company to cancel was ineffectual by reason of the fact that Vinocour was written "Vincour" and Granitville "Grantville." I think that this is too technical and narrow a view to take of the matter, especially in view of the fact that no one was misled by the misspelling. To hold otherwise is to sacrifice substance for form, notwithstanding the letter reached the proper post office and the authorities understood for whom it was intended and gave such person notice of its being there ready for delivery.

The policy provided that it might be canceled by sending to the insured at his last known place of residence a notice by registered letter ten days prior to the time such cancellation took effect, and at the same time giving the commission notice that the policy had been canceled. The notice thus given

not only complied with the policy, but with the statute relating to cancellation. (Workmen's Compensation Law, § 54, part 5.) It was immaterial, therefore, whether the insured received the notice or not. The company had done all it was required to do to cancel the policy and the cancellation became effective in accordance with the notice on the 31st of December, 1914, at midnight. (*Wolarsky v. New York Life Ins. Co.*, 120 App. Div. 90; *McConnell v. Provident Savings Life Assur. Soc.*, 92 Fed. Rep. 769.) That he did not receive the notice was due entirely to his own fault.

Evidence was introduced before the commission to the effect that in March, 1915, the company sent its representative to the insured's place of business to check up his payrolls for the purpose of ascertaining the exact amount of premium due when the policy was canceled. Such representative did not inform the insured what the purpose was in checking up the payrolls or that the policy had been previously canceled, and it is suggested for this reason the company, having knowledge that the insured never had received the notice of cancellation, should be estopped from asserting that the policy was canceled. I am unable to appreciate the force of this suggestion. It was only by an inspection of the payrolls that the exact amount of premium due when the policy was canceled could be ascertained. The policy had previously been canceled. The notice required to bring about that result had been given. The policy as a binding obligation on the part of the company had ceased to exist. Mere silence thereafter on the part of the company could not reinstate it, nor can anything that the company did be held to estop it from asserting whatever rights it might have by reason of the cancellation. Nor is the fact that the company accepted a part of the premium after the accident to Skoelz of any importance. The insured was only paying a part of what he owed when the cancellation took place.

It is also suggested that the commission did not have the power to determine whether the policy had been canceled. I think it had jurisdiction of the subject-matter and the power to make such determination. The act seems, inferentially at least, to confer such power. Under section 20 the commission is given full power and authority to determine all questions in relation to the payment of claims, and under section 23 an award made by it is final and conclusive upon all questions within its jurisdiction as against the state fund or between the parties. Section 26 (amd. L. 1915, ch. 167) expressly provides that "If payment of compensation * * * due under the terms of an award, be not made by the employer within ten days after the same is due, the insurance carrier shall be liable therefor." Subdivision 1 of section 54 provides, in substance, that every policy issued by an insurance company covering the liability of the employer shall contain a provision setting forth the right of the commission by making the insurance company a party to the original application to enforce the liability against it. It would seem necessarily to follow that if the insurance company may be made a party to the original application to the commission for compensation, all its rights may be there litigated and determined precisely the same as those of the employer. The latter can raise the question, and have it determined as to whether the relation of employer and employee existed at the time the accident occurred, and for the same reason I think the insurance company can raise and have the question determined as to whether there were then a valid outstanding policy issued by it. If such

questions be raised, then the determination of them lies with the commission. This view is strengthened by subdivision 2 of the same section, which provides, "That jurisdiction of the employer shall, for the purpose of this chapter, be jurisdiction of the insurance carrier and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer for the payment of compensation under the provisions of this chapter."

In order to give full effect to the provisions of the statute referred to it seems to me necessarily to follow that the legislature intended the commission should have power in the first instance to determine whether a policy of insurance covering the liability of the employer were in force when the accident occurred, and if so, the liability of the insurance company under it. (*Matter of Kelley*, 116 N. E. Rep. 308.) Unless this be the correct view of the statute, the scheme contemplated by it fails, to a large extent at least, of its purpose.

It follows that the order of the Appellate Division and the award of the compensation commission, so far as the same relate to the insurance company, should be reversed and the claim as to it dismissed, and as to the employer, the order of the Appellate Division and award of the commission should be affirmed, with costs to the state industrial commission against the employer.

CHASE, COLLIN, CARDOZO, POUND, CRANE and ANDREWS, JJ., concur. Ordered accordingly.

2. *Ten days' interval*.—The ten days' notice of intention to cancel begins to run from the date of mailing, not from the date of writing, so that a notice of intent to cancel on June 10th written May 31st but not mailed till June 2d is ineffective: *Newman v. Singer*, S. D. R., vol. 12, p. 579, Bul., vol. 2, p. 106, Feb. 17, 1917.

The ten days' requirement does not apply when cancellation has been effected upon the employer's request or upon request of an insurance broker who has obtained the policy from the employer and returned it to the insurance carrier: *Coopersmith v. Silverstein & Wallin*, S. D. R., vol. 14, p. 613, Bul., vol. 3, p. 11, Sept. 5, 1917.

C. *Transfer of policies*.—Consent of the insurance carrier is ordinarily requisite to transfer of a policy. Provision to such effect is usually an item of the insurance contract. Decisions of the courts and the Commission have had to do with transfers of compensation policies due to death, bankruptcy and sale of business. They have also tended to define transfer.

1. *Death of insured employer*.—The proprietor of a trucking business died leaving his property to his widow who continued

the business. Her broker put her deceased husband's compensation insurance policy in the hands of the insurance carrier with request for transfer to her. The carrier held the policy five weeks and executed the transfer upon the day after the occurrence of an accident to one of her truck drivers. The majority of the Appellate Division reversed an award to the injured man as far as it was against the insurance carrier. Two justices dissented upon ground (1) that such decision illegally deprived the employee of his security and (2) that the transfer ought to be treated as dating from the receipt of the policy by the carrier for that purpose. The Court of Appeals affirmed the Appellate Division's order, March 18, 1919. The majority and minority opinions of the Appellate Division are as follows:

KOLB v. BRUMMER, 185 App. Div. 835, Nov. 22, 1918.

LYON, J.: Richard Brummer, the husband of the defendant Meta Brummer, was engaged in the business of trucking. He held a policy issued by the defendant New Amsterdam Casualty Company of date August 31, 1916, which ran for one year and upon which he had paid the estimated premium. He died June 28, 1917, leaving a will by which he gave all his property to his wife. His wife took charge of and conducted his business for about two weeks during his last sickness, and after his death continued the business in the same way. About the middle of July, 1917, as she testifies, she informed the broker through whom the insurance was procured of the death of her husband, and delivered to him the policy to mail the same to the insurer. He wrote on the outside of the policy the words, "Kindly transfer this insurance to Meta Brummer, and return the policy to me, Buxbaum," and mailed the policy to the insurance company, as he testifies. The insurer attached to the policy a writing dated August 22, 1917, as follows: "The interest in this policy is hereby transferred from twelve o'clock noon of this date to Meta Brummer." On the preceding day, August 21, 1917, the claimant was in the employ of Meta Brummer and about nine o'clock in the morning suffered an accidental injury to the index finger of his right hand which resulted in the loss of the finger.

On August 23, 1917, Meta Brummer, as employer, filed a claim for compensation. On October 8, 1917, the company presented a bill to her for additional insurance premium under said policy, which she paid in full. The policy had expired the August preceding. The insurance company claims it was not notified of the accident until November 12, 1917. She made a report of the injury August 23, 1917, as the employer, and thereafter an award of compensation was made to the claimant against her as an employer. On her application the award was opened, a rehearing had, and an award made against her and the New Amsterdam Casualty Company, as insurer, from which this appeal has been taken.

The policy contained the following condition: "Assignment. Condition J. No assignment or change of interest under this policy shall bind the Company

unless its consent shall be indorsed hereon or attached hereto signed by a duly authorized officer of the Company." No act was done by Meta Brummer in reliance upon the belief that the company had consented to the transfer of the policy to her, which would estop the appellant. The liability of the insurer did not exist as to Meta Brummer until it had made a binding contract with her. It was not an insurance of property but against personal liability and hence the insurance was personal. The performance of this condition of the policy was essential to create liability against the insurer to another than the person to whom the policy was issued. An application for insurance to secure compensation would not charge the insurer until a contract was made. I do not think the collection of the balance of the earned premium estops the insurer from contesting liability under the contract. The bill was not presented until October eighth, and the company had no knowledge of the accident until November twelfth. Nor do I think that subdivision 5 of section 54 of the Workmen's Compensation Law is effective. This was not a cancellation of an insurance contract within the meaning of that term as used in that section. The parties had the right to insert any lawful conditions in the contract. (*Allen v. German American Ins. Co.*, 123 N. Y. 6, 13; *Dwight v. Germania Life Ins. Co.*, 103 id. 341; *Gans v. Aetna Life Ins. Co.*, 214 id. 326.)

The defendant insurance company might have had a good reason for not assenting to a transfer of interest. The management of the business had changed and they were no longer protected by the oversight of the husband. While the Commission has the power to determine whether the policy still existed it must determine that question on recognized principles of law. (*Matter of Skocslois v. Vinocour*, 221 N. Y. 276.)

The award must be reversed so far as it is against the New Amsterdam Casualty Company. All concurred, except JOHN M. KELLOGG, P. J., dissenting, with an opinion in which WOODWARD, J., concurred.

JOHN M. KELLOGG, P. J. (dissenting):

The Workmen's Compensation Law is designed to charge upon the hazardous employment the risks flowing from it, and to protect the employee therefrom. Security for compensation is not required for the benefit of the employer, but solely for the benefit of the employee. It is a burden cast upon the employer and the business to make sure to the employee the payment of compensation. It is a misdemeanor for the employer to carry on the business without insurance, and when the insurance is effected, notice of the fact is given to the employee, so that he may work in confidence that compensation which he may be entitled to will be paid. (§ 51.)* The insurance is more than a provision to reimburse the employer for the amounts paid by him, as the liability of the company is not affected by his insolvency or bankruptcy. (§ 54, subd. 3.)† The insurance cannot be canceled "within the time limited in such contract for its expiration," except after notice of ten days to be served upon the employer and the Commission. (§ 54, subd. 5.)† The object of this is to enable the Commission to see that the law is obeyed and that no interval shall elapse during which the security for the employee does not exist. If the insurance is in the State fund it cannot

* See Consol. Laws, chap. 67 (Laws of 1914, chap. 41), § 51; Id. § 52, as amd. by Laws of 1916, chap. 622.—[REPR.]

† Amd. by Laws of 1916, chap. 622.—[REPR.]

be withdrawn except upon thirty days' notice to the Commission and after other security for the employees has been provided. (§ 100.) * I think it follows from these and the other provisions of the law that when security is given for a particular time the employee cannot be deprived of its benefits, except in the manner provided by law and by cancellation of the policy on notice to the Commission. It would not be within the spirit of the law to permit the employer and the insurer to vacate the policy, and deprive the employee of security without any notice to him or the Commission. This policy never was canceled in the manner provided by law. The loss by the injury happened during the term of the contract and the company is liable to the employee. The insurance company is in the same position as the State fund, with a continuing liability until the policy is canceled, as required by the law.

There is nothing in the policy to the contrary. It does not provide that it shall be void if the ownership of the business changes. It simply provides that an assignment or change of interest shall not be binding on the company without its written consent. At the issuing of the policy an initial premium is paid, with the understanding that from time to time the payroll may be examined and additional premiums may be required and paid by the employer. If the assignment is not binding upon the company it may treat the original employer as still liable to it for the performance of every condition of the policy, but the employer by assignment or death cannot deprive the employee of his surety and free the company from liability.

In this case the widow of the employer, who was also the executrix, residuary legatee and devisee under his will, continued the business. She delivered the policy to the broker who obtained it, with the request that the company consent to the transfer to her. It was immediately forwarded by him to the company and was received by it about July thirteenth for transfer. It was then its duty to give or refuse its consent. It knew that the business could not be conducted without insurance. It could not retain the policy for a month and the day after the loss consent to the transfer to take effect on that day. By adjusting the premiums with the widow after the loss and exacting from her the full carrying charges from the death of the husband fairly recognizes that the policy was in existence all of the time, and renders it inequitable for it now to assert that for the month for which it collected the premium it had elected to treat the policy as not in force. The consent should be treated as made as of the day when it was the duty of the company to make it or refuse it. By making it the insurer showed its approval of the risk. The approval may be treated as relating back to the time when the policy was received, the date of the consent being treated as surplusage. I favor an affirmance. WOODWARD, J., concurred.

Award reversed so far as against the New Amsterdam Casualty Company.

2. *Bankruptcy of insured employer.*—Workmen's Compensation Law, § 54, subd. 3, provides that insolvency or bankruptcy of an employer shall not relieve the insurance carrier from payment of compensation. The Shevlin Manufacturing Company became bankrupt and passed into the hands of a receiver on or

* Amd. by Laws of 1916, chap. 622.—[REP.]

about November 1, 1915. Thereafter, within the next two months two separate accidents befell employees under the receivership. In one of these, *Hargraves v. Shevlin Manufacturing Co.*, an award of the Commission was successively affirmed by the Appellate Division and the Court of Appeals. The text of the Appellate Division's opinion in the case has been given below, page 235. The briefs of the insurance carrier in this case had failed to ground its appeal upon the transfer of the business to the receiver. In the other case, *Nolan v. Shevlin Manufacturing Company*, the carrier plead this point before Commissioner Lyon who was decidedly of opinion that the transfer to the receiver relieved the insurance carrier of liability for compensation but recommended approval of a deputy's award to Nolan's widow with suggestion that the courts could not have overlooked the question of transfer in the Hargraves case and that at any rate the carrier could bring the matter before them anew by appeal from the Nolan award. The Commission, in accordance with Commissioner Lyon's recommendation, approved the deputy's award. The carrier appealed to the Appellate Division which affirmed the award unanimously and without opinion: *Nolan v. Shevlin Manufacturing Co.*, S. D. R., vol. 15, p. 640, Bul., vol. 3, p. 155, Mar. 14, 1918; 186 App. Div. 927, Nov. 13, 1918.

3. *Sale of business.*—Sale of a business, or change of it from individual ownership to copartnership, forfeits a compensation policy "in the absence of knowledge on the part of the insurer of the change in ownership and of an assent on its part to carry the risk after the change of ownership": *Apra v. David & Co.*, S. D. R., vol. 16, p. 489, Bul., vol. 3, p. 195, May 10, 1918. But sale of an undivided interest by one partner to another does not work such forfeiture: *Mark v. Berman*, S. D. R., vol. 14, p. 599, Bul., vol. 2, p. 256, Aug. 14, 1917.

4. *Definition of transfer.*—At the time of the accident in the above case of *Mark v. Berman* the insurance carrier's agent had issued a binder to the purchasing partner pending assent of the carrier to the transfer, the purchasing partner had acceded in writing to the carrier's only demand, namely, that he stand liable for the premium, and the policy with this rider had been lost by the carrier's agent. Commissioner Lyon was "of the opinion,

There is no question that the notice was not filed with the State Industrial Commission, and there is no claim that any notice was given to the employing corporation or to its receiver, so that if the award had been made against the Zurich Company alone it would have had no grounds for this appeal. But it is conceded that after the Zurich Company had indicated its intention of not issuing a new policy to the receiver of the George F. Shevlin Manufacturing Company, at the request of the latter's attorney, a contract was entered into with the Standard Accident Insurance Company, and this latter contract was in effect at the time of the accident resulting in the award. The State Industrial Commission, finding this latter policy in effect, and the Zurich Company's policy not canceled in the manner pointed out by the statute, has made an award "against George F. Shevlin Manufacturing Company, employer, and its trustee in bankruptcy, and Zurich General Accident & Liability Insurance Company and Standard Accident Insurance Company, insurance carriers, to Arthur H. Hargraves, injured employee, at the rate of \$12.98 weekly for a period of seven and one-half ($7\frac{1}{2}$) weeks from December 31, 1915, to February 21, 1916." There is no attempt to adjudicate the proportion of liability on the part of these rival insurance carriers; the award is primarily against the employer, the insurance carriers having contracted to assume the liability of the employer, and how this liability is shared by the companies is of no consequence to the employer or to the employee, nor has the State Industrial Commission any jurisdiction over such a question. It has discharged all its functions when it has made an award and provided for its payment by those who are primarily or secondarily liable, and the appellate jurisdiction of this court, in cases arising under the statute, is limited to a review of the determinations made by the State Industrial Commission, so long as it proceeds within the limits of its authority. The award is joint, is properly made, and how the employer and his insurance carriers adjust the matter as between themselves is entirely apart from any question which has been decided by the State Industrial Commission. The question attempted to be brought here by this appeal not being within the jurisdiction of the State Industrial Commission, except to the extent necessary to determine that there were two policies in effect, in so far as they had any relation to the claim of Mr. Hargraves, no prejudice can result to either party from an affirmance of the award as made, and that is the only disposition which appears to be open to us.

The award and order of the State Industrial Commission should be affirmed. Award unanimously affirmed.

In a unique ruling the Commission allotted payment of a compensation award among ten insurance companies representing sixteen employers united in a common enterprise: *Sayers v. Ogdensburg Power & Light Co., et al.*, S. D. R., vol. 8, p. 393, Dec. 22, 1915. The case having been before the Appellate Division for two years and a half upon appeal of one of the parties, *Bell, Bell & Co.*, the award was affirmed unanimously and without opinion: 176 App. Div. 938, Jan., 1917; 181 App. Div. 907, Nov. 14, 1917; 184 App. Div. 922, May 17, 1918.

Determination of liability for compensation in a case in which an employer had insured with one carrier in New York and with another carrier in New Jersey turned upon the place of hiring in *Camardi v. Snare & Triest Co.*, Bul., vol. 4, p. 29, Oct. 30, 1918.

F. Limitation of policies to localities.—A hotel or apartment house proprietor may own and operate buildings in different cities or in different sections of the same city. A manufacturer may have plants in two or more cities as widely separated as Buffalo and New York City. The operations of his plant in one city may be very different from those of his plant in another. A contractor may conduct simultaneous operations under separate contracts in nearby or in widely distant localities. The work for one contract may differ from the work for another. The employees of some owners and contractors may be grouped in communities in different States and the States may be as far apart as New York and California. Under these conditions, an employer not infrequently insures his workmen in one building, plant or enterprise with one insurance carrier and his employees in another building, plant or enterprise with another insurance carrier. And the companies issue two forms of compensation policies, a general policy covering all of the employer's employees, wherever they may meet with accident in line of duty, and a limited policy covering only such of the employer's employees as may be injured in a certain trade, business, profession or occupation carried on at a specified location or specified locations.

In earlier encounters with cases covered by this limited form of policy, the Commission challenged the right of the insurance company to issue it at all. "Neither the State Workmen's Compensation Commission," it said, "nor the State Industrial Commission, its successor, has adopted any rule permitting an insurance company to issue a policy limited to particular premises." The Workmen's Compensation Law, it was of opinion, had apparently been so drafted as to compel an employer to cover all of his employees.

Following discussions, a joint committee representing the Commission and the carriers drafted changes in the limited form of compensation policy which the State Superintendent of Insurance accepted October 11, 1916, and the Commission approved October 24, 1916. The amended form applies to a separate and distinct

enterprise and operations incident thereto conducted either at the work places described or defined in the policy or elsewhere in connection therewith. The older form had applied, more loosely, to a trade, business, profession or occupation carried on at specified locations. Cases illustrative of the subject are *Schweizer v. Schreiner*, S. D. R., vol. 9, p. 337, June 21, 1916; 178 App. Div. 945, May, 1917; *Connolly v. Tucker Electrical Construction Co.*, Case No. 9217, Apr. 16, 1917; — App. Div. —; S. D. R., vol. 14, p. 716; Bul., vol. 3, p. 119, Jan. 2, 1918; 184 App. Div. 921, May 21, 1918; and *O'Shaughnessy v. Empire Construction Co.*, S. D. R., vol. 16, p. 467, May 8, 1918; 186 App. Div. 927, Nov. 13, 1918.

In the *Schweizer* case, an owner of two New York City apartment houses situated within a block or so of each other insured his employees at one of them under one company and his employees at the other under another company. Upon an occasion he sent the janitor and superintendent of one of his apartment houses to the other to repair a water gage. The glass of the gage broke and cut the employee's fingers. Serious resulting infection gave ground for a compensation claim. The Commission made award against the insurance carrier for the apartment house at which the employee met with his accident and held the carrier for the apartment house in which he lived and with which he was ordinarily connected not liable. The Appellate Division affirmed the award unanimously and without opinion.

In the *Connolly* case, the employer had insured his New York employees with one carrier and his Connecticut employees with another; one of his employees hired in New York met with accident in Connecticut; the New York Commission could not enforce compensation against the carrier for Connecticut but could enforce it against the carrier for New York; an award was made against the carrier for New York with suggestion that it find relief by a court action against the carrier for Connecticut; the Appellate Division affirmed the award unanimously and without opinion.

In the *O'Shaughnessy* case, a contractor had a single contract covering two portions of New York subway construction separated by some distance from each other, the work for one being above, and the work for the other beneath ground; upon his application

for compensation insurance, a carrier issued to him two successive binders preliminary to issuance of a policy; before the policy had been made out an employee upon one of the jobs met with an accident; at the hearings, the insurance carrier claimed that the binders called for a policy limited to that portion of the subway other than the one at which the employee had met with his accident; it charged the employer with fraud and misrepresentation; testimony was contradictory; the Commission exonerated the employer and found from the evidence that the binders "called for a first or unlimited form of policy;" the Appellate Division affirmed the Commission's award unanimously and without opinion.

In the case of another accident involving the same employer and carrier and the same conditions relative to the policy as the O'Shaughnessy case and occurring at about the same time, the Commission made awards for injuries to two other employees, both of which awards were affirmed by the Appellate Division: *Fagnani v. Empire Construction Co.*, S. D. R., vol. 16, p. 464, June 17, 1918; 186 App. Div. 927, Nov. 13, 1918; *Finley v. Empire Construction Co.*, S. D. R., vol. 17, p. 607, June 17, 1918; 186 App. Div. 926, Nov. 13, 1918.

Prior to the above court decisions some question of limited versus unlimited policy had figured with several other points of contest in the case of a paperhanger and painter who got some plaster in his eye while kalsomining a parlor for a state road contractor. The pertinent part of the Appellate Division's opinion in reversal of an award to the injured employee is as follows:

HUNGERFORD v. BONN, 183 App. Div. 818, July 1, 1918, in part.

The insurer contended before the Commission, and contends here, that the insurance related solely to the work upon the road in connection with the Sandy Creek job, and did not in any way cover the work upon this house at Syracuse. Attached to the policy is a declaration which furnishes the specifications and makes the application of the policy definite. Item 3 of the declaration states the "location of the factories, shops, yards, buildings, premises or other work places of the employer, by town or city, with street and number" as "Sandy Creek, Oswego County, N. Y." The "kind of trade, business, profession or occupation (Manual Classification)" is stated as "State or municipal road or street making, including culverts not exceeding ten feet span. All operations except quarrying and blasting." Under the heading "Location of all places where Operations are to be conducted" we find: "Sandy Creek, Oswego County, New York." In specification "M" the

words "Employees engaged in the repair, alteration and construction of buildings, structures or plants (except machinery)" are followed by the word "None." A careful perusal of the policy, and the specifications, satisfies us that it was issued to cover the employees engaged in road building and work incident thereto. The employee need not necessarily be at work all the time at Sandy Creek, but his work must be incident to that work. The statement in the policy that none of the employees are engaged "in the repair, alteration and construction of buildings, structures or plants," seems to exclude these repairs from the policy. The respondent was not covered by the policy and the insurance company is not liable.

The question of coverage of a general policy figures in *Aprea v. David & Co.*, S. D. R., vol. 16, p. 489, Bul., vol. 3, p. 195, May 10, 1918.

G. *Payment of compensation in extra-territorial cases.*—When an employer operating both in New York and in another State has taken out compensation insurance in both States with the same carrier, and an accident to an employee hired in New York State has occurred in another State, and the injured employee has received payment of compensation under the compensation law of the other State, the New York Commission will award compensation under the New York compensation law, deducting therefrom the payments made under the compensation law of the other State. Illustrative court cases are *Jenkins v. Hogan & Sons*, S. D. R., vol. 9, p. 380, July 31, 1916; 177 App. Div. 36, Mar. 7, 1917; *Gilbert v. Des Lauriers Column Mould Co.*, 180 App. Div. 59, Nov. 14, 1917; and *Beudet v. Mertz's Sons*, Case No. 4047, July 17, 1917; 181 App. Div. 963, Dec. 28, 1917; — N. Y. Rep. —, May 28, 1918. The texts of the Appellate Division's opinions in the Jenkins and Gilbert cases have been given in the first part of this Bulletin, pages 286–289.

H. *A second accident after expiration of policy.*—An iron gate fell upon a laborer dislocating his hip; after two months' treatment the hospital discharged him as cured; three weeks later, having returned to work, his hip was dislocated again, this time with a fracture resulting in a permanently bad leg; in the interval of three months between the first and second dislocations the insurance policy under which he had received compensation for the first dislocation expired; the insurance carrier claimed that the second dislocation was a separate and distinct accident from the first, having been caused by wrenching or slipping while the employee

was getting up from an awkward sitting position on a box; the predisposition of the first dislocation, it said, ought not to figure; the Commission held that the second dislocation was a consequence of the first; the Appellate Division affirmed the Commission's award of further compensation unanimously and without opinion: *Herald v. Cohen & Symanski*, Claim No. 26892, Aug. 28, 1918; 186 App. Div. 933, Nov. 22, 1918.

1. *Policy issued after enactment of compensation law but before it became effective.*—In *Sayers v. Ogdensburg Power & Light Co., et al.*, noticed above, p. 236, the appealing employer, *Bill, Bell & Co.*, plead with other objections that its policy bore date, June 26, 1914, four days before the compensation law went into effect. It raised the question of protection to an employee not included in the payroll for purposes of payment of premium.

CANCELLATION OF SELF-INSURANCE PRIVILEGE

(Workmen's Compensation Law, § 50, subd. 3)

As originally enacted in 1914, Workmen's Compensation Law, § 50, subd. 3, provided two conditions of self-insurance, namely, proof of financial ability and deposit of securities. By amendment of the subdivision in 1916, the Legislature empowered the Commission to revoke a self-insurer's privilege "for good cause shown," and by amendment in 1917, inserted a third condition of self-insurance, namely, agreement to pay into the state fund awards commuted under § 27. Requirement of securities or of payment of awards into the state fund is discretionary with the Commission.

Before amendment of the subdivision by the act of 1917, the Commission had been requiring applicants for self-insurance to enter into written agreements to pay commuted awards into the state fund. A self-insurer which had made such written agreement in 1914 appealed from an order of the Commission in 1918 directing it to pay into the state fund \$7,534.04. Because of this appeal in face of its agreement, the Commission revoked its self-insurance privilege. Thereupon the self-insurer took an appeal from the revocation. Before the Appellate Division its counsel argued that the Commission was not "vested with unbridled discretion" to withhold or to revoke the privilege of self-insurance, citing in support of this point the concluding paragraphs of *New York Central R. R. Co. v. White*, 243 U. S. 188 (Bulletin No. 87, pages 21, 22). The Appellate Division held that good cause had not been shown for the revocation and reversed the Commission's order. Its opinion is as follows:

STATE INDUSTRIAL COMM. v. YONKERS R. R. Co., No. 2, 186 App. Div. 192.
Jan. 8, 1919.

H. T. KELLOGG, J.: This is an appeal from a decision of the Commission revoking a privilege granted to appellant, under subdivision 3 of section 50 of the Workmen's Compensation Law, to carry its own risk of paying compensation. The privilege was granted in July, 1914, upon condition, among other things, that appellant execute a certain agreement. The agreement was entered into on July 3, 1914, and engaged appellant, when required by the Commission, to "pay an amount equal to the present value of the future payments of compensation, under any award made by the Commission against us, into the State Insurance Fund." On December 20, 1917, the

Commission made an award to the widow and children of a deceased employee of the appellant who lost his life, by an accident growing out of his employment, on August 30, 1917. The appellant paid the installments under this award, as directed. On May 21, 1918, the Commission passed a resolution requiring all self-insurers and carriers to commute all death benefits under awards for deaths occurring between July 1, 1917, and December 31, 1917, by lump sum payments into the State Insurance Fund, the amounts to be determined as provided in section 27 of the Workmen's Compensation Law, as amended by chapter 705 of the Laws of 1917. Accordingly, it directed appellant to pay in the sum of \$7,534.04 on the award made against it. The appellant declined to pay, and appealed from the order. Thereupon the Commission canceled its privilege of self-insurance. That the sole ground of the cancellation was the resistance of the appellant to the order, as shown by its appeal, and its alleged repudiation of its agreement of July 3, 1914, is established by the recitals of the order and the admissions contained in the briefs of counsel hereupon. The question arises whether the Commission properly exercised its discretion when it canceled the privilege upon such a ground.

In the year 1914 section 27 of the Workmen's Compensation Law provided for the commutation of awards, in the discretion of the Commission provided "the nature of the injury makes it possible to compute the present value of all future payments with due regard for life contingencies." It was held in *Matter of Adams v. N. Y. O. & W. R. Co.* (220 N. Y. 579) that it was not possible under this section to compute the value of awards of death benefits to widows, because no method was provided by law for estimating the contingency of remarriage, the occurrence of which would cause their termination, and, therefore, the Commission had no power to commute in such cases. The present value of an award to a widow was then as incapable of ascertainment under a contract as under a statute. Therefore, the agreement of July 3, 1914, which engaged appellant, when required, to pay "the present value of the future payments," did not comprehend commutation of awards to widows. Moreover, the Commission had no power to make a contract calling for lump sum, rather than periodic, payments in such cases, for the statute itself continued to require the latter instead of the former. Originally, therefore, the promise of appellant did not cover the commutation of an award like the award it was subsequently required to commute.

In the year 1917 section 27 of the Workmen's Compensation Law was amended, providing a method for the estimation of the present value of awards of future payments to widows, and the Commission became empowered to require the commutation of such awards. (Laws of 1917, chap. 705.) This statute amended the law as it stood in 1914, but it could not amend the agreement made by the appellant in that year. The terms of the agreement, and the extent of the obligations thereunder, were then fixed, and could not be enlarged without a new promise voluntarily made, however retroactive the amendment may have been to affect the law of cases previously arising. There was, therefore, no contract by appellant to pay as ordered in the particular instance, and no breach of contract on its part.

The Commission has in effect attempted to penalize the appellant for a resort to the courts to test the validity of its order. Even if the contract of appellant were construed to engage it to make payments under the amended

law when required, the questions would remain whether that law were valid, and whether the Commission had acted within it. Answers to these questions would have to be made before it could be determined that the contract was broken. The appellant had a right to raise these questions, and could not be penalized for so doing.

The Commission had power to revoke its consent for self-insurance "for good cause shown." (Workmen's Compensation Law, § 50, subd. 3, as amended by Laws of 1916, chap. 622.) It was not shown that the financial standing of the appellant was precarious, or that the securities deposited to protect the self-insurance were inadequate. Nor was any other ground proven or taken for cancellation except the fact that the appellant dared to contest an order of the Commission. Had the Commission required further securities or a further agreement, doubtless a failure of appellant to furnish either would have constituted "good cause shown" for cancellation. This course was not followed. We think that good cause has not been shown for cancellation. The order of the Commission should, therefore, be reversed. All concurred, except COCHRAN, J., dissenting. Determination reversed.

EXCLUSIVE JURISDICTION OF THE COMMISSION

The Commission has reversed its former holding that it could not enforce payment of fees of physicians, etc., in compensation cases and that claimants should collect such fees by civil actions. The line of decisions leading to this change of attitude has been presented above, page 21. An employee having followed its former advice recovered in the lower courts an amount equal to bills that he had paid to his physician and hospital. The Appellate Division of the First Department, however, reversed the judgment and dismissed the complaint upon opinion that the employee had not accepted proper treatment tendered by his employer: *Junk v. Terry & Tench Co.*, above, p 14. After the decisions establishing the jurisdiction of the Commission to enforce payment of such fees, the employee in the Junk case, though, as noted, he had failed in the Appellate Division of the First Department, asked the Commission to collect the fees. Upon hearing before the Commission, the insurance carrier argued that the common law courts had concurrent jurisdiction with the Commission for enforcement of the compensation law and that, therefore, the Junk case was *res adjudicata*, the Appellate Division of the First Department having dismissed the complaint. The Commission rejected the theory of concurrent jurisdiction upon opinion of Commissioner Lyon, as follows:

JUNK v. TERRY & TENCH Co., S. D. R., vol. 16, p. 495, Bul., vol. 3, pp. 201, 227, 230, May 10, 1918, *in part*.

LYON, Commissioner: The claim of the employer that the common law courts have concurrent jurisdiction with this Commission to administer the Compensation Law is now raised for the first time since the law was enacted, and I am bound to say that in my opinion, it is without foundation. The Compensation Law is purely statutory and does not rest upon the common law in any sense. A special body was created by the Compensation Law for the purpose of its administration, and appeals from the decisions of the Commission can be taken to only the Appellate Division, with a view evidently of trying to get a consistent body of compensation law, passed upon by those whose special duty it is to give it attention. The statute provides that the Commission shall not be governed by technical rules of evidence. As was said by the Court of Appeals in the case of *Shanahan v. Monarch Engineering Company*, 219 N. Y. 469: "An employee and his dependents receive compensation which may be smaller than would have been the amount of a judgment in a negligence action, but on the other hand they are compensated

Full text of the Cohen opinion is given above, page 141.

C. *Finality of an agreement.*—Any party to a compensation case may subsequently question the jurisdiction of the Commission, though the employer and employee have entered into an agreement, the Commission has approved the same, and acts have been done thereunder. The Commission has power to set aside an agreement no matter how far it has been carried out. The doctrines of estoppel and accord and satisfaction are not a bar to further proceedings. The Commission, upon opinion of Commissioner Lyon, held revision of its approval inequitable in the agreement cases of *Shanley v. American Sugar Refining Co.*, S. D. R., vol. 14, p. 623, Bul., vol. 3, p. 14, Sept. 11, 1917, and *Hassen v. Elm Coal Co.*, Bul., vol. 3, p. 98, Dec. 11, 1917. In the Hassen case, Commissioner Lyon said:

HASSEN v. ELM COAL Co., Bul., vol. 3, p. 98, Dec. 11, 1917, *in part*.

The insurance carrier is insistent that the Commission ought to rescind its approval of the agreement and does in effect rescind the agreement itself, on the ground that if the case was never compensatable, the Commission is without jurisdiction in the matter, but this, it seems to me, is rather begging the question. The parties when they made the agreement determined to put the question which might be the subject of litigation, entirely out of the case. They compromised and settled the case as much so as though they had fixed upon a definite and specific sum of money to be paid, with the exception that the amount to be paid was left to be figured out under a statute which could make it perfectly definite and certain by submission to the Industrial Commission, as the body who should determine the extent of the injury and the duration of disability. The fact that the insurance carrier thinks that the period of disability has ended and is doubtful whether the Commission will so rule, does not alter the proposition that the parties agreed that the consideration for the agreement which they deliberately entered into, should be fixed in that way.

It seems to me that in the absence of fraud or mistake, the Commission has no power to set aside the agreement which two perfectly competent contracting parties have made. It is not so much a question of estoppel as a question of a settlement, in which the parties having agreed to adjust any possible difference of opinion as to the Commission's jurisdiction, and each party has acted upon and in part carried out the terms of the agreement, the insurance carrier by paying compensation in pursuance of the agreement, and the injured man by refraining up to the present time, from exercising any right of action which he might have had at common law.

Reference has been made by the counsel for the insurance carrier to the Lanigan, Champion, Moran and Shanley cases, and objection is made to carrying the theory of estoppel from those cases over into this case. I am inclined to think that in the Shanley case, the decision might well have been placed,

not so much on the theory of estoppel as upon the theory here advanced of accord and satisfaction, or a *quasi* accord and satisfaction.

But the Appellate Division reversed the decision, vacated the award and dismissed the claim in the Hassen case, citing the Court of Appeals in *Doey v Howland Co.* The pertinent part of its opinion is as follows:

HASSEN V. ELM COAL CO., 184 App. Div. 715, Nov. 13, 1918, *in part*.

The Commission was of the opinion that the claimant was not within the act, but thought that by their agreement the parties had placed it beyond their power to question the jurisdiction of the Commission. The insurance carrier, the only appellant herein, was not a party to that agreement. It did not need to be a party if the claim was within the jurisdiction of the Commission. But no act or acquiescence on the part of any one can confer jurisdiction of the subject-matter of a controversy on a court or body exercising the same. This principle is firmly established and if there ever was any doubt about it, such doubt was removed by the recent case of *Matter of Doey v. Howland Co.* (224 N. Y. 30). The following extract from the opinion in that case finds special pertinency here: "The fact that the determination of the Commission had been acquiesced in to the extent that certain payments had been made thereunder and an appeal had not been taken therefrom could not prevent either of such parties raising the question at any time they saw fit. This follows from the fact that the determination was a nullity. It bound no one. It was a void determination." It follows that the Commission had no power or authority to approve the agreement or to enforce its execution.

The decision should be reversed, the award vacated, and the claim dismissed. All concurred. Decision reversed, award vacated and claim dismissed.

D. *Preference of agreement over claim.*—The Commission had before it at the same time an agreement of the employer and employee and a claim of the employee. "The action of the Commission was to approve the said agreement, taking no action upon the said claim": *Klein v. Stoller & Cook Co.*, S. D. R., vol. 8, p. 440, Apr. 10, 1916.

E. *Instances of modification.*—The Commission changed the rate of weekly compensation in one case of agreement from \$7.91 to \$8.33: *Rudewicz v. Wendell & Evans Co.*, S. D. R., vol. 6, p. 408, Jan. 18, 1916; and in another, from a "basis of a daily wage of two dollars" to \$17.10: *Sloate v. Rochester Taxicab Co.*, S. D. R., vol. 8, p. 498, May 12, 1916. It changed the period of compensation in one case of agreement from 40 weeks to 70 weeks: *Leiser v. General Drop Forge Co.*, S. D. R., vol. 7, p. 467, Mar. 3, 1916; and in another, from 169 weeks to 244 weeks: *Martin v.*

the employer from pleading absence of legal notice of the accident by the employee: *Lettiere v. Degnon Contracting Co.*, S. D. R., vol. 15, p. 604, Feb. 15, 1918; *Piekarski v. Doehler Die Casting Co.*, S. D. R., vol. 16, p. 447, Apr. 23, 1918; *Marra v. Nassau Electric Co.*, S. D. R., vol. 16, p. 501, May 10, 1918; *Kulp v. Stabell Co.*, S. D. R., vol. 17, p. 629, Aug. 16, 1918. The Appellate Division has affirmed awards involving such ruling unanimously and without opinion in *Farrell v. Swett Iron Works*, Case No. 8438, May 7, 1917; *Death Case*, No. 9257, Aug. 16, 1917; 184 App. Div. 919, May 8, 1918; and *Sheridan v. Trainer Construction Co.*, Case No. 71651, Apr. 3, 1918; 187 App. Div. 915, Jan. 15, 1919. The effect of an agreement in the way of estopping the Commission from reopening a case has been presented above under the title, "Finality of agreement."

FILING OF COMPENSATION CLAIMS, SUFFICIENCY AND TIME LIMIT

(Workmen's Compensation Law, § 28, § 67, subd. 3, §§ 70, 116)

Compensation for accidental injury depends upon the filing of a claim therefor with the Commission and such filing must take place within one year from the date of the accident, if it does not prove fatal, but within one year from date of death, if it does prove fatal: Workmen's Compensation Law, § 28. Though an employee may have survived his accident far beyond the year's limit and have failed to file any claim whatsoever, his widow, children or dependents may file claim within a year after his death, award being, of course, contingent upon his death having been due to the accident. The Appellate Division has so held in the following brief opinion:

O'ESAU v. BLISS Co., 186 App. Div. 556, Mar. 5, 1919.

JOHN M. KELLOGG, P. J.: The employee was injured on the 28th day of March, 1916, and died on account of such injuries March 21, 1918. The employee failed to file a notice of injury, as required by section 18, but the claim was filed as required by section 28 of the Workmen's Compensation Law.* His widow, however, filed a claim for death benefits the day after his death. The fact that he had failed to give notice in a manner which entitled him to compensation does not bar her right to death benefits. By section 28 the right to compensation "shall be forever barred unless within one year after the injury, or if death result therefrom, within one year after such death, a claim for compensation thereunder shall be filed with the Commission." This section makes it clear that she is not prejudiced by the fact that he lost his right to compensation by failure to file a claim.

Kelliher v. N. Y. C. & H. E. R. R. Co. (212 N. Y. 207), relied upon by the appellants, does not sustain their contention. There it was held that the action was a purely statutory one, and that, by the terms of the statute, the right to recover against a person for wrongfully or negligently causing a death did not survive after the injured person had permitted the limitation imposed by the statute to expire. The statute we are construing has no such provision, but upon the contrary carries a different intent. The award should be affirmed. Award unanimously affirmed.

The Legislature has limited the employer's right to plead the Statute of Limitations relative to notice of accident and filing of compensation claim in the same manner by the same law (L. 1918,

* See Consol. Laws, chap. 67 (Laws of 1914, chap. 41), §§ 18, 28. Since amended by Laws of 1918, chap. 634.—[RKP.]

ch. 634); i. e., the employer must plead it at the Commission's hearings if he is not to incur the penalty of waiver in the later court proceedings. Exceptions are made by § 20-a, concluding sentence, and § 116.

Examples of claims not filed in time and denied by the Commission are *Angehucchi v. Kerbaugh*, S. D. R., vol. 9, p. 387, Aug. 15, 1916; and *Roso v. State Insurance Fund*, S. D. R., vol. 11, p. 600, Nov. 10, 1916. The claimants in both of these cases resided beyond seas. A third instance is *Leczowski v. Lafave & Bellinger*, S. D. R., vol. 14, p. 701, Bul., vol. 3, p. 81, Nov. 15, 1917.

A. *Sufficiency*.—The Commission furnishes blank forms for claims, in accordance with § 76, but has taken care to provide in its rules that "a writing which sets forth the claims shall not be rejected as insufficient because not upon one of such blank forms, or because not verified." It has accordingly held in cases of negligence actions against third parties under § 29 that a notice of the election to sue filed with it within a year after the accident is a sufficient claim of compensation to avoid the statute of limitations if such notice reserves to the injured employee and his dependents all further compensation law rights and remedies: *Garlapow v. Zuckmaier Bros.*, Death File, No. 18541, Apr. 18, 1917; *Ridout v. Rogers & Haggerty*, S. D. R., vol. 14, p. 710, Bul., vol. 3, p. 101, Dec. 11, 1917; *Jelliff v. Crescent Bread Co.*, S. D. R., vol. 16, p. 511; *Brewinski v. Pullman Co.*, S. D. R., vol. 17, p. 644, Bul., vol. 4, p. 24, Oct. 15, 1918. The Garlapow award has been affirmed by the Appellate Division: 181 App. Div. 962, Dec. 29, 1917. The Ridout award has been affirmed by the courts: 185 App. Div. 901, July 2, 1918; 224 N. Y. 711, Nov. 26, 1918.

But after two years such filing of claim depends for its effectiveness upon the injured employee's keeping his action against the third party alive. If he does not, he deprives the insurance carrier of its remedy under Workmen's Compensation Law, § 29, and thereby forfeits his own right to compensation. The Commission has so held in *Easter v. Washington Heights Van Co.* in a finding based upon an opinion given below, page 285.

The Commission has held, in *O'Esau v. Bliss Co.*, that a letter of inquiry from the injured employee, received by it but not by the employer about six months after the accident, constituted a sufficient claim for compensation to avoid the year's time limit:

File No. 85053, Mar. 22, 1918. The letter began, "I would like to know if I am entitled to any compensation," and proceeded to recite briefly the facts of his employment and accidental injury. Commissioner Lyon, dissenting from his fellow Commissioners, was of opinion that the letter was not a claim. The Appellate Division approved of an award made upon the Commission's finding that it was a claim. In dismissing an appeal upon technical grounds the Court of Appeals said: "If we were at liberty to consider this appeal on the merits we would feel compelled to hold that the letter of October 22, 1916, did not constitute a claim for compensation under the requirements of the statute." Full text of the opinion of the Court of Appeals appears below, page 377. Upon reconsideration, the Commission granted disability compensation to O'Esau's widow, as administratrix, taking no notice of the discredited letter, but basing its award as originally upon estoppel (S. D. R., vol. 19, p. 444). The Appellate Division reversed this award, June 30, 1919.

In the case of an alleged widow living in Russia in war times, the Commission could not show timely filing of a claim by her in the usual form; the Attorney-General argued that § 28 does not require signature of a claim and that filing of proof of death and notice of injury by a son in behalf of the widow, together with filing of affidavit of death and report of injury by the employer constituted sufficient filing of a claim; the Commission made, and the Appellate Division unanimously affirmed an award to the widow: *Granofsky v. Bing & Bing Construction Co.*, Claim No. 28900, Apr. 5, 1916; 181 App. Div. 909, Nov. 14, 1917.

The Commission has upheld the sufficiency of a claim filed by a consular agent in behalf of his national in *Pinco v. St. Lawrence Pyrites Co.*, S. D. R., vol. 19, p. 514, Bul., vol. 4, p. 149, Apr. 9, 1919.

B. Reckoning of the time.—Under the General Construction Law of New York the day of the accident must be excluded in reckoning the year during which the injured employee has the right to file a claim for compensation; so that, the time limit in case of an accident occurring July 1, 1918, will be July 2, 1919. The Appellate Division has established this point in the following opinion:

HUDSPITH v. PIERCE-ARROW MOTOR CAR CO., 180 App. Div. 147, Nov. 14, 1917.

COCHRANE, J.: The accident happened January 10, 1916. Section 28 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) provides that the right to compensation shall be forever barred unless within one year after the injury a claim for compensation is filed with the Commission. The claim in this case was not so filed until January 10, 1917. The appellants contend that in computing time reckoned by years, the day from which the time is reckoned must be included in the reckoning, and that the claim, therefore, was not filed within one year. So it was held in *Aultman & Taylor Co. v. Syme* (163 N. Y. 54) and *Benoit v. New York Central & Hudson River Railroad Co.* (94 App. Div. 24). Those decisions were based on the Statutory Construction Law (Gen. Laws, chap. 1 [Laws of 1892, chap. 677], as amd. by Laws of 1894, chap. 447), which provided in section 27 as follows: "The day from which any specified number of days, weeks or months of time is reckoned shall be excluded in making the reckoning," and made no reference to years. That provision of the statute became part of section 20 of the General Construction Law (Consol. Laws, chap. 22; Laws of 1909, chap. 27). In the case of *Aultman & Taylor Co. v. Syme* (*supra*) the court said that while the statute specifically declared that "the day from which any specified number of days, weeks or months is reckoned shall be excluded in making the reckoning," no such provision was made in the statute for computing periods of years, and that under the principle *expressio unius est exclusio alterius* a computation of time reckoned by years should include the first day from which the time was reckoned instead of excluding the same, as the statute specifically required in the case of days, weeks or months. The court further remarked: "Had the Legislature intended to apply that method to periods of years it could have disposed of the whole subject in a single sentence by saying that the day from which any specified period of time is to be reckoned shall be excluded from the reckoning." The Legislature expressly acted on this suggestion and adopted almost the identical language of the court in chapter 347 of the Laws of 1910, by amending section 20 of the General Construction Law so as to substitute for the sentence, "The day from which any specified number of days, weeks or months of time is reckoned shall be excluded in making the reckoning," the following sentence: "The day from which any specified period of time is reckoned shall be excluded in making the reckoning." The rule, therefore, is now the same whether time be reckoned by days, weeks, months or years. In any event the day from which the reckoning is made must be excluded. It follows that the claim was filed with the Commission within one year.

The award should be affirmed. Award unanimously affirmed.

C. *Estoppel by conduct of employer.*—In certain circumstances the Commission has set up the doctrine that the employer's conduct has estopped him from his advantage of a year's time limit to the filing of a compensation claim by his injured employee: *Twonko v. Rome Brass & Copper Co.*, Claim No. 35302, Oct. 22, 1917, S. D. R., vol. 15, p. 598, Bul., vol. 3, p. 148, Feb. 5, 1918;

O'Esau v. Bliss Co., S. D. R., vol. 14, p. 606, Bul., vol. 3, p. 79, Nov. 15, 1917; *DeGaglio v. Bradley Contracting Co.*, S. D. R., vol. 15, p. 590, Bul., vol. 3, p. 120, Dec. 11, 1917, Claim No. 75360, Jan. 18, 1918; *Deecke v. Huyder's Corp.*, S. D. R., vol. 15, p. 671, Bul., vol. 3, p. 169, Apr. 2, 1918. The Commission held that the employer had been estopped in the Twonko case by false representations on his part to induce the injured employee not to file a claim, and in the other three cases by continuing the employee at work and wages for more than a year after his accident. Additional grounds in the DeGaglio and Deecke cases were the periodic payment of sums of money upon the compensation plan and in the Deecke case the conduct of the employer in inducing the employee to undergo a surgical operation.

Upon appeal in the Twonko case, the Appellate Division adopted the Commission's view to effect that the employer had made false representations and affirmed the award; but the Court of Appeals held the employer free of wrong intent, reversed the order of the court below and dismissed the claim. Both courts handed down opinions. The part of the Appellate Division's opinion relative to Twonko's failure to file a claim is as follows:

TWONKO v. ROME BRASS & COPPER CO., 183 App. Div. 292, May 17, 1918,
in part.

It is true that the claimant did not file his claim until more than one year after the accident. The evidence shows, however, that the claimant while in the hospital was approached on October 20, 1914, by an agent of the employer having in charge the report of accident cases to the Commission and the carrier, and was induced by him to make a written statement concerning the accident, which set forth sufficient facts to constitute a formal claim; that the claimant was told by this agent that the statement was a notice of claim for compensation, that through it he was to get money from the insurer, and that claimant believed such to be the fact. This proof, together with the proof as to the treatment of the claimant by the physicians in the hospital at the expense of the insurer, was sufficient to justify the Commission in its holding that the employer and insurer were estopped thereby from setting up the one-year limitation as a bar to the enforcement of the claim.

The award should be affirmed. All concurred, except COCHRANE, J., dissenting on the first ground. Award affirmed.

The opinion of the Court of Appeals states the main facts in Twonko's case, reviews the evidence relative to false representations and holds the employee responsible for the failure to file a

claim notwithstanding his illiteracy and ignorance. It says that the agent charged with false representations had no authority to waive the time limit provisions, assuming that he undertook so to do. The opinion in full is as follows:

TWONKO v. ROME BRASS & COPPER Co., 224 N. Y. 263, Oct. 15, 1918.

CRANE, J.: Section 18 of the Workmen's Compensation Law (Cons. Laws, chap. 67), as applicable to this case, required notice of the injury to be given to the employer within ten days after the accident, and, by section 28, the right to claim compensation was forever barred unless within one year after the accident the claim for compensation was filed with the commission. Neither of these provisions was complied with. The commission found that the employer was aware of the accident and that neither the employer nor the insurance carrier was prejudiced by the failure to give the notice required by section 18. It may be that there is some evidence to sustain such a finding, but we are of the opinion that there is no legal excuse shown for failure to comply with section 28. The commission found, and the Appellate Division has sustained the finding by a divided court, that the employer and the insurance carrier were estopped from raising this objection. The facts do justify this conclusion.

Frank Twonko, while in the employ of the Rome Brass and Copper Company, was injured on July 20th, 1914. His claim for compensation was filed with the workmen's compensation commission on September 9th, 1915, or fifty-one days after his right to compensation was barred by the statute. Twonko claimed to have stepped in a hole in the floor turning his ankle which thereafter led to serious results. He continued at work for two days and then remained at home for four weeks. At the end of this period he returned to work for three days and then remained at home for five weeks when he called a doctor and was taken to the infirmary.

Dr. Reid who attended him was apparently anxious about his compensation, as on September 26th, 1914, the Rome Brass and Copper Company wrote to Mr. Williver, the district manager of the American Mutual Compensation Insurance Company, notifying him of the accident and stating that Dr. Reid wanted to know about the man's hospital and medical charges. The insurance carrier replied on September 28th, 1914, asking particulars regarding the accident. On October 20th, 1914, Kenneth Bow, paymaster of the Rome Brass and Copper Company, called at the Rome infirmary and procured from Frank Twonko a written statement signed by him giving the details of his accident and the extent of the injury. On October 23d, 1914, a copy of this statement was sent by the employer to the insurance company. Twonko remained in the infirmary until the 6th of January, 1915.

The insurance company sent checks to Drs. Reid and Stranahan for their services to Twonko as follows: On November 3d, 1914, for \$8; on November 14th, 1914, for \$44; on January 12th, 1915, for \$10, and on February 6th, 1915, for \$5, and to the Rome infirmary a check dated December 7th, 1914, for \$30, and on January 12th, 1915, a check for \$31.

Twonko testified that at the time he signed the statement of October 20th for Kenneth Bow, he understood that it was a notice to the company of claim

for compensation. "Mr. Petz (the interpreter) told me that I was going to get money from the Compensation Insurance Company and that was the reason I signed the papers." The witness further says that this was the reason that he gave no further notice.

Bow testified: "We told him that in order to have all the facts so he would receive his compensation it would be necessary for him to give us a statement exactly how the accident occurred and the time he laid off."

These circumstances together with the fact that Twonko did not speak English are the basis for the estoppel found by the commission. There is no suggestion that the claim which the law required should be filed with the commission was referred to or that it was even intimated that it should not be filed. The claimant was obliged to give notice to the employer as well as file a claim with the commission. In his testimony it may be noted that he considered his statement of October 20th, 1914, to be a notice to the company, not that he thought it a claim to be filed with the commission. It may be that the claimant knew nothing about the procedure under the Workmen's Compensation Law, but his ignorance can not weaken its provisions and requirements. They are as binding upon him as upon one fully acquainted with all the privileges and obligations of the act. Even if we assume that Bow undertook to waive for his company and the insurance carrier the provisions of section 28 (which is not the fact), yet he had no authority so to do and such an attempt would not be binding upon the parties to this proceeding. (*Dailey v. Stoll*, 211 N. Y. 74).

The claimant had until July 20th, 1915, to file his claim with the commission. The last payment by the insurance carrier of any money for his benefit was on February 6th, 1915. During a period, therefore, of five months the claimant knew that he was receiving no money upon his claim or by virtue of his statement given to Bow. The first letter from his lawyer to the commission is dated August 21st, 1915.

That the insurance carrier paid the doctors and the infirmary could not amount to estoppel without some representation by it justifying the claimant in a belief that his claim had been filed or would be filed with the commission.

The law states that the right to compensation shall be forever barred unless within one year after the accident a claim for compensation shall be filed with the commission. These plain provisions can not be dispensed with by such evidence as we have in this case. (*Buckles v. State of New York*, 221 N. Y. 418.)

The order of the Appellate Division should be reversed and the determination of the State Industrial Commission annulled and claim dismissed, with costs against the Industrial Commission in this court and in the Appellate Division.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDERBACK, HOGAN and McLAUGHLIN, JJ., concur. Order reversed, etc.

In the O'Esau case, the employee hurt one of his fingers so severely as to be unable to continue at the work he had been doing but his employer gave him a position as foreman or overseer at his former wages. He continued to perform the duties of this position for a year after the accident though his finger was

undergoing treatment. The infection unfitted him utterly and he lost his employment. The Commission based its finding of estoppel upon an opinion of Commissioner Lyon the pertinent part of which is as follows:

O'EGAU v. BLISS Co., S. D. R., vol. 14, p. 696, Bul., vol. 3, p. 79, Nov. 15, 1917,
in part.

It is a well-settled general rule that a defendant who has not expressly waived the defense of the Statute of Limitations may be estopped by his conduct from setting up the statute, where his conduct, though not fraudulent, has nevertheless directly induced the plaintiff to delay bringing suit until after the expiration of the statutory period. 9 Am. & Eng. Ann. Cas. 755.

In *Brookman v. Metcalf*, 4 Robt. (N. Y.) 508, it appeared the defendant owed the plaintiff upon two promissory notes. The defendant in order to induce the plaintiff not to sue upon the second note promised the plaintiff that he would abide the result of the decision in a pending suit on the first note. Influenced by such offer the plaintiff delayed bringing an action upon the second note until after the decision of the action upon the first note and until after the bar of the Statute of Limitations had attached. The court said: "It seems to me, upon the doctrine of equitable estoppel or estoppel in pais, the defendant ought not to be allowed to disregard his engagement and set the statute up as a defense * * * It is not necessary to an equitable estoppel, that the party should design to mislead. If his act was calculated to mislead and actually has misled another who acted upon it in good faith, it is enough."

Mr. Parsons in his work on contracts says: "When a man has made a declaration or a representation, or caused, or, in some cases not prevented, a false impression, or done some significant act, with intent that others should rely upon it and act thereon; and upon which others have honestly relied and acted, he shall not be permitted to prove that the representation was false, or the act unauthorized or ineffectual, if an injury would occur to the innocent party, who acted in full faith in its truth or validity." 2 Para. Cont. 348.

In an action for personal injuries, a promise of settlement will stop the running of the statute, or, in other words, where the claimant is led to postpone his suit by the statement of the defendant to the effect that a suit will be unnecessary, the defendant will be estopped to plead the Statute of Limitations when subsequently sued. *Renackowsky v. Water Comrs.* 122 Mich. 613.

Where a claim was properly filed against the estate of a decedent, except that no notice was served on the administrator as required by statute, but the administrator made a partial payment and offered to pay the balance in real estate, it was held that the administrator was estopped by his acts from setting up the Statute of Limitations. *Wilson v. McElroy*, 83 Iowa, 596.

Where a debtor, at his creditor's request, made a payment to a third person, and by his conduct led the creditor to believe that such payment was intended as a payment on the debt which he owed the creditor, and

that it therefore arrested the running of the Statute of Limitations, and the creditor refrained from suing because of his reliance in such conduct, it was held that the debtor was estopped to deny that the payment was so intended. See, also, *Armstrong v. Levan*, 109 Penn St. 177; *Bridges v. Stephens*, 132 Mo. 524; *Daniel v. Board of Comrs.*, 74 N. C. 494; *Seofford Bros. v. Goss*, 65 Mo. App. 55.

Following these opinions and decisions and having in mind the serious nature of claimant's present condition, and the fact that the necessity, not to say possibility, of filing the claim was not apparent so long as claimant could, and was willing to, perform service at his former rate, and the further fact that the employer was at all times aware of the serious nature of claimant's injury, I am of the opinion that the employer is not in a position to successfully invoke the bar of the statute.

Upon appeal, the Appellate Division remitted the case to the Commission because of a letter of the claimant that had come to notice and that was thought by the Attorney-General to constitute a sufficient filing of a claim within the year: — App. Div. —, March, 1918. The letter is noticed above, page 254. Upon rehearing the case, the Commission found that the letter constituted a sufficient claim within the year and also readopted its former findings of estoppel. Upon appeal a second time, the Appellate Division affirmed the award without opinion, one justice dissenting: 185 App. Div. 900, July 2, 1918. Upon further appeal, the Court of Appeals dismissed the appeal because of the death of the claimant, assigning provisions of the Code of Civil Procedure as governing its action but taking occasion to say that it would not consider the letter a filing of claim. The opinion appears below, page 377.

Thereupon the Commission reconsidered the case and granted disability compensation to O'Esau's widow, as administratrix taking no notice of the discredited letter, but basing its award, as originally, upon estoppel (S. D. R., vol. 19, p. 444). The Appellate Division reversed this award with opinion relative to estoppel, as follows:

O'Esau v. Bliss Co., — App. Div. —, June 30, 1919.

WOODWARD, J.: The only question necessary to be considered here is whether the failure of the claimant to file a claim within the period of one year from the time of the accident may be disregarded upon the theory that the employer, by continuing the employee in its service, worked an estoppel. On the 15th of November, 1917, the State Industrial Commission made an award to John M. O'Esau, holding that the employer and insurance carrier

were estopped to urge the provisions of section 28 of the Workmen's Compensation Law. From this award an appeal was taken to this court, and at the March term in the present year it was urged that a certain letter, dated October 22, 1916, operated as a claim under the act. The case was sent back to the Commission to make such findings as it should find proper, and it was then held that the letter in question constituted a claim, and an award was made. A further appeal from an order of this court confirming the award resulted in a dismissal of the appeal, on the ground that it was not properly before the Court of Appeals, with a distinct suggestion that the letter in question did not constitute a claim within the meaning of the statute. The case was then reconsidered by the State Industrial Commission, which made findings of fact in which, after pointing out the manner and extent of the injury, it was found that

'2. * * * Said injuries soon incapacitated him from doing his former work but his employer retained him in the capacity of foreman, or overseer, and at the rate of wages earned prior to said accident. He was kept at work by his employer from the date of said accident to April 30, 1917, on which latter date he was discharged. From the date of said accident to April 30, 1917, during which time his employer retained him in a supervisory capacity, John M. O'Esau lost but three weeks on account of said injuries, and from the date of said accident to June 16, 1916, his employer furnished him with medical attention at the clinic located at the employer's plant.

"If he had not been retained by his employer as a foreman, or overseer, he would have been disabled from working from practically the date of said accident to November 15, 1917. Having been discharged by his employer on April 30, 1917, so far as a loss of wages is concerned, he was actually disabled from April 30, 1917, to March 21, 1918, the date of his death.

"3. John M. O'Esau filed with the Commission a claim for compensation on June 6, 1917, which was more than a year after the date of the actual injury received, but less than one year from the date of actual disability.

"4. The conduct of the employer, in view of all the circumstances, and particularly in keeping the claimant employed up to April 30, 1917, for a period of more than a year after the date of said accident, at a rate of wages equal to the wages earned prior to said accident, and in furnishing medical attention for the period required by the Compensation Law, directly induced the claimant to delay in filing a claim for compensation until after the expiration of the statutory period, as set forth in section 28 of the Compensation Law."

Upon these findings of fact the Commission decided that the "employer and insurance carrier are alike estopped to plead the Statute of Limitations in respect to the failure of the claimant to file his claim within one year after the injury, since, by the conduct of the employer, whether fraudulent or not, it has directly induced the plaintiff to delay in filing his claim for compensation with the Commission until after the expiration of one year from the date of said accident."

Section 18 of the Workmen's Compensation Law requires that a notice must be served within ten days, or the claim is barred, unless the Commission shall, in a proper case, excuse such failure, and it has been held that

the ten days thus limited runs from the date of disability, not from the day of the accident, but we find no provision of the statute which permits the State Industrial Commission to set aside the requirement of section 28 of the act. This section is not properly a statute of limitations; it is a condition of the right to compensation under the act. The claimant has no common-law right of compensation; this has been taken away and a new right has been substituted upon the conditions named in the act, and among these conditions is that the claim must be filed with the Commission within the period of one year "after the injury," and not only is there no provision for the Commission to excuse such filing, but it is provided in section 116 of the act that "No limitation of time provided in this chapter shall run as against any person who is mentally incompetent or a minor dependent so long as he has no committee, guardian or next friend," thus excluding all other cases under the rule of *expressio unius est exclusio alterius*. (*Aultman & Taylor Co. v. Syme*, 163 N. Y. 54, 57.) No suggestion is made here that the claimant was mentally incompetent; the record clearly shows that he was not; and the statute provides that the "right to claim compensation under this chapter shall be forever barred unless within one year after the injury * * * a claim for compensation thereunder shall be filed with the commission." (§ 28.)

The rule is thoroughly well established that where a statute gives a right unknown to the common law, and limits the time within which an action shall be brought to assert it, the statutory limitation measures the extent and qualifies the nature of the right conferred. (*Daily v. N. Y., O. & W. R. Co.*, 26 Misc. Rep. 539, 540; *The Harrisburg*, 119 U. S. 199; *Wooden v. W. N. Y. & P. R. R. Co.*, 126 N. Y. 10; *Hill v. Supervisors*, 119 id. 344, 347.) In the latter case the court say that where the statute creates a new cause of action "the limitation of time is so incorporated with the remedy as to make it an integral part of it, and the condition precedent to the maintenance of the action at all." (*Rosin v. Lingerwood Manufacturing Co.*, 89 App. Div. 245, 253.) "The right to claim compensation under this chapter is forever barred," says the statute, "unless within one year after the injury * * * a claim for compensation thereunder shall be filed with the commission." This is clearly a jurisdictional fact; without the filing of the claim within one year from the injury the Commission is powerless to act, because the right to "claim compensation" has been forever barred, and even the State Industrial Commission may not revive that claim sufficiently to give it jurisdiction to apply the doctrine of estoppel. What a court of law or of equity might do in a case coming within the scope of an estoppel, which always involves the element of fraud or something which operates as a fraud (*Wilmore v. Flack*, 96 N. Y. 512, 520), it is not necessary now to inquire. The claimant worked for the employer for many months after the accident, during all of which time he was in the possession of all his mental faculties, as we must assume. He was bound to know the law, and this law required, as a condition precedent, that he should file his claim within a period of one year from the date of the accident. Having failed to do this the "right to claim compensation under this chapter" was at an end; it was beyond the jurisdiction of the State Industrial Commission, and its holding that the employer and insurance carrier were estopped is utterly without

force or effect. No evidence of fraud appears in the record; the employer furnished the claimant with work which he could do at his old wages following the injury, and there is not a suggestion that anything was done to prevent the claimant taking such action as his interests required.

The award appealed from should be reversed and the claim dismissed. *As concurred. Award reversed and claim dismissed.*

About a month after it awarded compensation to O'Esau the Commission upheld the doctrine of estoppel in the DeGaglio case upon the ground that the employer and self-insurer had continued the employee at work with the same wages and had made what purported to be compensation payments to him when he could work no longer. It had paid him wages for about fourteen months after his accident and then, upon his disability, had paid him fifteen dollars per week for about sixteen months. The Commission found that the employer "by its conduct, whether fraudulent or not" had "directly induced the claimant to delay in filing his claim for compensation with the Commission until after the expiration of one year." It said that in relying on the employer's conduct the employee had "acted as a prudent man might reasonably act under the circumstances." It adopted an opinion of Commissioner Sayer which after reciting the facts in detail summed up the question of estoppel as follows:

DEGAGLIO v. BRADLEY CONTRACTING Co., Inc., vol. 8, p. 120, Dec. 11, 1917, *in part*.

It is well settled in law that the statute of limitations is not a bar to a claim unless pleaded and that the statute may expressly be waived. Moreover, even when the statute has not been expressly waived, it is well settled that the conduct of the party who seeks to set up the statute may be such as to work an estoppel upon him to set it up.

If, as we found it did, the company continued its employee at work at his regular wages for a period of more than one year after he was accidentally injured, so that the year within which to file a claim after injury had expired, and if, thereafter, when the claimant no longer could work, the employer promised him money and made payments to him which payments were exactly in accordance with what would have been paid under the Workmen's Compensation Law, then, the natural result of the employer's conduct would be to lull this injured workman into a feeling of security whereby his rights under the law might become prejudiced. The Workmen's Compensation Law provides a method for compensating industrial accidents which is exclusive as to all accidents coming within the scope of that law. No

employer may evade the provisions of the law, nor may he substitute a method of compensation of his own in place of that prescribed by the law. If he attempts to do so and makes payments to the injured employee and thereby either intentionally or unintentionally causes that employee to forego the filing of a claim with this Commission, he may, in my opinion, properly be held to have recognized the workman's claim before a formal filing with this Commission of a written claim, and he will be estopped from asserting before us that the claim has not been timely filed. The law on this question has been very exhaustively discussed in the opinion of Mr. Commissioner Lyon in the case of *John M. O'Toole v. E. W. Bliss Co., Aetna Life Insurance Company*, insurance carrier, decided by this Commission on November 15, 1917. The views therein expressed are hereby adopted as my views upon the question of estoppel.

The employer, having recognized this claim, and having made payments thereunder, it follows that he cannot assert the bar of section 28 of the Compensation Law, and I advise that an award be made bringing the case up to the date of the hearing. The carrier must be given credit for payments already made.

Upon appeal, however, the Appellate Division with a brief opinion and without dissent reversed the award and dismissed the claim upon ground that the employer had not made any false assertions tending to induce the injured employee not to file a compensation claim. Upon this score it distinguished the *Twonko* case. The opinion is as follows:

DEGAGLIO v. BRADLEY CONTRACTING CO., 184 App. Div. 243, July 1, 1918.

H. T. KELLOGG, J.: Claimant was injured on August 12, 1914. He did not file a claim for compensation until March 5, 1917, or nearly two years and six months after the injury was received. Unless he has established an estoppel, therefore, his claim is barred. He says that he told the head superintendent of his injury at the time, and that he replied: "We will take care of you." He also says that he asked the superintendent for payment of compensation, and that he answered: "Soon as you can work we'll give you an easy job." Here is no estoppel. There is no fact falsely asserted relying upon which the claimant was induced not to file a claim. It is not at all like the case of *Twonko v. Rome Brass & Copper Co.* (183 App. Div. 292), recently decided by this court, in which the claimant was falsely told that a paper signed by him would entitle him to an award. Claimant continued to work until October 2, 1915. He then went to a hospital for an operation. After this he was paid by his employer for about a year. Those payments, however, even though stated to be payments under the Compensation Law, do not help the claimant, for the time to file a claim had passed before they began to be made. They could not have induced claimant not to file a claim.

The award should be reversed. All concurred. Award reversed and claim dismissed.

In the Deেকে case, the accidental injury of which consisted of hernia, circumstances of wage and compensation payments somewhat similar to those of the DeGaglio case, and also the action of the employer in inducing the employee to undergo a surgical operation, led the Commission, on April 2, 1918, to set up the doctrine of estoppel and to award compensation.

D. *Exceptions*.—The year's time limit upon the filing of a claim does not run against "a person who is mentally incompetent or a minor dependent so long as he has no committee, guardian or next friend": Workmen's Compensation Law, § 116. In a case illustrative of this exception, an iron bar pushed from a ledge fell upon a workman's head. The blow caused paralysis and mental incompetency. Written claim for compensation was not filed for almost two years after the accident. A special deputy commissioner recommended an award on the ground that § 116 was applicable to the case. The Commission accordingly made an award. Upon appeal, the courts affirmed the award without opinion. The Appellate Division handed down a unanimous decision but the Court of Appeals divided four to three: *Smith v. Washburn*, Case No. 18733, Sept. 6, 1917; 183 App. Div. 911, Mar. 5, 1918; 224 N. Y. Rep. 619, Oct. 22, 1918. The argument of opposing counsel centered upon definition of the terms "incompetent" and "next friend" in § 116. The injured employee had been rendered speechless and had suffered other loss of physical and mental powers but had transacted some business subsequent to his injury. In making award, the special deputy commissioner said that "incompetent" did not necessarily mean "a person who is an idiot or *non compos mentis*"; that it did not imply "absolute lack of mental activity." "Aphasia," he said, "affects the mind." Before the courts, the injured employee's attorney argued that incompetency means relative lack of mental ability and instanced appointment of committees of incompetency for drunkards, aged persons and persons afflicted with loss of memory, as well as for the insane.

The insurance carrier, besides denying that the injury had rendered the employee incompetent, argued that he had had a "next friend" in his wife who had filed his belated claim for compensation. The Attorney-General and the employee's attor-

ney replied that New York law and usage generally restricted the terms, committee, guardian and next friend, to court appointees, applying the term, "committee" to the custodian of the person or property of an incompetent but the term "guardian or next friend" to the custodian of the person or property of a minor. They cited Code of Civil Procedure, § 2320. They pointed out that an employer could protect himself from operation of § 116 by applying to the courts for a committee or a guardian for the injured employee.

ELECTION OF REMEDIES

(Workmen's Compensation Law, §§ 11, 29)

Under Workmen's Compensation Law, §§ 11, 29, if the employer has failed to comply with insurance requirements, or if another not in the same employ has caused the accident, the injured employee, or his beneficiaries in case of his death, has the alternative of proceedings for compensation before the Commission or proceedings for damages before the court. Under § 11, his action for damages and his claim for compensation lie against one and the same party; namely, his employer. Under § 29, his action for damages lies against a party other than his employer while his claim for compensation lies against his employer. Further, § 29, involves subrogation while § 11 does not.

A. *Pursuit of second remedy after pursuit of first.*—The courts have been dealing with the important question: Does choice of one of these two remedies preclude the injured employee from availing himself of the other in case he fails of relief under the remedy chosen? He may either fail utterly of such relief under the remedy chosen or may obtain it but be dissatisfied with the amount yielded by it and desire to try the other remedy.

The Appellate Division has held, with opinions in all three cases, that pursuit of one remedy under § 29 does not preclude pursuit of the other: *Woodward v. Conklin & Son*, S. D. R., vol. 4, p. 432, June 28, 1915; 171 App. Div. 736, Mar. 8, 1916; but that pursuit of one remedy under § 11 does preclude pursuit of the other: *Pavia v. Petroleum Iron Works Co.*, S. D. R., vol. 9, p. 398, July 27, 1916; 178 App. Div. 345, May 2, 1917; *Crinieri v. Gross*, S. D. R., vol. 16, p. 432, Apr. 17, 1918; 184 App. Div. 817, Nov. 13, 1918. Decisions were unanimous in the Woodward and Pavia cases. Two justices dissented with opinion in the Crinieri case. Full text of the Woodward opinion is in Bulletin No. 81, pages 336-339; and of the Pavia opinion,

in Bulletin No. 87, pages 261-263. Text of the Crinieri opinion is presented below.

The basis for the difference between § 11 and § 29, as to relation of the two remedies to each other, is found by the court in a different interpretation of the term "elect" as used in the one section and in the other. Precedents have determined that if two existing remedies are consistent one with the other, the pursuit of one does not prevent later pursuit of the other, but, if they are inconsistent, the pursuit of one prevents later pursuit of the other. The Appellate Division appears to hold that the two remedies, filing of a compensation claim and institution of an action for damages, are consistent with each other as concerns cases of third party responsibility under § 29, but are inconsistent with each other as concerns cases of employer's failure to secure compensation under § 11. The distinction is developed more fully in the following presentation of the three cases.

In the earliest case, the Woodward case, an unruly mule injured his driver by throwing him from a wagon upon some railroad tracks. The railroad company, as third party, took the precaution to obtain a release from the driver. When the driver asked the Commission for compensation, his employer's insurance carrier set up the release to the railroad company as a bar to an award. It argued that the release proceedings, as incident to an action for negligence, constituted election of one remedy to the exclusion of use of the other. An award having been made notwithstanding its objection, it took an appeal. The Appellate Division affirmed the award with the following statement interpretative of the word "elect" as used in § 29:

WOODWARD v. CONKLIN & SON, 171 App. Div. 736, Mar. 8, 1916, *in part*.

The term "elect," as used in section 29, does not have the meaning which it frequently has of indicating a choice between two inconsistent remedies against the same party, the exercise of which choice in one direction precludes action in another direction. That is apparent from the whole tenor of the section. The claimant may bring his common-law action against a third party, and if he does so he does not thereby discharge the insurer of his employer unless he recovers as much as he might be awarded by the Commission under the act, because the statute says that in such case "the State Insurance Fund, person or association or corporation, as the case may be, shall con-

tribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case.' On the other hand, if the claimant elects to take compensation under the act, his cause of action against the third party must be assigned to the insurance carrier who thereby becomes subrogated to such remedy of the claimant. And for the protection of the insurer the statute expressly provides that 'a compromise of any such cause of action by the workman or his dependents at an amount less than the compensation provided for by this chapter shall be made only * * * with the written approval of the person, association or corporation liable to pay the same.' Clearly, therefore, a compromise or release by an employee of his cause of action against a third party is ineffectual against the insurer without the written approval of the latter. The release in such case constitutes no obstacle in the way of the insurer prosecuting the assigned claim against the third party. One of the primary purposes of the statute is to protect the employee against his own improvidence, weakness, ignorance or shortsightedness in compromising his claim for injuries. And a reciprocal advantage or protection to the insurer is given in the form of a claim against any third party negligently causing the injury which cannot be destroyed by the act of the injured party without the written approval of the insurer. When a third party takes a release or settles a claim he does so with full knowledge of this statutory requirement that the compromise shall have the written approval of the person or corporation liable for compensation under the act, and that without such approval such release or compromise may not be asserted against the person or party whose approval is thus required. And the statute while protecting the workman does so without sacrificing or prejudicing the rights of either the insurer or the third party. The latter cannot be placed in any less favorable position because whatever he pays he cannot be called on to pay again, but if he compromises for less than his actual liability he remains liable to the insurer for such excess up to the amount allowed under the act unless the latter has consented in writing, as the statute provides, for the compromise at the less amount.

Furthermore, section 33 of the act provides that 'claims for compensation or benefits due under this chapter shall not be assigned, released or commuted except as provided by this chapter.' This of course means that claims for compensation under the act against the insurer may not be assigned, released or commuted, but if the employee without the approval of the person liable to pay the compensation under the act may release a third party and make such release effective against the insurer, then he is permitted to indirectly accomplish the defeat of this provision in section 33 and by settling with the third party release and discharge his claim for compensation under the act. This seems to constitute an additional argument why a release is ineffectual as against the insurance carrier unless it has the approval of the latter.

In the present case the claimant received nothing for the release in question, but if he had done so according to the views expressed it would make no difference except that the insurer would be liable only for the difference between the amount received and the compensation provided by the act.

The award should be affirmed.

In the Pavia case, the employee was struck on the head while at work by a plank four inches square. His injuries were very serious. He filed with the Commission a claim for compensation against his employer company, not knowing that it had failed to insure its employees in accordance with the compensation law's requirements. The Commission awarded him \$105.71 which amount his employer tendered him within ten days thereafter. He refused to take the money and asked the Commission for leave to withdraw this claim and for rescission of its award, his object being to prosecute an action against his employer for negligence. The Commission denied his request on the ground that he had "duly elected to take compensation," made an additional award to him and continued his case for further hearing. He appealed to the Appellate Division which went over the facts in the case and came to the following conclusion:

PAVIA v. BOOMHOWER GROCERY Co., 178 App. Div. 345 May 2, 1917, in part.

With full knowledge of the situation, therefore, before an award was made and with competent counsel to guide and advise him, the claimant permitted an award to be made in his favor and thereby most effectually confirmed his election to accept such remedy as was afforded him by the Workmen's Compensation Law. There is no pretence that he did not fully understand his rights before the award was made. A party cannot experiment with the Commission for the purpose of ascertaining how much compensation may be awarded him and then if dissatisfied repudiate the award and seek the other remedy permitted by the statute. His election once made intelligently and with knowledge of the facts should be conclusive. The Commission was clearly right in denying the application to discontinue the claim.

Decision unanimously affirmed.

In the Crinieri case, an Italian peddler for a kindling wood factory crushed his little finger while unloading old ties from a railroad car. He was hauling the ties to the factory to be made into kindling. Through attorneys, he instituted an action for damages in the Supreme Court, Second Department, against Marie Gross, alleged by him to have been his employer. Marie Gross had not taken out insurance in accordance with the compensation law's provisions. Her answer alleged that she had not been his employer, that her husband, Louis Gross, had been his employer and that his injury had been due solely to his own negligence. The court gave the injured employee thirty days in

which to apply for leave to amend his complaint. He did not make such application. It accordingly dismissed the complaint. Thereupon, ten months after the accident, the employee filed with the Commission a claim for compensation against Marie Gross and Louis Gross jointly. The husband and wife could not write their names. Upon hearing, the books of the kindling wood factory were produced by their daughter who testified that she was bookkeeper for them. She exhibited entries showing payment of claimant's wages, also checks in claimant's favor signed by her father, Louis Gross, and witnessed by herself. She testified to payment to the claimant of about five weeks' wages covering time after his accident. In this and in other respects claimant's testimony contradicted her. Claimant testified that Marie Gross had ordered him to unload the car. Upon conclusion of the hearing, the attorney of Louis and Marie Gross moved to dismiss the proceeding upon the ground that the employee's previous election to sue precluded him from claiming compensation, citing as authority the Pavia decision. The Commission overruled this motion and, without taking into account the alleged payment of wages after disability, awarded the claimant compensation for fifteen weeks, the full statutory allowance for loss of a little finger. In concluding its findings it said:

CHINIK v. Gross S. D. R., vol. 16, p. 432, Apr. 17, 1916, in part.

The term 'elect,' as used in section 11 of the Workmen's Compensation Law, does not have the meaning which it frequently has of indicating a choice between two inconsistent remedies against the same party, the exercise of which choice in one direction precludes action in another direction; therefore, the bringing of an action under section 11 against one of his employers does not preclude him from thereafter claiming compensation against both employers, as in this case. This, especially in view of the nature of the order dismissing the complaint in said action.

Upon appeal, the attorney for the employers rested their case mainly and briefly upon the Pavia decision, while counsel for the Commission said:

The claimant brought suit for damages and in that case it was necessary for him to establish negligence before he could be entitled to a judgment. He failed to establish negligence and the complaint was dismissed. On exactly the same evidence as he presented in his suit for damages he would be entitled to an award for compensation. There was, therefore, no inconsistency

between the remedies which the injured employee sought. In the claim for compensation the employee was entitled to an award regardless of whether he could establish that the employer was guilty of negligence or not.

The remedies, therefore, not being inconsistent, the rule to be applied in this case is that laid down by this court in the compensation case of *WOODWARD v. CONKLIN*, 171 A. D. 736.

The Appellate Division, Third Department, reversed the award and dismissed the claim, noting in the outset of its ruling opinion that Marie Gross had alleged before the Supreme Court, Second Department, that her husband, Louis Gross, had been the employer but concluding that "It was proven that he (the injured employee) was employed solely by Marie Gross, and as against her the claim was barred by an election previously made." Two justices dissented with opinion. Texts of the majority and minority opinions are as follows:

CRINIEMI v. GROSS, 184 App. Div. 820, Nov. 13, 1918.

H. T. KELLOGG, J.: The claimant, having been injured through an accident, brought an action to recover damages against one Marie Gross, alleging that she was his employer, that she had failed to secure compensation for her employees, and that he was injured through her negligence. Marie Gross in her answer alleged that the employer of the claimant was not herself, but one Louis Gross, her husband. The complaint was dismissed. Thereafter the claimant filed a notice of claim in which in answer to the question, "Name of employer?" he wrote, "Louis Gross or Marie Gross, his wife." The Commission made an award against Louis Gross and Marie Gross, both of whom were found to be the employer of the claimant. A difficulty confronting the Commission was the fact that, if Marie Gross was the employer, the claimant had previously made his election to bring an action against her, and, therefore, could not later have an award upon a claim afterwards filed. (Workmen's Compensation Law, § 11; *Pavia v. Petroleum Iron Works Co.*, 178 App. Div. 245.) This difficulty was overcome by the very easy method of merely making a finding that the claimant was employed by Marie Gross and Louis Gross jointly, to sue whom as partners an election had never been made. There was no legal evidence that Marie Gross and Louis Gross were employers of the claimant. Moreover, there was no legal evidence that Louis Gross was the employer. Both the notice of injury and the claim for compensation named "Louis Gross or Marie Gross or both of them." The only positive evidence upon the subject was given by the claimant, who testified that Marie Gross hired him, directed him and paid him, and in answer to the question, "You were employed by Marie Gross on the 24th day of March, 1917?" replied, "Yes, sir." There was, therefore, no foundation whatsoever for the finding of the Commission that the claimant was employed by Marie Gross, and Louis Gross. On the contrary, it was proven that he was employed solely by Marie Gross and as against her the claim was barred by an election previously made.

The award should be reversed and the claim dismissed. All concurred, except JOHN M. KELLOGG, P. J., dissenting, with a memorandum in which WOODWARD, J., concurred.

JOHN M. KELLOGG, P. J. (dissenting):

"The institution by a party of a fruitless action, which he has not the right to maintain, will not preclude him from asserting the rights he really possesses." (*Kinney v. Kiernan*, 49 N. Y. 164.)" (*McNutt v. Hilkins*, 90 Hun, 235, 239.)

"The principles governing election of remedies are necessarily based upon the supposition that two or more remedies exist. If in fact or in law only one remedy exists, there can be no election by the pursuit of another and mistaken remedy. It is a well-established rule that the choice of a fancied remedy that never existed and the futile pursuit of it, either because the facts turn out to be different from what the plaintiff supposed, * * * though the first action proceeds to judgment, does not preclude the plaintiff from thereafter invoking the proper remedy." (9 Ruling Case Law, 962, § 9.)

"The question depends for its answer upon the law of election of remedies. Where two inconsistent remedies, proceeding upon irreconcilable claims of right, are open to a suitor, the choice of one bars the other. But, to have that effect, the remedies must be inconsistent." (*Ratchford v. Cayuga County Cold Storage & W. Co.*, 217 N. Y. 565, 568.) WOODWARD, J., concurred. Award reversed and claim dismissed.

The *Crinieri* case has been appealed to the Court of Appeals.

B. *Allegation of non-insurance under § 11.*—An employee who brings an action for injuries due to negligence against an employer whose business is covered by the Workmen's Compensation Law's list of hazardous employments must allege that the employer did not have statutory insurance at the time of the accident. The point is established by the following opinion:

NULLE v. HARDMAN, PECK & Co., 185 App. Div. 351, Dec. 13, 1918.

DOWLING, J.: The real question involved herein is the sufficiency of the complaint, which defendant claims sets forth no cause of action. The action is brought to recover damages for the death of plaintiff's testator, Julius Nulle, who was a night engineer employed by defendant in its piano factory at 542 West Fifty-second street, in the city of New York. It is set forth in the complaint that Nulle, while acting as night engineer in defendant's employ on November 5, 1916, in the ordinary course of his employment and under the direction, supervision and control of the defendant, was instructed to dispose of refuse collected in the piano factory, which was of a highly inflammable nature and was placed in cans to be disposed by decedent under defendant's supervision; that decedent was directed by defendant, in the ordinary course of his employment, to burn the refuse in defendant's furnace. It is alleged that the furnace was old, worn, defective and unsafe, to defendant's knowledge, despite which no instructions as to its danger were given

by it to Nulle; that the usual and ordinary guards in general use on furnaces of this character were absent; that because of these conditions, Nulle, while in the performance of his duties as engineer in defendant's employ, and while actually placing the highly inflammable material in the furnace, was severely burned as the result of the ignition of the refuse by a back draft, which in turn set fire to Nulle's clothing, and inflicted injuries from which he died more than a month thereafter. Among the specifications of defendant's negligence are, that the furnace was taxed beyond its capacity and was entirely unsafe and insufficient for the work for which it was used; that guards were absent; that there was no reasonable or proper care, test or inspection; that the Employers' Liability Act had not been complied with, nor had chapter 657 of the Laws of 1906;* that the furnace was used in an unsafe and improper manner; and that Nulle's death was due to the defective condition of the ways, works, machinery, plant, tools and implements owned, operated and controlled by defendant, which condition could have been discovered by defendant by the use of reasonable and proper care, and that defendant had knowledge thereof or could have discovered the same with reasonable diligence. It is further averred that the notice required by the Employers' Liability Act had been duly given. (See Laws of 1902, chap. 600; Labor Law [Consol. Laws chap. 31; Laws of 1909, chap. 36], art. 14, as amd. by Laws of 1910, chap. 352.)

Defendant contends that the complaint is insufficient and does not state facts sufficient to constitute a cause of action inasmuch as under its allegations the only remedy available was that provided by the Workmen's Compensation Law, which is exclusive; and that the only exception is to be found in case the employer has failed to secure the statutory compensation as provided in the act, in which event the plaintiff must set forth in his complaint the necessary allegations to bring himself within the exception. In this contention we think the defendant is correct.

The complaint alleges that decedent was employed in a piano factory and the manufacture of pianos is a hazardous employment within the meaning of the Workmen's Compensation Law (Consol Laws, chap. 67 [Laws of 1914, chap. 41, § 3, subd. 1, as amd. by Laws of 1916, chap. 622], being embraced in group 16 of section 2 thereof (as amd. by Laws of 1916, chap. 622). Decedent was an employee in a hazardous employment under the terms of subdivision 4 of section 3 of the act (as amd. by Laws of 1916, chap. 622). His status as an employee within the terms and protection of this statute is fixed by the allegations of the complaint. Section 10 of the Workmen's Compensation Law, so far as material, at the time of decedent's injury reads as follows: "Every employer subject to the provisions of this chapter shall pay or provide as required by this chapter compensation according to the schedules of this article for the disability or death of his employee resulting from an accidental personal injury, sustained by the employee arising out of and in the course of his employment, without regard to fault as a cause of such injury, except where the injury is occasioned by the willful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty. * * *."

* Adding to Railroad Law (Gen. Laws, chap. 39; Laws of 1890, chap. 565), § 42a; Railroad Law (Consol. Laws, chap. 49; Laws of 1910, chap. 481), § 64. —[RMR.]

Section 11 thereof (as amended by Laws of 1916, chap. 622) at the same time provided: "The liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death, except that if an employer fail to secure the payment of compensation for his injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his legal representative in case death results from the injury, may, at his option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury * * *."

Thus by the provisions of the Workmen's Compensation Law in effect at the time of decedent's death, under the state of facts shown by the complaint, deceased was an employee of defendant engaged in a hazardous employment, and having received injuries arising out of and in the course of his employment, the remedy provided by the act became exclusive and no cause of action arose either at common law or under the Employers' Liability Act. The only exception to this rule would be in case the employer had failed to secure the payment of compensation for his injured employees and their dependents as provided in the act. But this is a matter for the plaintiffs to plead, if they desire to seek a recovery outside the act. That the remedy provided under the act is exclusive where it applies, was held in *Shonkhaas v. Monarch Engineering Company* (219 N. Y. 469). That the burden is upon the plaintiffs to set forth the facts showing that the act did not apply is clearly indicated in the opinion of this court in *Skinnick v. Clover Farms Co.* (160 App. Div. 237): "There is no allegation that defendant has failed to secure the payment of compensation for his injured employees or their dependents as provided in section 50 of the act (as amended by Laws of 1914, chap. 316), or that plaintiff has, for that reason, elected to sue in the courts. The question we have to consider, therefore, is whether the Workmen's Compensation Law provides compensation for such an injury as that which plaintiff has suffered." This case was cited by the court as authority for its decision in *Nileon v. American Bridge Co.* (176 App. Div. 915; *affd.*, 221 N. Y. 12).

Inasmuch as plaintiffs have failed to set forth the necessary facts showing that they come within the exception and that they are not limited to the exclusive remedy provided by the act the complaint was demurrable, and the motion for judgment should have been granted.

The order appealed from will, therefore, be reversed, with costs, and the motion for judgment on the pleadings in favor of the defendant will be granted, with ten dollars costs, with leave to the plaintiffs to serve an amended complaint within twenty days upon payment of said costs.

CLARKE, P. J., SMITH, JUDGE and SHEARN, J.J., concurred.

Order reversed, with ten dollars costs and disbursements, and motion granted, with ten dollars costs, with leave to plaintiffs to serve an amended complaint on payment of costs.

C. *Reservation of second remedy under § 29.*—The Commission supplies a form for electing under § 29 to sue. This form carefully states that the injured employee claims compensation

in the event that he does not recover anything by the action. Cases illustrative of the value of such statement are noticed above, page 254.

D. *Who may elect.*—Important phases of this subject of “Election of Remedies” are presented under the title “Subrogation of Insurance Carrier in Third Party Cases,” immediately following. The decisions have held generally that the right to elect remedies belongs to the beneficiaries of an employee whose death has been due to industrial accident rather than to his administrator or executor, and to a mother on behalf of her minor children rather than to a legally appointed guardian of such children. The decisions on subrogation and the concluding amendatory sentence of § 29 have given an injured minor employee or his parents equal right with his duly appointed guardian to make an election in a third party case.

SUBROGATION OF INSURANCE CARRIER IN THIRD PARTY CASES

(Workmen's Compensation Law, § 29)

If an injured employee elects proceedings for compensation under Workmen's Compensation Law, § 29, an award to him operates as an assignment of the proceedings for damages to the insurance carrier. This provision has given rise to questions of the relation of the Workmen's Compensation Law to other statutes and to the common law, with consequent technicalities of procedure. An early illustration of them is *Herkey v. Agar Manufacturing Co.*, Bulletin No. 81, pages 35, 36, in which the court said that an injured minor employee might make election under the compensation law without appointment of a guardian *ad litem*. Various phases of the subject, with texts of several opinions, have hitherto been presented in Bulletin No. 81, pages 111-114, 116-126, 221-235, and Bulletin No. 87, Part 1, pages 261-283. The Appellate Division's order approving the award in *Matta v. Denning's Point Brick Works*, reviewed in Bulletin No. 87, p. 283, has been affirmed by the Court of Appeals (224 N. Y. Rep. 596). The Commission has held in a recent case that a widow and children, having recovered \$3,500 by suit against a third party, are entitled to regular compensation payments commencing from the end of "such a period as the \$3,500 received from the third party will cover in compensation"; *Sztorc v. Stansbury*, S. D. R., vol. 18, p. 621, Bul., vol. 4, p. 102, Dec. 31, 1918. The original obscurities of section twenty-nine have given rise to its amendment by L. 1916, ch. 622, to provide that election and assignment may, in the discretion of the Commission, be made either by a minor or by his guardian, and by L. 1917, ch. 705, to provide that assignment shall be automatic and shall not take effect until an award has been made to the injured employee or his beneficiaries. In case of accidents due to third parties, occurring prior to the amendments of § 29, and resulting in death,

the insurance carriers have argued that assignment, to be valid, must be made by an administrator or executor of the deceased employee rather than by his beneficiaries. They have based their contention upon the provisions of Code of Civil Procedure, § 1902. The courts have held, however, that the Workmen's Compensation Law provides for assignment directly by the deceased employee's dependents. The decision in *Hanke v. New York Consolidated R. R. Co.* is to such effect. The decisions in *Dearborn v. Peugeot Auto Import Co.*, and *Woodcock v. Walker* are of like import. Texts of the opinions of the Appellate Division, Third Department, in the Dearborn and Woodcock cases are in Bulletin No. 81, pages 233,308; text of the opinion of the Appellate Division, Second Department, in the Hanke case is in Bulletin No. 87, Part 1, pages 274-278. The same general conclusion as in these cases has been arrived at by the Court of Appeals in reversing a judgment of the Appellate Division in the First Department. The Appellate Division, reversing an interlocutory judgment of the Supreme Court in New York County, had held that only the executor or administrator of a deceased employee could assign the right of action granted by Workmen's Compensation Law, § 29. Its opinion had been as follows:

TRAVELERS INSURANCE CO. v. PADULA Co., 184 App. Div. 791, June 7, 1918.

PAGE, J.: The action is to recover the pecuniary damages to the next of kin, resulting from the negligent causing of the death of one Adolph Littman on May 29, 1915, who, while in the employ of the Brandt & Silverstein Iron Works, sustained certain injuries due to the alleged negligence of third persons, the defendant's employees, which resulted in his death. He left him surviving a widow and two minor children. His employer had secured compensation to its employees under the provisions of the Workmen's Compensation Law, by insuring with the plaintiff, as "insurance carrier." The widow and children elected to take compensation under the Workmen's Compensation Law, and not to pursue their remedy against the defendant, and assigned their cause of action against the defendant to the plaintiff, who thereupon brought this action. The defendant has demurred to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action.

The cause of action for the negligent causing of death is entirely statutory, and was created by statute, which is now embodied in section 1902 of the Code of Civil Procedure.

"The interest which a person has in the life of another on whom he is dependent, or to whose services he is entitled, the Legislature have chosen

to regard as a pecuniary right; a right having the essential attributes of property, so that when it is taken away compensation is due." (*Quinn v. Moore*, 15 N. Y. 432; *Master of Meskin v. B. H. R. E. Co.*, 164 id. 145, 149.)

The right of action is vested by section 1902 in the executor or administrator of the deceased for the benefit of the next of kin, each of the next of kin becoming vested with a property right in such cause of action that is descendible and transferrable, or which they can release. (*Rice v. Postal Telegraph Cable Co.*, 174 App. Div. 39, 40; *affd.*, 219 N. Y. 629.) If the next of kin do assign their interest, the assignee takes their interest and not the right to prosecute the action that is vested in the executor or administrator of the deceased. The next of kin cannot bring the action; therefore, they cannot assign to another a right that they do not possess. Section 29 of the Workmen's Compensation Law provides: "Such a cause of action assigned to the state may be prosecuted or compromised by the commission." (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 29. Since *amd.* by Laws of 1916, chap. 622, and Laws of 1907, chap 705.)

From this the learned justice at Special Term argues that this section operates to repeal by implication the provisions of section 1902 of the Code of Civil Procedure, in so far as the cause of action relates to claims to compensation under said act. Without determining what the effect would be where a conflict arises in the terms of the two acts, until a case arises in which the question is involved, it is sufficient to say that there is no conflict in this case. The action is to be prosecuted by the Commission when the claim is assigned to the State, but it is not stated that the action is to be prosecuted by the insurance company when the claim is assigned to the "insurance carrier."

Repeals by implication are not favored, and should not be extended by analogy or construction, unless absolutely necessary. The learned justice admits that, if there were next of kin, who were not dependents, and, therefore, their rights would not pass by the assignment of the dependents to the insurance carrier, complications would arise that would compel him to a different holding, as it would not be presumed that the Legislature would intend to sanction the splitting of a single cause of action. This difficulty is obviated, if we hold, as in my opinion we should, that this action must be prosecuted by an executor or administrator of the deceased.

In the event of recovery, if those who would be entitled to its benefits are those alone who have assigned their interest in the cause of action to this plaintiff, then the plaintiff will receive the entire amount recovered. If, however, there should be next of kin, other than those who have assigned their rights, the plaintiff would receive the distributive share of those who have assigned, and the others will receive their share. This, however, is a matter that relates to the distribution of the recovery, and not to the right to maintain the action.

The interlocutory judgment should, therefore, be reversed, with costs, the demurrer sustained, and the complaint dismissed, with costs. *CLARK, P. J.*, *LAUGHLIN, SMITH* and *SHEARN, JJ.*, concurred. Judgment reversed, with costs, demurrer sustained and complaint dismissed, with costs.

The opinion of the Court of Appeals, with decision reinstating and affirming the interlocutory judgment of the trial court, is as follows:

TRAVELERS INSURANCE CO. v. PADULA Co., 224 N. Y. 297, Nov. 12, 1918.

COLLIN, J.: The action is based upon the provisions of section 29 of the Workmen's Compensation Law (Cons. Laws, ch. 67, as amd. by L. 1916, ch. 622). The section, prior to amendments (Laws of 1917, chapter 705, section 8) inapplicable here, was: "Subrogation to remedies of employees.—If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, shall, before any suit or claim under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other. Such election shall be evidenced in such manner as the commission may by rule or regulation prescribe. If he elect to take compensation under this chapter, the cause of action against such other shall be assigned to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, and if he elect to proceed against such other, the state insurance fund, person, association, corporation, or insurance carrier, as the case may be, shall contribute only the deficiency, if any, between the amount of the recovery against such other person actually collected, and the compensation provided or estimated by this chapter for such case. Such a cause of action assigned to the state may be prosecuted or compromised by the commission. A compromise of any such cause of action by the employee or his dependents at an amount less than the compensation provided for by this chapter shall be made only with the written approval of the commission, if the deficiency of compensation would be payable from the state insurance fund, and otherwise with the written approval of the person, association, corporation, or insurance carrier liable to pay the same. Wherever an employee is killed by the negligence or wrong of another not in the same employ and the dependents of such employee entitled to compensation under this chapter are minors, such election to take compensation and the assignment of the cause of action against such other and such notice of election to pursue a remedy against such other shall be made by such minor, or shall be made on behalf of such minor by a parent of such minor, or by his or her duly appointed guardian, as the commission may determine by rule in each case."

The complaint alleged, in effect: In May, 1915, the plaintiff was, under the Workmen's Compensation Law, the insurance carrier of the Brand & Silverstein Iron Works, of which Adolph Littman was an employee. Littman received injuries, solely through the negligence of the defendant, Louis Padula Company, Inc., causing his death, under conditions making the law applicable and the employer and the plaintiff, the insurance carrier, liable. He left surviving as dependents a widow and two minor children, who elected to take compensation under the law and not to pursue their remedy against the defendant, which was not in the employ of the iron works. In June, 1915, the State industrial commission, in due course of proceeding,

awarded compensation to the dependents, for the payment of which the plaintiff was and is liable. The dependents duly assigned to the plaintiff, with the approval of the commission, the cause of action against the defendant for negligently causing the death of Littman. Judgment for the sum of twenty-five thousand dollars is demanded.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The Special Term overruled the demurrer. The Appellate Division reversed the decision of the Special Term, sustained the demurrer and dismissed the complaint on the ground that the action must, under section 1902 of the Code of Civil Procedure, be prosecuted by an executor or administrator of Littman. Section 1902 is: "Action for causing death by negligence, etc. The executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent, who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after decedent's death. When the husband, wife or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit."

A civil liability and the right to recover damages for a wrongful act or neglect causing death are created solely by statute. At common law no civil action would lie for causing the death of a human being. Legislative enactment is the exclusive source and boundary of the liability and the remedy. It may create the cause of action, define the period of its existence, and the party by whom and the method in which it shall be enforced and prescribe the measure of damages and the beneficiaries.

The meaning and intent of section 29 is, manifestly, not clear and certain through its language. We are, therefore, bound to search for the legislative intent in such facts and through such rules as may, in connection with the language, legitimately reveal it. If it, as determined, is within the scope or capability of the language it must be within the statute, however obscurely, imperfectly or inadequately it is expressed. To effect the intent the language may be freely dealt with. Words may be interpolated or shifted in position or enlarged or restrained in their meaning and operation. The expressed legislative intention is the statute. The courts are bound to enforce enacted legislative intent. (*Archer v. Equitable Life Assurance Society of the United States*, 218 N. Y. 18; *Riggs v. Palmer*, 115 N. Y. 506.)

The language of the section reveals and expresses the legislative intention to give to the dependents under the law, of the employee within the law, killed by the negligence or wrong of another not in the same employ, a cause of action for the death. It declares that his dependents, primarily, shall elect in accordance with the rule of the State Industrial Commission, whether to take compensation under the law or to pursue their remedy against the wrongdoer; if they choose the latter they shall receive under the

law only the deficiency, if any, between the amount "of the recovery against" the wrongdoer actually collected, and the compensation awardable under the law, and they—his dependents—cannot compromise the cause of action against the wrongdoer at an amount less than the compensation awardable, except upon the approval of the commission, if the state is the insurance carrier, or of the other insurance carrier, if the state is not the insurance carrier. The recovery is for the benefit of the dependents. If, however, his dependents choose primarily to take compensation under the law they—his dependents—shall assign the cause of action against the wrongdoer, if the state is the insurance carrier, to the state for the benefit of the state insurance fund, or, if another is the insurance carrier, to that other. The last paragraph of the section in connection with the other provisions relating to dependents, is an adequate declaration that the assignment of the cause of action shall be made by the dependents. If the language were "the cause of action which they have hereby" or "the cause of action which they shall have" against the wrongdoer, instead of "the cause of action against such other" the legislative bestowal upon the dependents of the cause of action for the death would have been indubitable. The intent to effect the bestowal is as clear as the words we have suggested would make it. The section empowers the dependents to assign such a cause of action, empowers, with a restriction, the dependents to compromise such cause of action, empowers the dependents to elect whether they will enforce or assign it and constitutes them the sole beneficiaries of it, in case they enforce it. Those provisions are not purposeless and meaningless. It must be presumed that an enactment has a purpose and an effect and that no absurd nor vain use of language was adopted. It must receive that construction which will make effective its intent. (*Matter of Jannicky*, 209 N. Y. 413; *Matter of Meyer*, 209 N. Y. 386; *Matter of Dowling*, 219 N. Y. 44.) Those opinions express that within the legislative mind and comprehension the section provided to the dependents of the employee a cause of action, independent of and not that created by section 1902, for the negligently caused death.

The language discloses that there were, further, within the legislative mind and comprehension these effects: In case the dependents elect to enforce against the wrongdoer the cause of action, they shall pursue, in so far as applicable under the language, the remedy provided in section 1902 of the Code of Civil Procedure. An executor or administrator of the deceased employee, as the representative or agent (*Hamilton v. Erie Railroad Co.*, 219 N. Y. 343, 350) of the dependents, may, the dependents having so elected, maintain the action. The action is not maintainable, however, until the dependents have determined that it shall be instituted. The right of action is a property right of all the dependents (*Matter of Meekin v. Brooklyn H. R. Co.*, 164 N. Y. 145), and they are the sole beneficiaries of its enforcement. The provisions of section 1903 of the Code of Civil Procedure, relating to the distribution of the damages, are inoperative. The amount of the recovery actually collected, within the amount of the compensation awardable to the dependents under the law, must be distributed as the compensation would have been awarded. The remedy provided in section 1902 is by the language of the section 29 peculiar to the enforcement by the dependents of their cause of action of which it is not an integral part. The legislature confined the pursuit of that remedy to the dependents, in behalf of simplicity and

convenience in procedure. In case the dependents elect to assign the cause of action the assignment creates its ordinary and established effects. It transfers to and vests in the assignee the cause of action. If the assignment is to the state the cause of action is thereby made the property of the state; if to another the cause of action becomes by virtue of the assignment the property of that other. In the case at bar the dependents assigned the cause of action to the plaintiff. A cause of action inherently includes and comprehends, in the absence of restrictive language, the right to maintain an action upon the claim or matter which also is inherently included in it. "Cause of action" is the right to prosecute an action with effect. (*Douglas v. Forrest*, 4 Bing. 684.) The right to maintain the action may by statute be withheld from the owner of the cause of action and given to another, because of convenience or simplicity in procedure, as is done by the provisions of the section 1902, or by the provisions of the section 29 that the industrial commission may prosecute, in behalf of the state, the causes of action assigned, under the section, to and owned by the state. It is, however, an elementary and fundamental rule of law and of property that the owner of a cause of action has the right, which is a part of it, in the absence of a valid restriction, to prosecute it in the ordinary and legal method and manner in the courts. There is not related nor applicable to the cause of action of plaintiff any restriction or provision forbidding or disabling him from prosecuting it. It needed no express empowerment, as did the industrial commission. The power was in and a part of the assigned cause of action, and became the plaintiff's.

The provision of the Constitution of the state, "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation" (Article 1, section 18), is not relevant to the determination of the rights arising through the section 29, to the dependents of the deceased employee. The people of the state, in section 19 of article 1 of the Constitution, restricted that provision from disabling the legislature to enact laws for the payment, in any method it selected, of compensation for death of employees resulting from injuries to them, and to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for death resulting from such injuries. The power to provide that a party who negligently kills an employee under the act shall be liable to the dependents of the employee, as defined by the act, and not to his next of kin, is clearly restored to the legislature by the later section. (See *Shanahan v. Monarch Engineering Company*, 219 N. Y. 469.)

The judgment should be reversed and the interlocutory judgment be reinstated and affirmed, with costs in this court and in the Appellate Division.

HISCOCK, CH. J., CUDDEBACK, McLAUGHLIN and CRANE, JJ., concur; CHASE and HOGAN, JJ., dissent. Judgment accordingly.

If an injured employee has died from accident caused by a third party and his dependents, having elected to bring an action for damages, have failed to keep the cause alive, the Commission, taking cognizance of loss of subrogation rights by the employer,

has denied the dependents compensation upon prosecution by them of a claim two years or more after death of the injured employee. The Commission has so held upon opinion of Commissioner Lyon, as follows:

EASTER V. WASHINGTON HEIGHTS VAN CO., S. D R., vol. 16, p. 438, BuL, vol. 3, p. 176, Apr. 23, 1918.

LYON, Commissioner.: The claimant here had a perfectly simple, speedy and easy way of securing compensation without expense, but preferred to take the chances of litigation, involving long delay and expense, and having made that choice, resulting in her inability to give the insurance carrier an effective transfer of a live cause of action, I think she has forfeited her claim to compensation. The law is very clear on the point that an employer or insurance carrier who pays compensation in a case where there is an outstanding cause of action against a third party, has an absolute right to recoup his payment so far as possible from the third party. The fact that on the trial the jury disagreed is evidence that there was a substantial claim against the railways company. Section 29 of the compensation law provides, among other things, as follows: "If such injured employee or in the case of death, his dependents, elect to take compensation under this chapter, the awarding of compensation shall operate as an assignment of the cause of action against such other," etc., meaning, of course, an *effective* assignment.

The Code of Civil Procedure provides (§ 1902) that an action for negligently causing death must be commenced within two years after death.

Decedent died as already stated on October 22, 1914. The case against the railways company was tried and resulted in a disagreement of the jury in February, 1915. There was abundance of time to have retried the case before October 22, 1916, but it was not done. If after February, 1915, the claim for compensation had been pressed and an offer made to the insurance carrier, to be substituted as plaintiff in the suit, the cause of action could have been kept alive. Instead of so doing, the case was kept in claimant's name until seven months after the Statute of Limitations had run, and then it was discontinued, leaving the insurance carrier remediless.

The case illustrates the utter futility of a poor claimant, either from a desire to recover a large sum of money or at the solicitation of a lawyer, choosing litigation instead of a perfectly easy path without a contest.

Had claimant been wise or wisely advised, she could have had compensation and the advantage of the suit against the railways company, too, for the courts have held that a carrier who recovers against the third party, more than enough to recoup its losses, holds the balance for the benefit of the next of kin.

It is also to be noted that before the suit against the railways company was discontinued and on October 1, 1915, our legal department wrote plaintiff's attorney that a discontinuance of the suit would be fatal to the claim for compensation. Our counsel wrote plaintiff's attorney as follows: "It seems to me, therefore, that this case should be tried over again and prosecuted to a finish, or that consent to discontinue be obtained from the em-

ployer and the insurance carrier. Any other disposition of the matter would, in my opinion, defeat the right of Mrs. Easter to claim compensation."

On the preceding May 14th, our counsel wrote claimant direct, "In my opinion you are not entitled to compensation until your suit has been retried and a verdict obtained, one way or the other."

Yet notwithstanding this warning the suit was discontinued, with the result that subrogation under section 29 has been rendered ineffective. I advise that the award be rescinded and the claim dismissed.

EVIDENCE

(Workmen's Compensation Law, §§ 18-20, 21, 23, 65, 67-73, 101-105, 111-113, 115)

Discussion and controversy relative to evidence under the New York compensation law have figured most in relation to Disease and Internal Injury as a result of accident. Other questions especially fruitful of evidential difficulties and problems have been Dependency, Amount of Wages, Occurrence of Accident, Contract of Employment and Contract of Insurance. Each of these subjects, with texts of cases, has been separately presented in Bulletins No. 81 and 87 and in this Bulletin. Special attention may be directed, for example, to the evidence cases in dependency of foreign claimants, above, pages 127-136. The diseases cases, for example, are in Bulletin No. 81, pages 100-102, 249-256, and Bulletin No. 87, Part 1, pages 208-248. The following topics have received particular attention.

A. *Hearsay*.—Compensation may not be awarded upon hearsay evidence alone. Hearsay is of value only when supported by other evidence. Hearsay may not stand if contradicted by evidence which is not hearsay. Texts of the opinion of the Appellate Division and the Court of Appeals in the leading case upon hearsay evidence, *Carroll v. Knickerbocker Ice Co.*, are in Bulletin No. 81, pages 367-374, 381-388. In the two following additional opinions, handed down upon the same day, the Court of Appeals has found not only absence of evidence corroborative of hearsay testimony but presence of evidence contradictory to it. Therefore it has reversed orders of the Appellate Division which affirmed awards without opinion, two justices dissenting in each case: 184 App. Div. 922, May 17, 1918; 185 App. Div. 901, July 2, 1918. There were dissenting minorities in the Court of Appeals also.

First Opinion

BELCHER v. CARTHAGE MACHINE Co., 224 N. Y. 326, Oct. 29, 1918.

McLAUGHLIN, J.: On the 7th of November, 1916, Thomas H. Belcher died. His widow made a claim on behalf of herself and another dependent against

the employer for an award growing out of his death. The state industrial commission, upon the theory that it was due to an injury received on the 7th of June preceding, while in the employ of the Carthage Machine Company, made an award to his widow and minor dependent under the Workmen's Compensation Law. The employer and insurance carrier appealed to the Appellate Division, where the same was affirmed, and they appeal to this court.

The industrial commission, after hearings had by it, at which several witnesses were sworn, some in favor and others against allowing the claim, found certain conclusions of fact which, so far as material, are, in substance, as follows: That on the 7th of June, 1916, the claimant's husband was the ~~superintendent and~~ general manager of the Carthage Machine Company; that while thus acting in its plant at Carthage, N. Y., he was struck by a casting which was falling from a pile of castings, and injured; that the injury then received resulted in sarcoma of the ribs and pleura, which, on the 7th of November following, caused his death.

The appellants challenge the correctness of this conclusion and urge there is nothing to indicate that the death of claimant's husband was due to any injury which he received at the time and place alleged, except that shown by hearsay evidence. In this respect the appellants are correct. There is nothing to sustain this award except hearsay evidence. The question, therefore, is squarely presented whether an award made under the Workmen's Compensation Law can be sustained upon hearsay evidence, uncorroborated by facts, circumstances or other evidence. I do not think it can.

A perusal of this record shows there is nothing to sustain the conclusion of the industrial commission that the deceased was injured while in the employ of the machine company on the 7th of June, 1916, other than his own declaration to that effect. It does appear that he stated to his wife and other witnesses that while he was at work in the company's plant on that day a casting fell, by reason of the breaking of a chain, and to avoid being injured he exerted himself to such an extent his side was injured. It also appears that he died of an injury to his side. In this connection, however, it is to be noted that he consulted a physician five days after the injury is alleged to have been sustained, and that he then stated to him that the injury to his side of which he was complaining was due to his being thrown against an automobile lamp while cranking an automobile. This physician testified that he made a thorough examination of the deceased and did not then discover a fractured rib or any other serious injury to the side. The deceased did not consult another physician until some time during the following August, when an examination disclosed a fractured rib. In the meantime it appears that he had been in at least two automobile accidents, and when complaining about his side, declared to at least one witness it was due to one of such accidents; and to sustain this statement the foreman of the employer's plant testified that a casting did not fall when the deceased was present. Another employee testified he was at work in the plant at the time when the accident is alleged to have occurred and he never heard of it; and the one whose duty it was to make a report of all accidents also testified that she never heard of it. If an accident had occurred as here claimed, to the superintendent and general manager, it is fairly to be inferred that some one other than himself would have heard of it, and yet not a single witness

was produced to testify thereto. Under such circumstances to permit a claim against the employer to be sustained is to base an award upon sympathy and not evidence.

This court has held that great liberality should be allowed in establishing claims under this statute, but in the final analysis, notwithstanding such liberality, there must be evidence setting forth facts of a probative character, outside of hearsay statements, to prove the award and show it is fair and just. (*Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435.)

In reaching this conclusion *Matter of Sorge v. Aldebaran Co.* (218 N. Y. 636) and *Matter of Fogarty v. National Biscuit Co.* (221 N. Y. 20) have not escaped my attention. They are not in point or controlling of the question here presented. In the former case the only disputed question was whether the accident arose out of and in the course of the employment, and the declarations of the deceased were in part at least corroborated by certain facts and circumstances, while in the latter there were facts and circumstances shown which a majority of this court was of the opinion justified the commission in making the award which it did.

I am of the opinion that the order of the Appellate Division should be reversed and the determination of the industrial commission should be annulled and the claim remitted to the industrial commission for rehearing, with costs to abide event.

HISCOCK, Ch. J., COLLIN and CRANE, JJ., *concur*; CHASE, CUDDERBACK and HOGAN, JJ., *dissent*. Order reversed, etc.

Second Opinion

HANSEN V. TURNER CONSTRUCTION CO., 224 N. Y. 331, Oct. 29, 1918.

MCLAUGHLIN, J.: The claimant's husband, on the 23d of July, 1917, was in the employ of the Turner Construction Company. While in the cellar of a new building which it was constructing he collapsed and fell. No one saw him fall, but immediately thereafter he was observed by his co-employees, who went to his assistance and found him in an unconscious condition, trembling and frothing at the mouth. They threw water in his face and shortly thereafter he revived and was taken to a hospital, where he died the following morning. A post-mortem examination disclosed that his death was due to a blood clot and pressure upon the brain. His widow and minor dependents presented a claim against his employer on the ground that his death was due to an injury which he received when he fell. The claim was disputed by his employer and the insurance carrier. The industrial commission, after a hearing had, at which evidence was taken, reached the conclusion that the claim should be allowed and accordingly made an award. From this determination an appeal was taken to the Appellate Division, where the same was affirmed, and an appeal then taken to this court.

After a careful consideration of the evidence set out in the record, I have been unable to find *any* evidence that the death of the claimant's husband was due to an injury received while in the employ of the Turner Construction Company. At the time he collapsed he was working on a dirt floor and there is nothing to indicate that his fall was due to anything connected with his employment; on the contrary, all of the evidence shows that it was due to an

injury which he had previously sustained or disease with which he had been afflicted. One of the persons with whom he was working at or immediately prior to the time he collapsed, testified that he stood within a few feet of him and while he did not see him fall, he did immediately thereafter see him lying on the floor; that he went to his assistance and there was nothing to indicate the cause of his fall; that there were no obstructions upon the floor, no pillars or posts near where he fell, or anything to show that the cause of his fall was other than a collapse. The witness was corroborated by another to the effect that he saw the deceased immediately after he fell; that he was then lying on his back, frothing at the mouth, and trembling; that there was nothing to indicate he had tripped or fallen by reason of anything upon the floor, and there were no marks upon his face or head which showed in any way that he had been injured, except a slight scratch upon his cheek.

When he reached the hospital he was immediately put to bed, a careful examination made of his person, and the only evidence of an external injury which could be discovered was an abrasion over his forehead about as big as a quarter of a dollar. There was no evidence of a fracture or a concussion of any kind. After his death an autopsy was performed and this disclosed a subdural hemorrhage, which, according to the physician making the autopsy, had existed for some time prior to his collapse; that there was no evidence whatever of traumatism or concussion received at that time, or that his death was in any way caused by an injury then received.

Under such circumstances I do not see how an award could be made. If so, it had for its basis a mere guess or conjecture. The Workmen's Compensation Law should receive a liberal construction, but it ought not to be so construed as to take money from one person and give it to another without any legal basis therefor. To hold otherwise would be simply to make the employer an insurer of his employee, and this the Legislature has not as yet done.

The order of the Appellate Division should be reversed and the determination of the industrial commission annulled and the claim dismissed, with costs in this court and in the Appellate Division against the industrial commission.

HISCOCK, Ch. J., COLLIN and CRANE, JJ., concur; CHASE, J. concurs in memorandum, as follows: CHASE, J. Although it appears that Hansen on the day of the injury said that he tripped and fell while at his work, it further clearly appears that such statement was a conclusion on his part, as he stated to the physician who attended him at the hospital that he did not know what happened to him. I am of the opinion that there is no evidence to support the findings of the Commission on which the award rests. CUDDEBACK and HOGAN, JJ., dissent.

Order reversed, etc.

The wife of an employee claimed death benefits for a fatal hernia alleged to have been caused by heavy lifting; the Appellate Division remanded the case twice, first upon question of notice requirements and second upon question of happening of an accident; in remanding it the second time, the Court pointed out that the evidence was entirely hearsay and that other evidence

was present conflicting with the hearsay; the Commission finally rescinded its award on the ground that proof of an accident was not forthcoming: *Harrison v. American Cooperage Co.*, S. D. R., vol. 8, p. 402, Mar. 14, 1916; — App. Div. —, Sept., 1916; Death File, No. 422, Feb. 13, 1917; — App. Div. —, May 4, 1917; Death File, No. 422, July 13, 1917.

In the case of a lumber yard foreman alleged to have strained and otherwise injured himself while attempting to unload lumber from a car, the insurance carrier alleged that the evidence was purely hearsay; Commissioner Lyon discussed the point in an opinion upon which the Commission based an award to the injured foreman's widow; the Appellate Division affirmed the award unanimously and without opinion: *Carman v. Loper Bros.*, S. D. R., vol. 14, p. 727, Bul., vol. 3, p. 117, Jan. 2, 1918; 185 App. Div. 901, July 2, 1918.

The Commission, upon an opinion of Commissioner Sayer citing the Belcher opinion, denied compensation on the ground of hearsay in *Montenari v. Rensselaer Valve Co.*, Bul., vol. 4, p. 73, Dec. 18, 1918.

If an insurance carrier has either introduced hearsay statements or declarations itself or has received them without objection in hearings before the Commission, it cannot be heard to argue later upon appeal that they were incompetent and of no probative value. The Appellate Division has so held in *Hernon v. Holahan*, text of which is in Bulletin No. 87, Part 1, pages 46, 47.

B. Expert opinions of physicians.—A mason's hammer slipped and bruised the back of his left hand. In sequence his right eye became blind. Upon the ground that his blindness was due to septicaemia originating from the wound to his hand, the Commission made an award to him for loss of the eye. Several months later, upon advice of medical experts that its findings had been erroneous, it reopened the case and rescinded the award (S. D. R., vol. 17, p. 616, July 24, 1918). The mason took appeal from this action. The Appellate Division condemned the Commission's proceedings and reinstated the award, with opinion as follows:

FISCHER v. GENESEE CONSTRUCTION Co., 187 App. Div. 350, May 7, 1919.

JOHN M. KELLOGG, P. J.: An award was duly made October 8-11, 1917, and, upon a motion to reopen, was duly affirmed January 14, 1918, and several payments were made thereon. It was well sustained by the reports of the

employer, the employee, and Dr. Schuhart, who treated the arm, and by the testimony of Dr. Snell, the oculist who treated the eye, and the testimony of Dr. Lewy and Dr. Gelser for the State Fund. The claimant was present, without counsel, but was not called as a witness. An adjournment was had for a week to enable the fund to have the claimant examined by a physician, but upon the adjourned day counsel for the fund stated that "the general opinion seems to be that the loss of his eye is due to the accident," and the record shows that no further testimony was introduced, "largely due to the fact that the representatives of the State Fund, the physician who examined him, and those familiar with the case were of the opinion that the claimant had sustained a systemic septicaemia as the result of the injury to the hand and that caused the iritis, and subsequent loss of use of the right eye."

July 24, 1918, by the order under review, the Commission annulled the award and dismissed the claim. Its decision is based upon the written opinions of two physicians. One of the opinions was written after the hearing was closed, and neither opinion seems to have been made a part of the record at any hearing, and the claimant apparently had no knowledge of them and no chance to cross-examine or to be heard with reference to them. This practice did not give him the fair hearing contemplated by the statute and the order should, therefore, be reversed. (*Holmes v. Communipaw Steel Co.*, 186 App. Div. 645.)

The award was final and conclusive against the State Fund, no appeal having been taken. (Workmen's Compensation Law, § 23.) Nevertheless, the Commission had continuing jurisdiction over the case, with power to change its determination as justice may require. (§ 74.) The presumption raised by section 21, and the provisions of section 23 and of section 20 (as amd. by Laws of 1917, chap. 705) prevent an interference with the award on the facts, unless there is substantial evidence of a mistake which, in the interest of justice, compelled such action. Sections 22 and 74 must be given a broad and liberal interpretation, and, as circumstances arise, must be held to cover cases which we cannot in advance anticipate. They are intended to remedy an apparent injustice. The State Fund so far assented to this award that it would not be permitted a review upon appeal. (*Cunningham v. Buffalo Copper & Brass Rolling Mills*, 171 App. Div. 955, 956.) Neither, upon its application, should the Commission annul the award except upon new evidence clearly showing its injustice and that the counsel for the Commission was deceived, overreached or acted upon a clear mistake of fact. The mere fact that cumulative evidence has been found which might bear negatively upon a question of fact already amply proved and understandingly conceded, is not in itself a basis for annulling the award. Public policy requires that there should be a reasonable end to litigation, and that issues once fairly tried and stipulated, with full knowledge of the facts, should not be disturbed except for some compelling reason in order to prevent a miscarriage of justice or a manifest wrong. The power to change an award is not an arbitrary one, but a judicial discretion, to be exercised only in the interest of justice. The award was a property right, which cannot be destroyed unless it definitely appears that, as a matter of justice, it should not stand.

We may profitably consider whether there is any substantial evidence against the award and whether justice requires its annulment. The decision under

review is so out of harmony with the uniform decisions of the Commission in like cases against other insurance carriers that it evidently rests upon a mistake of law or fact. (See *Caine v. Greenhut Co.*, 13 State Dept. Rep. 515; 181 App. Div. 907; *Abelson v. Steinway & Sons*, 188 id. —.) The liability of the State Fund is in all respects the same as that of any other insurance carrier, and is established by like proof. That rule is so well understood that we conclude that the Commission relied too much upon the statements and conclusions found in the expert opinions. It is evident that the physicians were misinformed as to the facts, or did not fully appreciate them. The opinions, if they had been properly received in evidence, would form no substantial basis for annulling the award. Neither physician had examined the claimant. In fact one physician, called by the fund at the hearing, had examined him, and gave evidence favorable to him. Another examined the claimant at the request of the fund, and it was stated at the hearing that he concluded that the loss of the eye resulted from the injury to the hand. The opinions upon which the decision under review was made are not based upon the facts of the case. Each opinion, in substance, assumed that the claimant was not sick and that the trouble with the eye developed in the case of a well man. The evidence shows that, immediately after the accident, the hand and arm to the armpit became very much swollen, inflamed, red and tender, and that while the swelling was at its worst, the deposit of infectious matter, concededly from within, lodged at the eye, and that claimant lost thirty pounds in weight in about three months. was unable to work, was not feeling well at all, was complaining of his hand and of rheumatic pains; that he had attempted to do two or three things and could not do them and, about seven months after the accident, was still disabled from headaches and dizzy spells, together with poor vision. The claimant was not sworn and was without counsel. The Commission made such inquiry as to it seemed best, and it did not inquire of him as to the symptoms or the extent or nature of his illness. Apparently the physicians who wrote the opinions desired no further information upon those subjects. One of the opinions rests upon the statement that the claimant had abscess of teeth and that the attending physician had sworn that the claimant was entirely well at the time he first treated the eye. The physician swore to the contrary, and there is no statement outside of the opinion of any "abscess of teeth." The other opinion also was based upon the apparent assumption that the trouble at the eye developed in a well man, and the improbability of such an occurrence. It assumes that there was a diseased tooth. Both opinions practically assume that there was no infectious pus, arising from the injured hand, absorbed into the blood, entirely overlooking the facts that the employer concedes that pus was forming in the hand and arm; that there was no puncture of the skin for its escape, and that the "bad tooth" spoken of by the doctor who examined the claimant had been extracted at an early time and that the source of infection evidently remained for a long time thereafter, and that none of the physicians who examined the claimant connected the bad tooth with the loss of the eye. The doctors who saw the claimant had no doubt that infectious matter from the bruised hand was absorbed into the blood and caused the loss of the eye. The physicians called by the fund on the hearing confirmed that theory. The *ex parte* opinions referred to doubt the existence of septicaemia because the

claimant was not sick enough to indicate its existence and because the attending physician, who was dead at the time of the inquiry, in filling up the blank form prepared by the Commission, did not give the symptoms from which he determined that there was septicaemia, but made the general statement that there was septicaemia from which the loss of the eye resulted. Neither opinion attempts to account for or to explain the known symptoms. The opinions are not in harmony with the decisions of the Commission and of this court. The assumed facts were not the facts of this case, and, therefore, the opinions were not a sufficient basis for a determination that the interests of justice required the award to be vacated and the claim dismissed. If, in any event, the award was not to stand, justice required a rehearing.

The decision under review is arbitrary, and is not fairly within the spirit of sections 22 and 74 of the Workmen's Compensation Law. The order should be reversed and the award reinstated, without prejudice to a regular proceeding for a rehearing if desired.

All concurred. Order reversed and the award reinstated, without prejudice to a regular proceeding for a rehearing if desired.

C. *Depositions*.—The Commission's freedom from "common law or statutory rules of evidence" and "technical or formal rules of procedure" under Workmen's Compensation Law, § 68, is restricted in no wise by the provisions of § 72 allowing it to take depositions "in the manner prescribed by law for like depositions in civil actions in the supreme court." Section 72 is permissive and not mandatory. Ordinary affidavits, as distinguished from the statutory depositions of Code of Civil Procedure, §§ 870-899, with their notices to the adverse party, etc., are receivable in evidence. The Appellate Division has so held in *Moran v. Rogers & Haggerty*, relative to certain affidavits taken in Ireland. Full text of the court's opinion appears above, page 125. The paragraph pertinent in this connection is as follows:

MORAN v. ROGERS & HAGGERTY, 180 App. Div. 821, Dec. 28, 1917, *in part*.

The employer makes the claim upon this appeal for the first time that these affidavits were not properly receivable as evidence for the reason that section 68 of the Workmen's Compensation Law providing that the Commission shall not be bound by common law or statutory rules of evidence, "except as provided by this chapter," and that the Commission should be authorized to make such investigations or inquiry or conduct such hearing in such manner as to ascertain the substantial rights of the parties, is limited by the provisions of section 72, entitled "depositions," which provides: "The commission may cause depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in the supreme court." If the contention of the employer is

correct, and the section was intended to be mandatory, no affidavit taken either within or without the State is properly admissible under objection. Section 72 was plainly intended to be permissive only, and to furnish a further means within the discretion of the Commission of obtaining evidence for use before the Commission, and not to in any way limit or restrict the authority of the Commission under section 68.

D. *Credibility of witnesses.*—The right of the courts to review the Commissions' rulings or decisions is restricted by the sentence in § 20 which declares: "The decision of the Commission shall be final as to all questions of fact, and except as provided in section twenty-three, as to all questions of law." The jurisdiction of the courts to review the evidence in compensation cases has been interpreted in *Carroll v. Knickerbocker Ice Co.*, *Goldstein v. Centre Iron Works*, *Gardner v. Horseheads Construction Co.*, and *Rhyner v. Heuber Building Co.* Texts of the opinions in these cases are in Bulletin No. 81, pages 367-388. The Appellate Division has held in *Benjamin v. Rosenberg Bros.* that the credibility of a witness is a question of fact which the above-quoted restriction of § 20 prevents it from reviewing. Texts of the brief majority opinion to such effect and of a lengthy dissenting opinion are given above in another connection, page 203. The Court of Appeals has affirmed the decision without opinion.

E. *Right to cross-examine.*—In an early compensation case the Appellate Division reversed and remanded an award where the employer and insurance carrier had not had opportunity to cross-examine the claimants: *Ramsey v. Fairbanks-Morse & Co.*, 171 App. Div. 959, Nov., 1915. Charges of lack of opportunity to cross-examine were unsuccessfully urged in *Sheridan v. Trainer Construction Co.*, 187 App. Div. 915, Jan. 15, 1919, award in which the court affirmed unanimously and without opinion.

F. *Right to submit new evidence.*—In the Sheridan case, just noticed, the appellants alleged unsuccessfully that the Commission had declined to receive new evidence. Refusal of the Commission to reopen cases for the admission of new evidence has led to court interpretation of its discretionary power of review under Workmen's Compensation Law, §§ 22, 23 and 74. These court opinions are presented below, pages 364, 365.

G. *Fair and impartial hearing.*—Certain practices in connection with compensation awards are noted by Justice Kellogg as irregular and unfair in the following brief opinion:

HOLMES v. COMMUNIPAW STEEL Co., 186 App. Div. 645, Mar. 5, 1919, *in part*.

JOHN M. KELLOGG, P. J., (concurring): The award seems to be based upon answers given by experts to hypothetical questions after the case was adjourned and upon opinions given by the chief medical examiner outside of the hearing. The hypothetical question embraced certain material matters not covered by the statements of the experts at the trial. Such practice is irregular and denied to the employer the hearing contemplated by the law. We would, therefore, favor a reversal of the award except for the following reason: Upon the last rehearing the Commission stated the facts referred to and filed the answers of the experts as a part of their proceeding; this method of procedure was not objected to by the appellants; they did not ask that the chief medical examiner or the experts be produced for examination. We conclude, therefore, that the question was waived and thereafter furnished no ground for reversal. The award should be affirmed.

Award unanimously affirmed.

The conduct of a deputy commissioner in examining witnesses has been reproved by the Appellate Division in the following opinion. The Court quotes the minutes of the hearing at length. The text is as follows:

VISSAGGIO v. N. Y. CONSOLIDATED R. R. Co., 188 App. Div. 49, May 7, 1919.

COCHRANE, J.: This award must be reversed because of the misconduct of the deputy commissioner who conducted the investigation. The claimant was employed to clear car windows. The alleged accident was the fall of a window on her left little finger causing subsequent infection. The defense was that the infection was caused by a brass ring worn by her which scratched or injured a pimple on her finger. The claimant testified she never had a ring on that finger. She further testified that two women were working with her at the time of the accident. These women were called as witnesses by Mr. Isaacsen, the attorney of the appellant. One of the women testified that the claimant had a pimple on her little finger; that she had a brass ring on the finger which started the blood poisoning. She was then subjected to a searching and exhaustive cross-examination by the deputy commissioner in the course of which the record discloses the following, the questions being asked by him:

"Q. What kind of a ring was it? A. A little brass ring.

Q. You have been watching that ring? You have seen the ring a hundred times on her? A. I never watched it.

Q. How many times did you see it? A. Once or twice I noticed it.

Q. You know the ring. Describe the ring. A. I cannot describe it. She had a ring on her finger.

Q. How do you know it wasn't a piece of wire? A. She told me. It was a little ring.

Q. Was it like a piece of wire? A. No wire — a little bit of a ring.

Q. 'A little bit of a ring.' What do you mean? A woman knows all about rings. I am not talking to a man. They are fond of jewelry. You know

what kind of a ring it was if you know at all. A. A little bit of a ring. She told me it was brass herself.

Q. What kind of a ring was it? Was it a ring like that (shows ring on his finger)? A. No, sir.

Q. Did she ever show it to you and say, 'Look at my ring'? A. She never showed it to me like that. She was working and I noticed it on her finger. We are always busy working on subway cars.

Commissioner Curtis.— You evidently worked a whole lot from what you say if she told you all her business.

The Witness.— We never talk about rings. She told me the ring scratched that pimple.

Commissioner Curtis.— You just testified that she told you all about her business.

The Witness.— Not about the rings.

Commissioner Curtis.— You first said she told you all about it and you told me the reason why she told you—she told you all her business and that's how you knew. Is that what you said?

The Witness.— We don't talk about rings. She told me the ring scratched her pimple.

By Commissioner Curtis:

"Q. You are sure of that part? A. Yes, sir.

Q. What makes you so sure? A. I am sure of that.

Q. Why? A. Because she told me.

Q. Who was talking to you to make it so fresh in your memory that she told you about this ring? Did she tell you about her home affairs? A. Sometimes. * * *

Q. When did she tell you that the ring scratched her finger? A. She told me some time while working together.

Q. When? A. I cannot remember the date. The 17th she first complained about her finger.

Q. The 17th of August? A. Something like that.

Q. Who told you the 17th? Where did you get this information? You are unable to remember any other date only the 17th. That has been instilled in you very thoroughly. How is it you know the 17th? A. I didn't know it would be a case of it. * * *

Q. Do you remember the date she told you she was injured? A. The 17th.

Commissioner Curtis.— God! You will stick by the 17th. You have it solid in your memory.

Witness.— Yes, sir.

Commissioner Curtis.— You don't know anything about anything else. * * *

Q. You never saw a window fall on the subway cars? A. No, sir. They cannot fall.

Commissioner Curtis.— Then you haven't had the same experience I have.

Mr. Isaacsen.— On the Brooklyn Rapid Transit?

Commissioner Curtis.— Are they different?

Mr. Isaacsen.— Very much different.

Commissioner Curtis.— That's one good thing the B. R. T. has—the windows don't drop. * * *

Q. Did you ever have any trouble with this woman? A. No, sir; always friendly, but once sweeping—

Commissioner Curtis (interrupting, addressing Interpreter Vioni).—Ask her did she ever have an argument?

The Claimant.—In one week I make \$18.60 and this woman was jealous because I made more than they did.

Commissioner Curtis.—I thought there was something."

At the conclusion of the testimony of this witness, she was dismissed with this comment by the deputy commissioner:

"She knows all about the B. R. T.—only the schedule; nobody knows that."

The other woman who was present at the time of the alleged accident was then called as a witness and testified to an admission by the claimant that her finger was hurt by the ring. In the course of her testimony she stated that the claimant had not asked her to testify in her behalf. This bit of testimony being somewhat favorable to the claimant drew from the deputy commissioner the comment: "You are telling the truth." He then took the witness in hand and his examination not developing from her responses in each instance favorable to the claimant he apparently changed his views about the veracity of the witness as his subsequent comments indicate. In the course of a lengthy examination conducted by the deputy commissioner in the same spirit as characterized the examination of the former witness the following occurred:

"This woman says on the 17th you cleaned them. A. She has better dates than I have.

Commissioner Curtis.—Maybe she has reason to have better dates. She has the injury. Maybe if you had the injury you would have better dates.
* * *

Q. You had some trouble with her? A. She wanted to do the clean work and wanted us to do the dirty work.

Q. You had a little spat with her every day? A. Not exactly.

Q. There was always a feeling between you that she wasn't doing this or that right? A. Not a bad feeling.

Commissioner Curtis.—Not very bad.

Mr. Isaacsen.—I submit that she said 'no bad feeling between us.' You said 'Not very bad.' I don't believe you should put words in her mouth.

Commissioner Curtis.—She has been very well schooled. Even in testifying she is not holding to her own story because she doesn't know whether she cleaned windows on that day or not. From the start she has shown there is a feeling between the two women.

Mr. Isaacsen.—I don't think you can show any prejudice—

Commissioner Curtis (interrupting).—She stated here that this woman wanted her to do the dirty work. * * *

Q. What was the size of the ring in your opinion? You are a woman that knows about the wedding rings used these days. Was it the size of the wedding ring used to-day as a rule? A. There was the hand right here (indicating)—

Q. (interrupting). Was it gold or brass? A. I think it must be mixed.

Commissioner Curtis.—You are a little better.

Mr. Isaacsen.—She is not a jeweler. How does she know? She is testifying to the best of her knowledge.

Commissioner Curtis.—Then you are acknowledging that your other witness didn't know."

The claimant had been treated by a nurse in the employ of the appellant. A discussion arose at the hearing as to whether the nurse should be produced. It seemed to be the understanding of the attorney for the appellant that she was not at that time in the employ of the appellant. The attorney after stating that the nurse did not witness the accident announced that he would rest the case without her testimony. The record then discloses the following:

"Commissioner Curtis.—The carrier rests on the evidence already presented. This woman, the claimant, mentions a nurse who treated her and who is now in the employ of the company, to show she had an accident and that she treated her for same—

Mr. Isaacsen (interrupting).—I object to that.

Commissioner Curtis (continuing).—And the company has refused to produce her here as a witness and on those grounds I make the award as I am of the firm opinion that the testimony presented isn't facts.

Mr. Isaacsen.—I now ask that the company be given a chance to bring this woman, Mrs. Wait. There is nothing in the testimony to show that this claimant met with an accident and the words were put in by yourself—

Commissioner Curtis (interrupting).—This woman testified that the nurse treated her immediately after she came out. The only conclusion that can be formed is that the case isn't being produced here.

Mr. Isaacsen.—I ask for an adjournment.

Commissioner Curtis.—I wanted to give you an adjournment and you didn't want it. You are trying to pull over something—

Mr. Isaacsen.—I am not trying to pull anything over and you well know it.

Commissioner Curtis.—The minutes will show that—

(At this point Mr. Isaacsen threw his papers on the table and left his chair.)

Commissioner Curtis.—Don't throw your papers down like that. You are not worrying me any. We have your statement there that you would stand on the testimony—that you will rest on the testimony presented.

Mr. Isaacsen.—From what you said I am asking that the case be adjourned one week.

Commissioner Curtis.—This same witness that you claim you were to have here is still in your employ and you have failed to produce her.

Mr. Isaacsen.—I didn't know she was still in our employ.

Commissioner Curtis.—This woman claims to have seen her there.

Mr. Isaacsen.—I think this witness is mistaken.

Commissioner Curtis.—That's the only thing in which she is mistaken."

The hearing was then adjourned one week. On the adjourned day the nurse was produced as a witness and testified that she treated the infected finger and that the claimant told her that it was caused by the ring and said nothing to the effect that a window had fallen on the finger. The witness produced a book in which she kept a record of serious cases. It contained an entry made at the time when she treated the claimant appearing in its regular order in the book and containing the statement:

"Infection on small finger, left hand, due to tight ring. Wet dressing of opium and lead. Sent to Dr. Gibson to have lanced,"

and dated August 21, 1918. During the examination of this witness the deputy commissioner turned to the report of Dr. Gibson, made September 20, 1918, in which he stated that first treatment was rendered by him on August 22d, and that the claimant stated to him that a car window had fallen on her hand. The deputy commissioner commented on what apparently seemed to him a singularity that the claimant on August 21st should tell the nurse that the injury was caused by the ring, and that the doctor in his report of September 20th should say that the claimant had told him that the injury was caused by the fall of a window. The inconsistency in the two statements seemed to impress the deputy commissioner as being greatly to the disparagement of the nurse, entirely overlooking the fact that the statement to the doctor was the one subsequently made, and that it might have been an afterthought by the claimant and that in any event it was her self-serving declaration, and according to the most elementary rules of evidence tended in no degree to discredit the nurse. We quote again from the record:

"Commissioner Curtis.—Just what does Dr. Gibson mean there on the 22d, the next day? Why don't you add something in that record?"

Mr. Isaacsen.—What do you want me to do with this report of Dr. Gibson's?

Commissioner Curtis.—I just want to know why there is such a change in the two reports.

Mr. Isaacsen.—I don't know; how should I?

Commissioner Curtis.—Well, there it is.

Mr. Isaacsen.—You accept one part of the testimony but won't accept the other which is sworn testimony. I can't do anything more than to bring the witnesses here and testify. I only can do my duty to my company and I tried to do that; I presented the evidence and testimony.

Commissioner Curtis.—I am not interested in your dealings with your company. I am here to deal out compensation."

At the conclusion of the hearing the deputy commissioner announced his decision in favor of the claimant. The attorney for the appellant announced his intention to appeal which drew from the deputy commissioner the following statement:

"You might enter in the minutes that I did not place credence in the witnesses that testified, as their mode of testifying was not satisfactory."

We have not attempted to reproduce all that was said by the deputy commissioner. The record is replete with improprieties, and we may regretfully add that numerous records have come under our observation which have been marred by the indiscretions of this official. The statute (Workmen's Compensation Law, section 20) gives to any party a right to present evidence and to be represented by counsel. Clearly witnesses and counsel are entitled to respectful and courteous treatment. Sarcasm, insinuations, sneers, ridicule and intimidation, all of which were indulged in by the deputy commissioner, have no place in the administration of justice. His attitude was not that of an impartial judicial officer patiently attempting to develop facts regardless of which side might be helped by such facts. His attitude was rather that of a belligerent and aggressive partisan attorney seeking to develop only such facts as were favorable to the party he represented. In any well conducted court such comments and statements as were indulged in by the deputy commissioner would not be tolerated on the part of an attorney. If he per-

sisted therein after admonition he would subject himself to discipline. The indulgence in such conduct by a presiding officer clothed with judicial or quasi-judicial functions and who is amenable for his own conduct to no one in the tribunal over which he presides and in whose keeping is the dignity of such tribunal and the impartial administration of justice is particularly reprehensible and might well be characterized in severer terms. If an attorney would be subject to discipline for similar conduct, what can be said of a presiding officer who takes advantage of his official position to indulge in methods which should not be tolerated in another? His publicly expressed intimations repeatedly indulged in at the very time that the witnesses were giving their testimony that they were not telling the truth constituted gross improprieties. It is conceivable that during a judicial hearing evidence of perjury on the part of a witness might be so obvious as to call for immediate action. But such was not the case here. Such statements and comments on the testimony as it is proceeding from the witnesses excites either embarrassment or hostility in the witness according to temperament and is not productive of that mental serenity which is essential to an accurate statement of the knowledge which the witness possesses. Ofttimes witnesses testifying in public are affected by a natural nervousness or stage fright. This is enhanced by such treatment as was accorded them in this proceeding, particularly when it comes from the judge or presiding officer. Such witnesses need reassurance rather than harshness. The effort should be to get from them as naturally as possible the testimony which they have it in their minds to give. Methods which disconcert or humiliate or intimidate witnesses are sometimes reflected in the distortion of their testimony. They do not give it as they would if their minds were at ease. The mental disturbance of the witnesses is naturally greater when it is produced by the presiding officer rather than by an attorney. We cannot be sure in this case that the witnesses have expressed themselves as they intended to do. They were subjected to a species of duress or intimidation which may well have had the effect of unconsciously suppressing what was in their minds to testify or discoloring that which they did testify.

It is true that this award appears to have been made by three of the Commissioners. But they did not take part in the development of the testimony and we have no means of knowing how much personal consideration they gave to the case. The statute (section 65) provides that the award of a deputy commissioner only needs the approval and confirmation of the Commission to make it the award of the Commission. It is a fundamental and primary right of every party to have a fair and impartial hearing, and that the person who acts as his judge or arbiter shall be without prejudice or bias. More particularly should this right be guarded under a statute where the determination of the judge or arbiter in respect to a question of fact is final and cannot be reviewed. We make no criticism and intend no reflection on any of the Commissioners. We express no opinion as to the merits of this claim. The claimant may or may not be entitled to an award. What we hold is that the remarks and comments by the deputy commissioner manifested bias and prejudice against the appellant, and that his treatment of the witnesses and manner of examining them may have been productive of the suppression or incomplete development of their testimony constituting legal error, and that

the appellant has not had a fair hearing and has been deprived of its day in court.

The awards should be reversed and the proceeding remitted to the Commission for another hearing. All concurred. Awards reversed and proceeding remitted to the Commission for another hearing.

H. *Question of accident, when res adjudicata.*—An employee suffered from a hemorrhage. The Commission attributed it to the strain of lifting a heavy box and made eight separate awards to him from time to time from none of which was appeal taken. Eleven months after his accident the employee died of tuberculosis. Upon award to his widow and children, the carrier raised the question of occurrence of an accident. The Commission held that acquiescence of the carrier in the eight disability awards had caused the question to become *res adjudicata*. The Appellate Division affirmed the award unanimously and without opinion: *Volk v. Gretsck & Co.*, Death Case, No. 77456, Oct. 21, 1918: — App. Div —, May 7, 1919.

I. *Notice of accident by employee to employer.*—This topic is specially presented below, pages 303–344. The texts of two earlier opinions are in Bulletin No. 81, pages 389–391.

J. *Presumption in favor of compensation claims.*—This topic, also, is specially presented below, pages 345–355, with cross-references to various opinions in Bulletin No. 81 and Bulletin No. 87, Part 1.

NOTICE OF ACCIDENT BY EMPLOYEE TO EMPLOYER

(Workmen's Compensation Law, § 18; § 21, subd. 2; § 54, subd. 2; § 76)

Workmen's Compensation Law, § 18, requires and regulates notice of accident by the injured employee to his employer and to the Commission.

A. *Purpose of notice.*—For protection of themselves against illegal or fraudulent compensation claims, employers need timely opportunity to investigate accidents and to test the good faith of claimants.

B. *Sufficiency of notice.*—The courts have held that the notice provisions of § 18 are not to be glossed over as mere forms. Their main object is not just to start a proceeding. Notice must be such as will warn a reasonably prudent and watchful employer of a coming claim and must indicate that the injury has arisen out of and in the course of the employment. The Court of Appeals has not passed upon the sufficiency of oral notice in absence of written notice, the question not having been before it: *Bloomfield v. November*, 223 N. Y. 265. The Appellate Division has affirmed some compensation awards that have rested upon oral notice but has declared that the burden of proving that oral notice has been given rests upon the injured employee and that notice by calling the attention of a foreman or other intermediary to the accident is ineffective if such foreman or other intermediary fails to convey the information to the employer.

C. *Excuse of failure to give.*—The courts have held that findings of the Commission excusing absence of notice are defective if they do not indicate that one or another of the particular grounds for excuse permitted by § 18 fits the particular case. The fact that eye-witnesses to an accident are lacking requires rather than excuses notice. If the employee asks for excuse upon the ground that his failure to give notice has not prejudiced his employer, he must offer proof to such effect. The courts will not disturb general findings of absence of such prejudice, if supported by any evidence.

D. *Frequency of failure to give.*— In the light of four years' experience, a very large percentage of injured employees have either failed to give any notice of their accidents whatever or have failed to give notice measuring up to the requirements of § 18. This has been due for the most part to ignorance of the existence of the notice provisions, misunderstanding of them or defective compliance with them. In certain kinds of accidents the employee has not given the required notice because the original injury has been slight or peculiar and he has not readily connected it with the serious troubles that have resulted from it sometimes many days after its occurrence. Infection from a scratch, injury to the eye by a flying particle, hernia or strain, are instances. These are the very cases that are most liable to controversy and that most need the prompt securing of evidence aimed at by § 18. Amendments to § 18 have made its provisions less severe towards employees, but the true remedy for the failure is an educational campaign among workmen.*

E. *Estoppel from pleading want of notice.*— Recent Commission rulings have applied the doctrine of estoppel in excuse of failure to give notice. Thus, in *Deecke v. Huyler's Corp.*, S. D. R., vol. 15, p. 671, Bul., vol. 3, p. 169, Apr. 2, 1918, the Commission held that the employer had been estopped by its own conduct from pleading the time limit not only as concerned the injured employee's failure to file a claim with the Commission within a year but also as concerned his failure to give notice of his accident to his employer within ten days. The Appellate Division has affirmed the award in a case in which the Commission held that the employer's agreement to pay compensation estopped him from pleading want of notice: *Farrell v. Swett Iron Works*, Case No. 8433, May 17, 1917; Death Case, No. 9257, Aug. 16, 1917; 184 App. Div. 919, May 8, 1918. Other Commission rulings basing estoppel upon agreement are: *Lettiere v. Degnon Contracting Co.*, S. D. R., vol. 15, p. 604, Feb. 15, 1918; *Piekarski v. Doehler Die Casting Co.*, S. D. R., vol. 16, p. 447, Apr. 23, 1918; *Kulp v. Stobell Co.*, S. D. R., vol. 17, p. 629, Aug. 16, 1918.

*The Workmen's Compensation Bureau of the State Industrial Commission is distributing to employees a leaflet entitled "What to do when injured."

F. *Presumption that notice has been given.*—The burden of proving that sufficient notice has not been given is upon the employer or carrier: Workmen's Compensation Law, § 21, subd. 2. Cases illustrative of this presumption, favorable to the injured employee, are noticed below, page 352.

G. *Amendments to § 18.*—Section eighteen retained its original form for four years. Experience of the Commission with it, especially in view of court interpretation, led to radical revision of it by the Legislature of 1918. The more important changes consist: (1) In lengthening the time limit for notice by twenty days; (2) In causing such time limit to run from date of accident instead of from date of disability; (3) In permitting the Commission to excuse failure to give notice upon the ground that the employer had knowledge of the accident; and (4) In requiring the employer to present at the Commission's hearings any objections relative to notice that he may have, upon penalty of waiver as concerns appellate proceedings, if he does not. The brevity of the original time limit for notice, ten days, favored the employer; but the running of the time from date of disability, rather than from date of accident, favored the employee. The two amendments relative to these points may be read together as a compromise. Court decisions have not yet tested the section under the revision. The Commission held the amendments retroactive in *Struzycki v. Smith Contracting Co.*, Bul., vol. 4, p. 177, May 13, 1919; and made award under them in *Stolhoff v. Asch*, Bul., vol. 4, p. 171, Apr. 30, 1919.

H. *Court decisions.*—Four opinions of the Court of Appeals deal with the subject of notice. The text of the earliest opinion, *Bloomfield v. November*, December 12, 1916, has been presented in Bulletin 81, pages 390, 391. The Court there emphasized the duty of the Commission to treat the notice provisions of § 18 as something more than a mere formality. It reversed an order of the Appellate Division affirming an award and remitted the claim to the Commission on the ground that the Commission had failed to make a finding of the existence of either of the two legal reasons upon which it could excuse the claimant's failure to give written notice of the accident to the employer.

The Commission having reconsidered its findings in accordance with the court's suggestions amended them to the effect that neither the employer nor the insurance carrier had been prejudiced by the claimant's failure to give notice, and gave as proof of absence of prejudice the fact that the claimant had personally notified her employer at the time of the accident that she had pricked her finger and five days later had exhibited her swollen hand to her employer's representative. Upon appeal, the Appellate Division reversed the award upon ground that the statute required notice to the employer after disability, not before, that the exhibition of her swollen hand to her employer's representative was not an attempt to send word to her employer and that there had been no claim that the representative had ever informed the employer about the swollen hand. Two justices dissented from the Appellate Division's decision with opinion reviewing the evidence. The majority and minority opinions are as follows:

BLOOMFIELD v. NOVEMBER, 180 App. Div. 240, Nov. 28, 1917.

WOODWARD, J.: The claimant alleges that on the 6th day of August, 1914, while employed by one S. November, she scratched the third finger of her right hand with a pin; that she continued to work until the eighth day of August, when she quit work. It is claimed that this pin scratch or puncture resulted in blood poisoning, and an award for twenty-five weeks, at \$11.54 per week, was made on the 28th day of May, 1915. Subsequently, and on the 2d day of August, 1915, a second hearing was held, where Dr. Werner testified that the infection from the wound in the third finger of the right hand had extended to the left wrist, and for this further injury the State Industrial Commission made a further award of twenty-seven weeks, amounting to \$311.58. Appeals were taken to this court from these awards, and they were affirmed. (172 App. Div. 917.) The Court of Appeals reversed this court and sent the case back to the State Industrial Commission, upon the ground that the claimant had failed to serve the written notice required by the statute (Workmen's Compensation Law, § 18), and that the State Industrial Commission had not properly excused the failure on the part of the claimant to give this notice. (219 N. Y. 374.)

The State Industrial Commission has made a finding of fact that "Ella Bloomfield failed to give to her employer written notice of injury within ten days of disability. Such failure has not prejudiced the employer for the reason that the employer was personally notified at the time of the accident that she had pricked her finger and that she required some peroxide for application to the injury and he then had an opportunity to avail himself of all the facts and to give such attention as the occasion might require to the matter, and failed to do so because he was busy and did not consider the matter of any moment. When Ella Bloomfield did not return to work on August 10th, the employer sent to her home her uncollected wages and the employer's rep-

representative was then shown by Ella Bloomfield the swollen condition of her hand and was told the cause thereof and as being the reason why she failed to report for work. The insurance carrier was not prejudiced on the part of Ella Bloomfield for the reason that the knowledge of the employer above mentioned constituted knowledge on the part of the insurance carrier by force of the contract of insurance involved herein between S. November, employer, and Zurich General Accident and Liability Insurance Company, Limited, insurance carrier." Upon this finding of fact the State Industrial Commission decides that the "failure of Ella Bloomfield to give to her employer within ten days of disability a written notice of her injury is hereby excused on the ground that neither the employer nor the insurance carrier was prejudiced by such failure."

Does this meet the objection pointed out by the Court of Appeals? That court, in its opinion, says: "The Legislature, however, has deemed it proper and essential, under ordinary circumstances, that a written notice of disability and claim should be promptly served so as to give an employer the opportunity to investigate the circumstances of the claim. This requirement ought not to be treated as a mere formality or be dispensed with as a matter of course whenever there has been a failure to serve such notice. The Legislature has enumerated reasonable conditions under which failure to serve the notice may be excused and we think that the attention of the Commission should be fastened upon the question whether upon the proofs in a given case the circumstances do exist which are sufficient to justify such failure, and that if they do exist that fact should be properly stated as one of the facts which constitute the basis of the award." (*Matter of Bloomfield v. November*, 219 N. Y. 374, 376.)

Section 18 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) provides that in case of an injury notice "shall be given to the Commission and to the employer within *ten days after disability*," either by the person or by some one in his behalf, and that the "notice shall be in writing, and contain the name and address of the employee, and state in ordinary language the time, place, nature and cause of the injury, and be signed by him or by a person on his behalf." The importance which the Legislature placed upon this notice is evidenced by the provisions that the notice "shall be given to the commission by sending it by mail, by registered letter, addressed to the commission at its office," and not by ordinary mail, with a like provision in reference to the employer, unless the notice is delivered to him personally. The section then proceeds, that "the failure to give *such notice*, unless excused by the commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the state fund, insurance company, or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim under this chapter."

Neither the evidence nor the findings of the Commission make any pretense that there was any good reason why the claimant could not have given the written notice provided by the statute "within ten days after disability," so that the only inquiry is whether there is any evidence to sustain the finding that the insurance carrier or employer was not prejudiced by this failure to give the written notice. It appears from the testimony that the alleged accident occurred on the 5th day of August, 1914, and that upon this day the claimant told her employer that she had been pricked by a pin, and that she

wanted some peroxide, and that the employer, being busy, paid no heed to the matter. This is the only time that there is any pretense that the claimant told the employer anything in reference to this alleged injury, and at that time it is not claimed there was any disability; the uncontradicted evidence is that the claimant continued to work until the eighth day of August. The statute requires that the notice shall be given within ten days after disability, not three days before disability, and that this notice shall be in writing, and contain the name and address of the employee, and state in ordinary language the time, place, nature and cause of the injury. Can it be that anything less definite and certain than the notice required by the statute can be accepted as just as good? Does not the fair and reasonable construction of this act require that the insurance carrier and employer shall have at least a substantial compliance with the provisions of section 18; a notice which shall be the fair equivalent of the notice required by the act? Is an employer bound to take notice of every trifling injury, such as a pin prick, because some hysterical woman calls for an antiseptic? Is he bound to anticipate that three days or a week later, or at any subsequent time, this trifling, every-day accident, may eventuate in blood poisoning? The statute, by making definite requirement of a written notice, and specifying its contents and the mode of service, furnishing its own method of proof to a large extent, presumes that the insurance carrier or employer would be prejudiced by a lack of such a notice — by a lack of an opportunity to investigate the circumstances of the accident while the matter was fresh in the minds of all persons — and to say that the employer, in the present instance, had a fair equivalent of this written notice, by this claimant telling him, while he was busy, that she had pricked her finger with a pin, and asking for an antiseptic, is certainly reaching out a long way for an equivalent. It is not claimed that the claimant was at that time disabled, or that she had received any injury which in the ordinary experiences of mankind was likely to result in disability; there is no pretense that the claimant intimated in any manner that she expected to be laid up from this trifling wound, and it is not claimed that this alleged injury was brought to the attention of the employer, the Commission or the insurance carrier at any time after the disability is alleged to have arisen until more than nine months afterward, except that the Commission suggests that the messenger who carried the claimant's salary to her after she had failed to return to her work was shown the swelling on her hand and told of the cause. There is no claim that she attempted to send word to the employer, or that the messenger ever in fact communicated this alleged information to the employer. The net result is that the only information which was ever shown to have been communicated to the employer was the statement of the claimant that some days before any disability had occurred she told her employer that she had pricked her hand with a pin, and that she asked for peroxide to put upon it. There is little safety in doing business if every trivial pin puncture puts the employer on notice and compels him to follow up each employee to learn whether the puncture has resulted in infection. It opens the way to fraud, and endangers the success of this innovation upon the common-law rule of liability.

In the light of the discussion of the Court of Appeals, it seems to us that in order to excuse a claimant for not giving the notice required by the statute it should be made to appear that the disability of the claimant, and its

cause, were called to the attention of the employer or the insurance carrier, or to the Commission, in such a manner that the inference could be fairly drawn that the presumption of prejudice to the rights of the insurance carrier was overcome. This ought not to rest upon mere specious reasoning; it should have a substantial basis of fact. There is not the slightest evidence in this case that the employer, the insurance carrier or the Commission ever had any notice of the alleged disability until the filing of the "employee's first notice of injury" on the 15th day of May, 1915, more than nine months after the alleged injury. This notice was filed in writing upon the regular blanks, but it was filed long after the accident; long after the total disability, which she fixes at August 8, 1914; long after the partial disability, which she places at the 1st day of November, 1914. There being no evidence of any notice of disability brought home to any of the persons or officers within a period of ten days from such disability, and the first notice of injury being filed in writing in May, 1915, it would seem to follow that there is no foundation of fact on which the State Industrial Commission could rest its finding that the insurance carrier and employer were not prejudiced; and the award may not properly be sustained.

The awards should be reversed and the claims dismissed. All concurred, except LYON, J., who dissented in part in opinion in which KELLOGG, P. J., concurred.

LYON, J. (dissenting):

The holding of the State Industrial Commission, that the employer and insurance carrier have not been prejudiced by the failure of the claimant to give to the Commission and to the employer the required notice in writing of injury within ten days after disability, as well as the act of the Commission in excusing such failure, were fully justified. Evidence was taken at the hearings had before the Commission pursuant to the direction of the Court of Appeals (219 N. Y. 374) in remitting the claim to the Commission to pass upon these subjects of prejudice and excuse, to the following effect: The claimant's occupation was that of a model in the cloak and suit manufactory of the appellant employer in the city of New York. On the 5th day of August, 1914, while trying on a garment, not finished, but bound with pins and needles, a pin was forced into the third finger of the claimant's right hand. She immediately notified her employer's son who was connected with the business, and who is spoken of as the boss, of the accident, showing him her finger, and asked for peroxide. He told her not to bother him, that he was too busy, but that the peroxide was in the closet. She at once went and got it and applied it to the wound. Considering the injury to be slight, she continued at work until the afternoon of the third day following, when her finger and hand having become badly swollen and very painful, to quote her statements, "I went over [to the son], I says 'I have to go home. I am very sick.' They were very busy at the time you know, so he says to me 'You can't go home.' I says 'I am very sick, I have got to go home. I can't stand the pain.' I went home." One of the claimant's associates testified that on this occasion the claimant's hand was so swollen and sore that she could not use it and that she asked the witness to put her hair up, and to help her on with her coat, which the witness did. Two days later the employer sent the balance of the claimant's wages to her home by his shipping clerk, who found her in bed. She then showed

him her hand, which was badly swollen, and told him she had stuck her finger while trying on a garment, and had put peroxide on it, and did not know it would be so serious, and that her finger had become blood poisoned. It is very probable that the shipping clerk upon his return to the factory informed his employer of the claimant's condition, and what she said to him regarding her injury. From the time of returning home, August 8, until November 1, 1914, she underwent constant treatment both at her house and at St. Mark's or St. Luke's Hospital by a surgeon who made incisions and inserted drainage tubes in her finger and in her left wrist, the whole of which had become infected. November 1, 1914, her wounds became healed, leaving the second joint of her finger completely ankylosed, or as she expressed it dead to her, both the tendon and joint being involved, and leaving her wrist so weak and painful that she was unable to work until practically after the expiration of fifty-two weeks from the date of the accident. In speaking to the surgeon about her injury she for the first learned of her right to compensation, whereupon she went to the office of the Commission and being told that such was the fact she obtained the usual blanks, which she at once filled out and filed with the Commission. That the employer knew of the injury at the time it took place, or at least of the disability at the time it occurred three days later, is well established by the evidence. The employer testified before the Commission as follows: "Q. Did you know anything about a certain injury which Mrs. Bloomfield sustained on or about August 5, 1914? 'I know she went home sick, I don't know exactly what the reason was.' Q. Did she ask if she could go home? 'She did not ask me.' Q. When was the first time you knew? 'I discovered it the same day.' Q. How did you discover it? 'I had four girls working then, and I could easily see if one was missing.' Q. Did you inquire as to why she wasn't there? 'Yes, I was told she went home sick.' Q. Did you see her subsequent to that date? 'No.' Q. Did she return the following day to work? 'No, sir, she didn't return at all. I sent her the money to her home as the season was over any way.' * * * Q. When did you next see Mrs. Bloomfield? 'I guess I saw her a couple of months later.' Q. Where? 'In my place of business.' Q. What did she say to you? 'She said she was very sick, that she had a lot of trouble with her arm.' Did she say anything about an injury to her finger? 'Yes.' Q. What did she say? 'She said she was very sick and that they operated on her finger.' Q. Did she say what caused it? 'I don't remember that.' Q. Did she say she was injured while working for you? 'I don't remember her saying that.' * * * Q. Did she ever file a notice of injury with you? 'No, but I knew she was home sick.' * * * Commissioner Mitchell: Do you remember anything about accident occurring to her? Witness. I was told that she—After she stayed away, I ask where she is and I was told she was sick home. I don't remember. I am a busy man." Following the filing of the report of injury by the claimant, an investigator of the Commission in the company of the claimant called upon the employer. The investigator testified: "Q. Tell us what the conversation was. Give it as exactly as you can, your own words and the employer's words. A. I asked Mr. November whether Mrs. Bloomfield was employed by him and he told me that she was. I next asked whether she met with any accident. He informed me the accident was so slight he didn't think it was necessary to report to the Commission * * *."

It is a matter of very serious doubt whether a notice in writing of the injury, given ten days after disability, stating the time, place, nature and cause of the injury would have added anything to the information which the employer already had. The statute presumes that sufficient notice was given. (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 21.) Notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier. (Id. § 54, subd. 2.) The surgeon testified that he made the claimant forty visits at either her home or the hospital between August eighth and November first. There is not to be found in the record, or in the brief of the appellants, a suggestion that the claimant did not have the best attention and most scientific medical and surgical treatment which could have been given her, or that anything could have been done which would have brought about a more prompt or complete recovery. In view of all the facts above stated the finding and decision of the Commission that the employer and insurance carrier were not prejudiced by the failure of the claimant to give the written notice was fully warranted. It quite naturally follows for the same reasons that the Commission was justified in excusing such failure. The claimant testified that she was entirely ignorant of her rights under the Workmen's Compensation Law until immediately previous to her filing the report of injury. While ignorance of the law is in general no excuse for its violation, I think such lack of information is a proper subject for our consideration in view of the fact that the Workmen's Compensation Law had been in effect less than six months at the time the claimant suffered the accidental injury. The evidence is that the claimant suffered intensely, more than one month and a half being required to complete the drainage from the infected finger. Her statement is that after leaving her employer's place of business she was too ill to inform her employer or any other person of the accident.

The report of the attending surgeon described the nature and extent of the injury as "Infected punctured wound of right ring finger involving second surgical joint and by infection to left wrist (metabolic)." Perhaps the award should have been for a single period of fifty-two weeks, instead of for a period of twenty-five weeks for the loss of the use of the finger, and for an additional period of twenty-seven weeks for disability on account of inability to use the wrist. (*Matter of Marhoffer v. Marhoffer*, 220 N. Y. 543.) However, the manner in which the award has been made in no way affects the merits of the claim nor increases the amount of the award. For these reasons the appellants may have seen fit not to raise such objection, which I think under the circumstances should not first be raised by us.

The award should be affirmed, with costs against the appellants. *KELLOGG, P. J.*, concurred. Award reversed and claims dismissed.

Claimant Bloomfield appealed to the Court of Appeals from the Appellate Division's reversal of her award. The Court of Appeals sustained the Appellate Division upon the ground that the Commission's findings were insufficient to rebut the presumption of prejudice. The employer, it said, had not been warned of a

the employer would thereby have the same warning of a necessity for investigation that would follow from service of a written notice and that, therefore, he would not be injured by failure to serve the latter. But it seems utterly extravagant to hold that every time an employee tells an employer that he has suffered some little hurt which neither by its nature nor by what is said appears to be anything connected with his employment, an employer can be deemed to have been so forewarned of a coming claim and put upon investigation that he has suffered no injury from failure to give a proper and fair notice under the statute. Such is this case. If we were at liberty to consider the evidence we should feel perfectly clear that the claimant never believed that she was giving any notice of an injury under the statute. Certainly what she said could never have warranted a reasonably prudent and watchful employer in imagining any such notice.

Under these circumstances it seems to us that there is an utter lack of connection between the finding made by the Commission that the respondents were not injured by failure to give the statutory notice and the fact which is found as a reason and basis for such finding. It is possible that the evidence might be so construed as to sustain a general finding, if it had been made in the words of the statute, that the employer and insurance company were not injured by failure to give the statutory notice. But it is unnecessary to consider that question. The Commission has put its interpretation upon all of this evidence by finding simply that the claimant did state that her finger had been pricked, although it was strenuously and stoutly denied that she did even this. But having found this as the limit of what claimant did and having given this statement as the sole reason for the finding of lack of injury we are presented with the question whether such finding was sufficient, and as indicated we do not think that it was.

Therefore, the order of the Appellate Division should be affirmed, with costs against the Industrial Commission.

CHASE, COLLIN, CUDEBACK, POUND and ANDREWS, JJ., concur; CARDOZO, J., dissents. Order affirmed.

The third opinion of the Court of Appeals upon the subject of notice was handed down one week after its second decision in the Bloomfield case. It reversed a unanimous decision of the Appellate Division sustaining a compensation award. This case also had to do with infection from the pricking of a finger. The accident was without witnesses other than the injured employee. In this case, as in the second Bloomfield decision, the court condemned the special reason assigned for the finding of no prejudice and suggested that the courts would be bound by a general finding, if supported by any evidence. "Notice and consequent chance of investigation," said the court, "is given for the very purpose of enabling the employer to test the good faith of the claimant." One judge dissented with brief opinion. The majority and minority opinions are as follows:

HYNES v. PULLMAN Co., 223 N. Y. 342, April 30, 1918.

ANDREWS, J.: On May 5, 1916, Dennis E. Hynes wounded his finger with a tack while engaged as a car cleaner. He continued his work until May 11. By that time his finger and arm had become infected, but he reported to his employer in good faith that he had rheumatism. He later underwent several operations. He did not give written notice of the accident until July 28th.

Under these circumstances the Commission finds that the employer was not prejudiced by the failure to give notice "for the reason that there was no one present when the accident occurred and, therefore, the employer could obtain no affirmation nor denial of the fact of the accident, and for the further reason that as soon as evidence of infection appeared, Hynes was under the care and attention of a duly authorized medical practitioner."

This court has already said that the written notice required by section 18 of the Workmen's Compensation Law (Cons. Laws, ch. 67) is not a mere formality to be dispensed with as a matter of course. The act is definite as to the powers of the Commission. It may make no award in the absence of the notice unless for some reason it could not have been given, or unless the employer has not been prejudiced by the failure to give it. The burden rests upon the claimant who has been guilty of the default to show the facts and secure a finding that entitles him to an award. (*Matter of Bloomfield v. November*, 223 N. Y. 265.)

Where, as here, the notice might have been given and is not, the ultimate fact upon which the award must rest is that the employer is not prejudiced. If such a general finding, supported by any evidence, is made, doubtless all the appellate courts are bound by it. The Commission has a large and undefined discretion. This, the legislature intended to confer upon it. We may not assume that it will abuse its power. Unless it is honestly satisfied, after weighing all the probabilities, that no prejudice has been suffered, its duty will be to uphold the statutory bar.

If such a finding is made and is unanimously affirmed by the Appellate Division, the question as to whether it is supported by any evidence is not before this court. But no such finding has been made in the case before us. The facts are given upon which the ultimate conclusion is made to rest. Whether these facts support the conclusion is a question of law.

We do not think that they do. For more than two months the employer was not warned of the alleged accident or its alleged results. For that time he was deprived of the opportunity of investigating the claimant's story and of determining for himself the sequence of events, and whether the septicaemia from which the claimant suffered did, in truth, result from the scratch.

The logic of the Commission seems to be as follows: Because the claimant tells the truth as to his accident; because no one was present to contradict him; because later blood poisoning developed and developed as a result of the injury; because a licensed physician attended him who was presumably competent, no investigation could have been useful to the employer. This is reasoning in a circle. Notice and consequent chance of investigation is given for the very purpose of enabling the employer to test the good faith of the claimant. Without it no contradiction is possible. If many are present at the time of the alleged accident; if their stories agree; if there

is no doubt of the injury and its results, there may be a basis of the finding that lack of notice did no harm. But assume that the injury was so slight as not to cause attention at the time; that no physician was called for eleven days; that the accident is remembered only after the lapse of six or perhaps thirteen days; that blood poisoning may result from any slight prick, any scratch, any bite of an insect, then the absence of witnesses would seem to require rather than to excuse notice.

The order of the Appellate Division and the award of the Commission should be reversed, and as all the facts were before the Commission and were interpreted by it so as not to admit a recovery, the claim should be dismissed, with costs in all courts against the Industrial Commission.

POUND, J. (dissenting): The unanimous affirmance of the finding of the Industrial Commission that the employer was not prejudiced by the failure of the employee to give notice of injury is final. No question of law survives.

"A speculative and insubstantial suggestion of prejudice," as Lord SUMNER says in the *Hayward Case* ([1915] A. C. 540, 547-8) is not enough. It is not open to this court to conjecture that the employer, with notice, might have done something which would have changed the result. Prejudice means disadvantage. How and why did disadvantage arise in this case? Would other inquiries or other treatment have been to the employer's advantage? Looking at all the matters before it, the Commission answers this question in the negative and finds that the employer is no worse off than it would have been with notice. The judgment appealed from should be affirmed.

HISCOCK, Ch. J., CHASE, COLLIN and CUDDEBACK, JJ., concur with ANDREWS, J.; POUND, J., reads dissenting opinion, and CARDOZO, J., concurs. Order reversed, etc.

The fourth opinion of the Court of Appeals has been handed down a year later than the Hynes opinion. It reiterates the declarations of the previous decisions to effect that a finding of no prejudice to the employer from failure of a claimant to give the statutory notice must rest upon evidence that the employer has had timely opportunity to investigate the alleged accident and to care for the alleged injury. It reverses an order of the Appellate Division affirming an award without opinion. Text of the opinion is as follows:

COMBES v. GEIBEL, 226 N. Y. 291, April 29, 1919.

CHASE, J.: The Industrial Commission found that, "On or about December 13, 1916, the day when Charles Combes sustained his injury he * * * was employed as a stableman in the livery and boarding stable, operated by the employer."

Also that, "Charles Combes in connection with the duties of his employment was rolling out certain cans containing manure and while so doing he accidentally slipped on the ice and snow on the sidewalk, and one of these cans fell upon him and crushed his left hand on to the sidewalk. As the

result of this crushing, an infection set in which necessitated the amputation of three fingers."

Also that, "At the time of the said injury Charles Combes was sixty-five years of age and was then suffering an acute dilatation of the heart. The injury which he sustained on or about December 13, 1916, and the consequent infection and amputation of the fingers lowered the vitality of the claimant and caused the aggravation and lighting up of other conditions which he suffered as the result of which he died on February 3, 1917, of chronic interstitial nephritis and the complicating condition which generally accompanies this condition, namely, pulmonary oedema. The disability and death of Charles Combes were therefore caused by said accidental injury."

And also, "Written notice of the injury to the claimant and of his death was not given to the employer respectively, within ten days after disability and thirty days after his death, but neither the insurance carrier nor the employer was prejudiced by such failure."

The findings were made as a part of the decision and two awards based thereon, one upon a claim for compensation for disability filed by the employee January 25, 1917, and the other upon a further claim for death benefits under the statute (Workmen's Compensation Law, section 16), filed March 26, 1917, by the employee's surviving wife. The decision of the Commission was not unanimous. One of the Commissioners dissented. An appeal was taken from the awards to the Appellate Division of the Supreme Court where they were affirmed by a divided vote of the court. (*Matter of Combes v. Geibel*, 187 App. Div. 912.)

We will assume, without deciding, that there is some evidence to sustain the findings of an injury to the employee and that his death was caused by such injury. We do not think that there is any evidence to sustain the finding that "neither the insurance carrier nor the employer was prejudiced" by the failure to give the notices required by the statute.

The statute as it existed in 1916 and 1917 provided as follows: "§ 18. Notice of Injury.—Notice of an injury for which compensation is payable under this chapter shall be given to the commission and to the employer within ten days after disability, and also in case of the death of the employee resulting from such injury, within thirty days after such death. Such notice may be given by any person claiming to be entitled to compensation, or by some one in his behalf. The notice shall be in writing, * * *. The failure to give such notice, unless excused by the commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the state fund, insurance company or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim under this chapter." (Workmen's Compensation Law [Cons. Laws, ch. 67], section 18.)

There was no reason why notices could not have been given in this case. No pretense was made of obeying the statute quoted. Not only did the claimants fail to give the notices as provided by the statute but no written notice of the injury or death was given to any one at any time except the claim dated January 25, 1917, that we have mentioned, and a notice by letter to the employer from the employee's wife saying that her husband had his fingers cut in his place and that "He (the employee) had stated by a notary public that he was hurt," and in which letter she asked the employer to look after compensation. That letter must have been written after January 25, 1917.

The employer testified that in response to that letter he went to see the employee and was told by him or by his wife that he hurt his finger on a can while working in the stable. The employee died the next day.

While the employer knew that the employee had a sore finger he testified without contradiction that he saw the finger when the employee first commenced working for him either late in November or early in December and that it was then red and swollen and that, to some extent, it incapacitated the employee in his work. There is no evidence of a verbal notice of the injury having been given to the Commission or the employer, until after January 25, 1917, and immediately before the employee's death, and no evidence of knowledge, except as stated, on the part of either that the employee claimed to have been injured on December 13, or at any time when employed at the stable.

The findings from which we have quoted, including the statement that neither the insurance carrier nor the employer was prejudiced by the failure to give the notices required by the statute, and the ruling of the commissioners excusing the failure to give such notice "on the ground that such failure did not prejudice the employer or the insurance carrier," are not sustained by any evidence whatever.

This court in *Matter of Bloomfield v. November* (219 N. Y. 374, 376) say: "The legislature, however, has deemed it proper and essential under ordinary circumstances that a written notice of disability and claim should be promptly served so as to give an employer the opportunity to investigate the circumstances of the claim. This requirement ought not to be treated as a mere formality or be dispensed with as a matter of course whenever there has been a failure to serve such notice." (*Matter of Bloomfield v. November*, 223 N. Y. 265; *Matter of Hynes v. Pullman Co.*, 223 N. Y. 342.) The burden rests upon the claimant who has been guilty of the default to excuse the same. (*Matter of Bloomfield v. November*, *supra*; *Matter of Hynes v. Pullman Co.*, *supra*.)

If the employee was injured on December 13, as he claims, by having his finger pinched by one of the cans that he was handling, it was a mere aggravation of a prior injury or inflamed condition of the same finger. He thereafter applied home remedies and continued at his employment with some intermissions until December 26, when he went to a physician. At that time the physician found that the employee was suffering from heart trouble; that he had Bright's disease "which must have existed some time" and that the finger was in a gangrenous condition and that the infection ran half way up his forearm. Subsequently he amputated first one finger and later two more fingers. The amputations were successful but his other troubles grew worse and he died as stated.

If the notices had been given as required by the statute or even if knowledge of the alleged injury had been obtained in some other way at or about the time it is claimed that the injury occurred, there would have been an opportunity not only for a prompt general investigation of the alleged circumstances of the accident but of the employee's story thereof and there could have been an examination of the injured finger, and such care and attention could have been given to it as to have prevented infection or if infection was not so prevented, then the facts relating to it could have been obtained from which it could have been better determined whether the infec-

tion was the result of causes other than the alleged injury. There can be no reasonable doubt that without the statutory notices or proof of knowledge of the injury and claim, the employer and insurance carrier were prejudiced.

The order of the Appellate Division should be reversed and the awards of the Industrial Commission annulled, and the claims dismissed, with costs in this court and in the Appellate Division payable by the Industrial Commission.

HISCOCK, Ch. J., HOGAN, CARDOZO, POUND, McLOUGHLIN and ANDREWS, JJ., concur. Order reversed, etc.

About three months before the first Court of Appeals decision in *Bloomfield v. November*, the Appellate Division had remanded a hernia case to the Commission to determine whether notice had been given; the Commission had thereupon found that the wife of the injured employee had given verbal notice to his employer within four days after date of the injury; this case was appealed and remanded a second time and the award was finally rescinded by the Commission on the ground that there was no proof of occurrence of an accident: *Harrison v. American Cooperage Co.*, S. D. R., vol. 8, p. 402, Mar. 14, 1916; — App. Div. —, Sept., 1916; Death File, No. 422, Feb. 13, 1917; — App. Div. —, May 4, 1917; Death File, No. 422, July 13, 1917.

Two months after remanding the Harrison case relative to notice, the Appellate Division had affirmed, unanimously and without opinion, an award to an employee for loss of use of his eye due to a blow from a horse's hock, the employee having failed to give notice of the accident for more than a month after its occurrence: *Pellegrino v. Skowfoe*, S. D. R., vol. 8, p. 417, Mar. 22, 1916; 175 App. Div. 958, Nov. 15, 1916.

Following is a presentation in chronological order of all the court decisions to date relative to excuse of failure to give notice, starting from the first Court of Appeals decision in *Bloomfield v. November*, December 12, 1916.

In two opinions evoked by failure to give notice, the Appellate Division on December 28, 1916, two weeks after the first Bloomfield decision of the Court of Appeals, took note of the opinion of the higher court, reversed two awards and remanded the cases to the Commission. Judge Kellogg dissented in both cases, in one with lengthy opinion. In one of the cases, *Prokopiak v. Buffalo Gas Co.*, the court dwelt upon the insufficiency of the evidence

but based its reversal upon the Commission's "habit of excusing these failures to give notice, irrespective of the merits of the case, as a matter of course." The opinion is as follows:

PROKOPIAK V. BUFFALO GAS CO., 176 App. Div. 123, Dec. 23, 1916.

HOWARD, J.: The claimant has been awarded compensation by the State Industrial Commission and the only question for our consideration is the failure of the injured employee to give the statutory notice.

The accident occurred July 15 or 16, 1914. A lump of coal fell from a buggy, which is a vehicle for conveying coal, and struck the claimant on the leg. This occasioned the injury. The claimant did not work any more that day nor for four or five days, but returned to work after this short interim, and continued, with one interruption, until August 9, 1914. In October, following, he was taken to a hospital and his right leg was amputated. Previous to the injury the claimant had been suffering from sarcoma of the bone in the injured leg. The Commission has found that the hurt from the falling piece of coal aggravated the cancerous condition of the leg and rendered amputation necessary.

No written notice, as required by section 13 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), was given until July 8, 1915, nearly a year after the accident; and no verbal notice, in any wise complying with the requirements of section 13, was ever given. The Commission has, however, found that at the time of the accident the claimant told the appellant's foreman that he had been hurt and did not want to work any more—although he did, in fact, after a few days, work more. The Commission has found as a conclusion of fact that the employer was not prejudiced by the failure of the claimant to give the statutory notice.

We have repeatedly stated that we will not attempt to upset findings of fact made by the Commission if there be any evidence to support them. The Workmen's Compensation Law (§ 20, as amd. by Laws of 1915, chap. 167) does not permit us to do so. We reiterate that position here. It would be quite possible, however, in this case for us to point out that there is no evidence to support the finding that the employer was not prejudiced. The injury was not severe at first; a mere trifling hurt which did not even break the skin, but only left a red spot. After the lapse of three months the leg was amputated, and the bone was found to be diseased—cancerous; and this condition is shown to have existed before the accident. Therefore, the amputation was at most only the remote result of the injury. If the employer had been given prompt notice of the accident it would have been afforded an opportunity to investigate and perhaps it might have been able to produce medical evidence to the effect that the cancer, which was the disease directly responsible for the amputation, was in no degree produced, aggravated or accelerated by the apparently insignificant hurt.

But we have concluded to reverse the award, not because this finding is unsupported by the evidence, but because we feel that the Commission has fallen into the habit of excusing these failures to give notice, irrespective of the merits of the case, as a matter of course. In *Matter of Bloomfield v. November* (219 N. Y. 374) it was said: "This requirement ought not to

be treated as a mere formality or be dispensed with as a matter of course whenever there has been a failure to serve such notice." The notice which the law requires has a substantial, definite purpose; not, as the Attorney-General argues, "mainly for the purpose of starting a proceeding," but, as the Court of Appeals in the *Bloomfield* case has stated, "so as to give an employer the opportunity to investigate the circumstances of the claim." This being the clear purpose of the notice required by section 18, the court cannot permit the requirements of that section to be nullified and thrown into disuse by the Commission.

In view of the attitude of the Court of Appeals so recently assumed in the *Bloomfield* case, to which we have just referred and from which we have quoted, we consider it unnecessary to indulge in further comment.

The award should be reversed and the claim remitted to the Commission for further consideration. All concurred, except KELLOGG, P. J., who dissented. Award reversed and claim remitted to the Commission for further consideration.

In the other case, *Sicardi v. Sarnoff Hat Co.*, the Appellate Division held that the Commission's findings of no prejudice from want of notice were inaccurate because they declared that the employer had not been prejudiced; whereas, under the law as it stood at the time of the accident, they should have declared that the insurance carrier had not been prejudiced. The decision turned upon interpretation of the phrase "state fund, insurance company or employer" in Workmen's Compensation Law, § 18. In view of the decision, this phrase has since been amended by striking out the words "state fund, insurance company or" (L. 1918, ch. 634). Judge Kellogg, with Judge Lyon concurring, delivered a dissenting opinion in which he took the ground that the court was giving the statute too technical a construction. His opinion is of interest also for its interpretation of the phrase "within ten days after disability" in § 18. Commissioner Sayer has followed Judge Kellogg with opinions that further elucidate the phrase: *Elsinger v. Remhof*, Bul., vol. 3, p. 99, Dec. 11, 1917; *Peck v. Allison*, S. D. R., vol. 15, p. 621, Bul., vol. 3, p. 147, Feb. 27, 1918; *Ten Broeck v. Levenson & Cohen*, Bul., vol. 4, p. 71, Dec. 11, 1918. The Legislature of 1918, however, as noted above, has substituted the phrase "within thirty days after the accident causing such injury." The majority and minority opinions in the *Sicardi* case are as follows:

SICARDI V. SARNOFF HAT CO., 176 App. Div. 13, Dec. 28, 1916.

COCHRANE, J.: The only question on this appeal is the failure of claimant to give notice of his injury within ten days after his disability, as provided

by section 18 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41). He was injured by a piece of splinter from the floor which pierced his shoe and entered his right foot. This occurred November 4, 1915. The Commission has made findings as follows: "By reason of this accident Sicardi laid off from work for nine days until November 13th, and then returned to work and worked to and including March 1, 1916. On March 2, 1916, he went to the hospital and was operated [upon] and the splinter was withdrawn from his foot, and he was not able to return to work until March 28, 1916. He then continued working until the 1st of May, 1916, when he had another operation for the same injury and was disabled from working until May 29, 1916. The claimant failed to give written notice of his injury to his employer within ten days thereof for the reason that he did not consider his injury very serious and it was not until March 2, 1916, when he went to the hospital, that he gave notice of injury to his employer pursuant to the statute. His failure to give notice of injury within the statutory period did not prejudice the employer." At the conclusion of the award is the following statement by the Commission: "The failure of Frank Sicardi to give statutory notice of injury to his employer is hereby excused on the ground that such failure did not prejudice his employer."

Section 18 requires that a written notice of the injury should be given within ten days after disability, and in case of death within thirty days thereafter. After specifying the details of the notice and the manner in which it may be given, the section concludes as follows: "The failure to give such notice, unless excused by the commission either on the ground that notice for some sufficient reason could not have been given, or on the ground that the state fund, insurance company, or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim under this chapter."

In *Matter of Bloomfield v. November* (219 N. Y. 374), decided by the Court of Appeals December 12, 1916, that court had under consideration the requirement of this statute as to notice and said: "This requirement ought not to be treated as a mere formality or be dispensed with as a matter of course whenever there has been a failure to serve such notice. The Legislature has enumerated reasonable conditions under which failure to serve the notice may be excused and we think that the attention of the Commission should be fastened upon the question whether upon the proofs in a given case the circumstances do exist which are sufficient to justify such failure, and that if they do exist that fact should be properly stated as one of the facts which constitute the basis of the award. We do not think that it is good practice that the service of such notice should be excused without any finding of the existence of conditions which justify such action on the part of the Commission or statement even of the theory on which the excuse has been granted."

In the present case the findings of the Commission are more explicit than they were in the *Bloomfield* case and there is a distinct finding that the failure to give the notice "did not prejudice his employer." This finding was absent in the *Bloomfield* case. But such finding does not meet the situation or comply with the statute. The failure to give notice may be excused for one of two reasons: *First*, that it could not have been given. That reason manifestly does not exist in this case. *Second*, "on the ground that the

state fund, insurance company, or employer, as the case may be, has not been prejudiced thereby." The word "employer" as used in this last sentence of section 18 as indicated by the context means an employer who is a self-insurer, the idea being that it must appear that the state fund, or insurance company, or employer, "as the case may be," liable for compensation has not been prejudiced. The notice does not have to be given to the insurance company because by virtue of the statute (§ 54, subd. 2) notice to the employer shall be deemed notice to the insurance carrier. But when no notice has been given and there is an insurance carrier, the question is not whether the employer but whether the insurance carrier which must pay the compensation has been prejudiced. In the present case, therefore, if the failure to give notice is to be excused, the ground of the excuse should be that the insurance company has not been prejudiced if such is the fact, and in accordance with the rule declared in the *Bloomfield* case this should be accompanied by appropriate findings of such facts, circumstances or conditions, if they exist, as to render proper the conclusion that the insurance company has not been prejudiced.

The award should, therefore, be reversed, and the matter remitted to the Commission.

All concurred, except KELLOGG, P. J., who dissented in an opinion, in which LYON, J., concurred.

KELLOGG, P. J. (dissenting): We are giving this remedial statute a too technical construction. It must be conceded that if the employer was a self-insurer the award would be affirmed, as the Commission finds as a matter of fact, which we cannot question, that he was not prejudiced by the delay in giving the notice of injury.

Technically the Commission should also have found that it did not prejudice the insurance carrier; but that omission, probably an oversight, should not defeat the award. We quote subdivision 2 of section 54 of the Workmen's Compensation Law:

"2. Knowledge and jurisdiction of the employer extended to cover the insurance carrier. Every such policy shall contain a provision that, as between the employee and the insurance carrier, the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge, as the case may be, on the part of the insurance carrier; that jurisdiction of the employer shall, for the purpose of this chapter, be jurisdiction of the insurance carrier and that the insurance carrier shall in all things be bound by and subject to the orders, findings, decisions or awards rendered against the employer for the payment of compensation under the provisions of this chapter."

Notice is not served, or required to be served, on the insurance company. It is not a necessary party to the proceedings. The employer who insures in the State fund is absolutely relieved from liability; but one who insures otherwise remains liable for the award. The insurance company, his surety, relieves him so long only as it makes the payments. If it should become insolvent, then he must pay. (Workmen's Compensation Law, § 53: Id. § 54, subds. 1, 2.) It is immaterial, therefore, whether standing alone the insurance company would be liable or not. The insured is liable, and the insurance company, his surety, is necessarily bound to protect him.

It would be an idle ceremony to affirm the award as to the employer and reverse it as to the insurance company. It is immaterial to the claimant

who pays the award. The law fixes the liability upon the employer; the payments fall upon the insurance company, under its bond, as long as it is able to respond. The requirement that the notice be served upon the employer makes it plain that if the employer is not prejudiced by the failure of notice—that is, if it had information which justified the excuse of the notice, the insurer cannot complain.

A determination that the employer is not prejudiced necessarily carries with it the idea that the insurance company cannot be prejudiced. The omission in the award to state that the insurance company is not prejudiced is, therefore, immaterial. The determination practically establishes that neither the employer nor the insurance company is prejudiced. (*People v. Munroe*, 190 N. Y. 435; *Pangburn v. Buick Motor Co.*, 211 id. 228.)

The employee was injured November 4, 1915, by a piece of splinter from the "bad floor," as he calls it, passing through his shoe into his right foot. We infer from his answers to the questions that he was a foreigner, unacquainted with the language, and ignorant. The Commission finds: "By reason of this accident Sicardi laid off from work" until November thirteenth, when he returned to work and worked to and including March first. On March second, infection having set in, he went to the hospital and was operated upon and the splinter withdrawn. He was not able to return to work until March twenty-eighth, and upon May first a second operation was necessary, and he was disabled until May twenty-ninth. The Commission finds that he failed to give written notice "of his injury to his employer within ten days thereof, for the reason that he did not consider his injury very serious, and it was not until March 2, 1916, when he went to the hospital, that he gave notice of injury to his employer pursuant to the statute. His failure to give notice of injury within the statutory period did not prejudice the employer; * * * and the failure of Frank Sicardi to give statutory notice of injury to his employer is hereby excused on the ground that such failure did not prejudice his employer." The employer made a report March 18, 1916, stating the accident substantially as above.

On the hearing the carrier objected to an award upon the ground that the statutory notice had not been given. It said: "We claim prejudice in that we were unable to properly investigate the happening of the accident and also prescribe or see to the treatment he was getting. We are obliged under the law, if you make an award, to pay the medical bill, yet we had no voice in supplying him treatment, and we are called upon now, almost a year after it happened, to contest a claim for compensation." The claimant, when asked why he did not notify the Commission before, replied: "When I had that, I think I won't have nothing the matter like that. First operation I had was the second of March. At that time I let him know this thing happen."

The accident seemed trivial at the time and no attention was paid to it. It did not seem worthy of consideration until March second and then the claimant went to the hospital and was operated upon; the treatment he had, and his condition then, were matters of easy proof. If the employer had been notified of the accident immediately there was no way in which it could have verified the statements of the claimant. It could only be ascertained whether or not it was a "bad floor" with loose splinters in it. The condition of the floor was a fact well known to the employer and easily susceptible of proof; whether it was splintered and in bad condition could have been

discovered as well in March as in November. It is not claimed that there was any change in the floor from the time of the accident to the time of the notice, or that the fact of the accident could be proved or disproved by the testimony of any one other than the claimant. Apparently he alone knew of the injury at the time. The suggestion by the insurance company that it was prejudiced in not being able to prescribe or see the treatment the claimant was getting is not of force, for as matter of right the claimant could employ his own physician and exercise his own judgment as to his treatment. From the facts appearing and the suggestion of the insurance company as to how it might have been prejudiced, it was for the Commission to determine as matter of fact whether the failure to give the notice prejudiced the defense.

We conclude, therefore, that the determination of the Commission that the failure to give notice did not prejudice the employer, and its determination to excuse the failure to give the notice was a question of fact upon the evidence, and that the Commission in determining that question of fact had evidence upon which to act, and under such circumstances its conclusion is not subject to review by us.

The Commission is not required to make formal findings of fact and law. In fact section 68 of the law declares that it is not bound by technical or formal rules of procedure except as provided in the act, and section 20 (as am'd. by Laws of 1915, chap. 167) provides that the Commission "shall make or deny an award, determining such claim for compensation, and file the same in the office of the commission, together with a statement of its conclusions of fact and rulings of law."

In the *Bloomfield Case* (219 N. Y. 374), recently decided by the Court of Appeals, in the award the Commission stated that it excused the failure to give the notice, but gave no reason why it excused it, and the record shows no reason. The Court of Appeals held that the practice was improper. The Commission cannot act arbitrarily and thereby practically disregard the statute. It must determine whether or not it will excuse the failure to give the notice, and that determination must rest upon some foundation of fact.

The finding of the Commission that "The claimant failed to give written notice of his injury to his employer within ten days thereof" indicates that the Commission erroneously considered that the notice must be given within ten days of the injury or accident. The law (§ 18) requires that notice be given "within ten days after disability." The Commission has not determined whether notice was given within ten days of the disability or not, but has found certain facts, from which, and from the other facts in the record not in conflict with the facts found, we are to determine whether the claimant has lost his right to compensation by failing to give the notice within ten days after disability. In determining that question we must always bear in mind the reasonable presumption that the claim comes within the act, in the absence of substantial evidence to the contrary, and that the claimant should have the benefit of this remedial statute unless the appellant has shown that the award is in violation of law.

The compensation given by the law is only for "disability" or "death" resulting from a personal injury (§ 10). Section 15 gives a "schedule in case of disability." The 1st subdivision provides for a total permanent disability; the 2d for a temporary total disability; the 3d for permanent partial disability;

the 4th for temporary partial disability. The claim here is under this fourth subdivision, and by it for claimant's temporary partial disability the compensation is sixty-six and two-thirds per cent of the difference between his average weekly wages before and during partial disability. Therefore, if the injury did not unfit him for work or lessen his earning power, he was not entitled to compensation, and the service of the notice was entirely unnecessary. We find in the statute no definition of the word "disability" as there used. The statute being one providing compensation to workmen for disability, and basing the compensation, so far as we are now concerned, upon the difference in the earning power of the employee before and after the injury, the meaning of the word is plain. There is no disability until the result of the accident interferes with the earning power of the employee. The time to serve the notice then begins to run.

Section 3, subdivision 7, defines "injury" as follows: "'Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom." We must remember that the claimant considered the injury to his foot as unimportant, not worthy of being mentioned to the employer, and he made and makes no claim for it. The claim now made is only on account of the infection, which was only apparent March second. (*Matter of Rist v. Larkin & Sangster*, 171 App. Div. 71.) Aside from the infection the claimant had received no injury for which compensation could be awarded him, for by section 12 of the law no compensation is awarded for the first fourteen days of disability, except the benefits provided for in section 13 of the law, which benefits were never claimed. We are, therefore, safe in saying that the claimant was not within the purview of the law until March second. Having returned to work within nine days, and being entitled to no compensation for the first two weeks, there was no reason why he should file notice on the tenth day, for at that time he was at work, apparently without any disability.

If the employee had not quit work for the few days after the injury there would be no doubt I think but his notice was given in time. He did not consider there was any real disability until March second, and the notice was given March second. We may, therefore, consider whether, as matter of substance, this ignorant man did not give notice within ten days after the disability. We have quoted his excuse for not giving immediate notice, which we infer means that he did not think at the time the injury amounted to anything. In his claim, in answer to the question, "On what date were you compelled to stop work as the result of this injury?" claimant answered, "March 2, 1916." The attending physician's report was dated June 2, 1916, and he was asked, "For what period from the date of accident, (not from date of this report) is disability likely to exist?" He answered, "nine weeks." This, of course, was a mistake, for he was at work within ten days of the accident and no disability was alleged until March second. The physician evidently intended that the disability was likely to continue for nine weeks from March second. We find nothing in the record justifying the conclusion by the Commission that the claimant laid off for nine days by reason of the accident. It was, therefore, error of law for the Commission to determine that fact without any evidence before it. The presumptions created by the act are in favor of the claimant and are not intended for his disadvantage. If the

claimant quit work for nine days after the accident, there is nothing to show that it was on account of disability. His habits, and whether or not he was regular at his work, do not appear. That a man is injured and lays off work for nine days does not establish, directly or indirectly, that he suffered a disability by the injury, especially where the injury was a mere sliver in the foot. No fact appeared before the Commission which could have justified the finding that the claimant was entitled to compensation (a proper notice being served) for the time when he was out of work after the accident, if it had been for sufficient time to justify compensation. As the evidence does not show disability for the nine days, construing the law in favor of the claimant, we are compelled to say that he did not lay off on account of disability. As matter of fact, from the evidence, the claimant accidentally ran a sliver in his foot November fourth, but considered it unimportant until infection set in, with resulting disability March second. The claim is made for a disability then beginning; the notice was served March second, and unless we draw unfavorable inferences against the claim within the fair meaning of the law the claimant is entitled to compensation. A workman, in performing his ordinary duty, is struck by a cinder in the eye; he deems it unimportant and continues work. A month or two later infection sets in, caused by the cinder. It cannot be said that the failure to give notice of a cinder in the eye, which did not disable him and seemed entirely unimportant, bars him from recovery. There is no controlling evidence that by the accident the claimant had sustained a disability within the meaning of the act until the infection was discovered March second. There is nothing until then to indicate that he was unable to earn his ordinary wages. Many reasons other than a disability within the act might have kept him at home for nine days. He may have thought it was better for the foot that he should remain at home and while the injury was trivial he might have acted from what seemed at the time to be over-caution in taking care of it. Upon the whole record, therefore, I favor an affirmance of the award. Lyon, J., concurred.

Award reversed and matter remitted to the Commission for further action.

Upon reconsideration of the Sicardi case, the Commission denied award upon ground of prejudice to the insurance carrier: Bul., vol. 2, p. 151, Apr. 11, 1917.

At the same time with the opinion cases of Prokopiak and Sicardi the Appellate Division reversed and remanded without opinion the award case of *Testa v. Burns Co.*, S. D. R. vol. 9, p. 277, Bul., vol. 2, p. 208, May 18, 1916; 176 App. Div. 924. Dec. 28, 1916, citing the first Bloomfield opinion of the Court of Appeals. Testa, a laborer, claimed to have been injured in the groin by a nail protruding from a concrete form that he was helping to handle but had not given written notice of the accident till six months after its occurrence. Upon receiving the case back, the Commission rescinded the award: Bul., vol. 2, p. 208, June 19, 1917.

A unanimous decision of the Appellate Division handed down without opinion upon the same day with the Prokopiak and Sicardi decisions, affirmed an award to an employee for finger injuries. The employee had abraded his finger upon an emory wheel but had continued working for five days after the accident, when infection had compelled him to quit work. Next day he had returned to the plant and had told his foreman about his hand but had not stated the cause of its condition. He had not given written notice until four months and a half after the accident: *Dollard v. Transit Developing Co.*, S. D. R., vol. 8, p. 449, Apr. 12, 1916; 176 App. Div. 924, Dec. 28, 1916.

May 2, 1917, the Appellate Division, unanimously and without opinion, affirmed the award in a case that it had previously remanded to the Commission to determine whether the claimant should be excused for failure to give notice; the Commission, upon receiving the case back, had found that the claimant had "told the bookkeeper of his employer of the accident and its consequences within ten days of the accident, and such bookkeeper was the person duly charged with the handling of accident matters for the employer": *Winters v. Marcotte & Co.*, 174 App. Div. 936, Sept. 15, 1916; S. D. R., vol. 10, p. 639, Nov. 3, 1916; 178 App. Div. 943, May 2, 1917.

In the case of a driver who fell from the wheel of his truck to the ground and suffered injury to his brain that terminated in his death eight months later, there was no written notice but the employer's physician had supplied a physician. The employer did not raise the question of absence of notice at the Commission's hearings but raised it later upon appeal. The Attorney-General argued that the failure to raise it at the hearings constituted waiver. The Appellate Division affirmed an award to the injured employee and later affirmed an award to his widow. Both decisions were unanimous and without opinion: *Henderson v. Donovan Co.*, Case No. 16407, Feb. 3, 1917; 178 App. Div. 946, May 17, 1917; Death Case, No. 19214, Jan. 24, 1918; 185 App. Div. 901, July 2, 1918.

July 3, 1917, the Appellate Division, unanimously and without opinion, affirmed an award to an engineer who had fallen astride a hot pipe and had suffered a slight burn which had not

seemed to amount to much and had not troubled him or prevented him from working for more than six months after the accident. It had then suddenly developed into a cancer. Upon ascertaining the seriousness of his condition, he had quit work and had informed his employer immediately. In making the award the Commission had excused failure to give notice upon the ground that the employer had had notice as early as it was practicable to accomplish anything: *Richardson v. Builders Exchange Assn.*, S. D. R., vol. 9, p. 317, June 14, 1916; 179 App. Div. 949.

September 27, 1917, the award in *Hynes v. Pullman Co.* was affirmed by the Appellate Division unanimously and without opinion (179 App. Div. 966). The opinion of the Court of Appeals reversing the Appellate Division's order has been given above, page 315.

September 28, 1917, the Appellate Division, unanimously and without opinion, affirmed an award to an employee who had injured his knee by a fall from a ladder. He had continued to work for three weeks after the accident and had then begun to be lame. His employer, by his own testimony, had known of the fall at the time of its occurrence and had known of its result when he had stopped work but the employee had failed to give the statutory written notice: *Rosen v. Jacobwitz*, File No. 32203, Aug. 31, 1916; 179 App. Div. 967.

November 14, 1917, in *Dorb v. Stearns & Co.*, the Commission excused failure of an employee to give notice of a hernia alleged to have occurred in line of his employment upon the ground that he had notified his boss within three or four days after the disability. The boss did not report the matter to the employer. Upon appeal the Appellate Division held that the oral notice was insufficient because it lacked detail and because it had not been brought home to the employer. The case was remitted to the Commission. The Appellate Division's opinion is as follows:

DORB v. STEARNS & Co., 180 App. Div. 138, Nov. 14, 1917.

COCHRANE, J.: The employer is a corporation engaged in the business of a manufacturing pharmacist. The employee was a shipping and order clerk. On June 23, 1916, while lifting some heavy boxes containing the manufactured product of his employer he sustained an acute right inguinal hernia. He continued working without cessation until July third. He then sought

medical assistance and was informed as to the nature of his injury. He thereupon telephoned to the department where he worked and said that he was sick, but made no reference to an accident or to the nature of his illness. Three or four days thereafter he went to the place of his employment and informed the assistant foreman of the nature of his injury, but even then gave him no information of the time, place or circumstances of the injury nor that it was due to an accident, nor that he had sustained any accident while working for the employer, although the assistant foreman seems to have assumed that he received the hernia in the course of his employment. Much less did the claimant make any statement conveying the idea that he had a claim against the employer or that he intended his statement as the basis of a claim. It was the duty of the assistant foreman to report accidents to the employer but he failed to do so in this instance and no report was made. No notice except as aforesaid has been given the employer and the employer has not waived notice or recognized the accident in such a manner as to render unnecessary the formality of a notice.

Section 18 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41) provides explicitly that within ten days after disability a notice in writing stating the time, place, nature and cause of the injury shall be given the employer, and that "if the employer be a corporation, then such notice may be given to any agent or officer thereof upon whom legal process may be served, or any agent in charge of the business in the place where the injury occurred," and that the failure to give such notice, unless excused by the Commission either because it could not have been given or on the ground that the State fund, insurance company, or employer, as the case may be, has not been prejudiced thereby, shall be a bar to any claim.

In *Matter of Bloomfield v. November* (219 N. Y. 374) it was held that if the circumstances are such as to justify failure to serve the notice, the fact of such circumstances should be set forth by the Commission as one of the facts constituting the basis of the award, and that the Commission should make apparent the ground upon which it excuses the failure to serve notice. (See, also, to the same effect, *Prokopiak v. Buffalo Gas Co.*, 176 App. Div. 128.)

The only compliance by the Commission with these requirements is the finding that "the employer was not prejudiced by such failure for the reason that his duly authorized agent thereto was aware of the accident within three or four days of disability," although this is coupled with the additional finding that such agent made no report to the employer. The reason assigned by the Commission for its action is that under section 21 of the act there is a presumption that the notice was sufficient. The presumption as to notice created by that section means the notice which the statute requires. It is the written notice of section 18 which is protected by the presumption of section 21. The presumption disappears simultaneously with the establishment of the fact that the claimant has not complied with section 18. Then the burden properly falls on him to establish affirmatively that his failure has not been prejudicial.

The practice of the Commission in this case completely nullifies the statutory requirement for written notice. The statute provides that written notice may be given to the employer in the case of a corporation, by delivering it to an agent possessing certain qualifications specified in the statute. But the Commission has excused the failure to give the written notice and found

that the employer and insurance carrier were not prejudiced by such failure solely because an *oral* notice was given to an agent. It is obvious beyond discussion that the effect of this is to hold that oral notice in all instances to an agent of a corporation is sufficient, and the statutory requirement as to a written notice to such agent is thereby destroyed. It does not help the case of the claimant that it was the duty of the agent to report accidents to the employer. That was a matter between the agent and the employer. The agent owed no duty to the claimant to report the accident. The statute casts on the claimant the duty of giving notice and provides what kind of notice it shall be, and specifically to whom it shall be given, and the plain inference therefrom is that the claimant cannot rely on a duty which his fellow-servant or foreman owes not to him but to the employer. The claimant cannot excuse his own default by alleging the default of another to a person other than himself. If in the present case the information which the claimant gave the assistant foreman had been passed along by the latter to his superiors in such a way as to arrest the attention of the employer and excite it into activity in reference to the accident, or in other words if the purpose of the statutory notice had been accomplished, those facts but not the oral notice might have constituted grounds for excusing the claimant's default.

The cases cited point out that the statutory notice should not be regarded as a mere formality and dispensed with, unless the circumstances clearly indicate that no prejudice has resulted to the employer and insurance carrier. The statute confers benefits on the workman far beyond what theretofore existed. In the present case for instance, so far as the facts are disclosed, the claimant would have no cause of action against the employer independently of this statute. One of the requirements of the statute is that employees shall notify the employer in the manner provided by the statute as a condition of having the benefits which it confers. The Legislature has seen fit to safeguard the rights of employers and insurance carriers by requiring written notice to be given within a certain time setting forth the details of the accident. A very essential and important purpose of this notice is that the employer may have the benefit of an early investigation of the circumstances surrounding the alleged accident. Any tribunal assumes a heavy responsibility when it judicially determines that any investigation by the employer if seasonably made would have been fruitless. Of course there are cases where the circumstances are so plain that such a decision may well be made. Technicalities should be brushed aside and a liberal application of the statute should be made in favor of claimants. Their path should not be beset with difficulties. But on the other hand before the money of an employer or insurance carrier is appropriated in payment of such claims, they should be given full and ample opportunity to investigate the claims and the circumstances of the accident. That is the reason why the statute with such particularity and in such detail makes minute provision in reference to the notice. The Commission should be reasonably satisfied that the failure to give notice has not prejudiced those who must make compensation. As pointed out in the cases cited the Commission should find the facts from which the conclusion reasonably and logically follows that the employer or insurer has not been prejudiced. In this case certain facts have been found on which the failure to give notice has been excused but such facts clearly do not justify the excuse.

The award should be reversed and the matter remitted to the Commission for further consideration. All concurred. Award reversed and matter remitted to the Commission.

Upon receiving the case back from the court the Commission gave Dorb opportunity to present affirmative evidence that his employer had not been prejudiced by his failure to give statutory notice. Such evidence not being forthcoming it rescinded his award, December 10, 1917.

Upon the same day of the Dorb decision, the Appellate Division, unanimously and without opinion, affirmed an award to an employee who had incurred traumatic hernia, March 10, 1916, but had worked continuously for the employer till July 9, 1916. About eleven days before quitting work, he had told the employer of his trouble and the employer had furnished him with medical attention. The Commission had excused failure to give written notice of the accident and of his death from the hernia: *Bellafiore v. Roman Bronz Works*, Bul., vol. 2, p. 213, June 19, 1917; 181 App. Div. 910, Nov. 14, 1917.

A driver employed by a town superintendent hurt his hand while operating a wagon lever. Resulting infection caused his death. In excusing absence of written notice, the Commission said: "This was the first accident happening to an employee of the Town of Shelby under the Workmen's Compensation Law. The Town Superintendent did not understand that it was his duty to report accidents until about the middle of December, 1916. The Town Superintendent was aware of the accident three weeks after it happened." Upon appeal, the Appellate Division held that the failure to give notice had not been properly excused. It remitted the case to the Commission which struck the above specific declarations from the findings and substituted a mere general statement that neither the employer nor the insurance carrier had been prejudiced by the failure to give notice. Upon a renewed appeal under these amended findings the Appellate Division affirmed awards to the injured employee and to his widow unanimously and without opinion: *Swart v. Town of Shelby*, Death File, No. 17112, Jan. 25, 1917; 181 App. Div. 915, Nov. 28, 1917; S. D. R., vol. 16, p. 520, May 15, 1918; 186 App. Div. 927, Nov. 13, 1918.

Upon the same day, November 28, 1917, that it handed down

the Swart decision the Appellate Division handed down its decision reversing the award in the Bloomfield case with opinion, the text of which has been given above, page 306.

A month later the Appellate Division reversed the awards and remitted the cases of *Berisso v. Leagan* and *Gordon v. Holbrook, Cabot & Rollins Corp.*, upon authority of its decision in *Dorb v. Stearns & Co.*, above, page 329. In the *Berisso* case, a truck driver was alleged to have contracted a fatal hernia while lifting heavy cases of merchandise. There were no eye witnesses of his accident and the only notice within the time limits was verbal notice by the widow. In the *Gordon* case an iron worker's eye was struck by a piece of hot steel. He notified his foreman immediately and was instructed to see a doctor but failed to give written notice within ten days. There were minority but no majority opinions in these two cases. The minority opinions are as follows:

BERISSO v. LEAGAN, 181 App. Div. 958, Dec. 28, 1917.

Appeal from an award of the State Industrial Commission, entered on the 6th day of July, 1917.

Award reversed and matter remitted to the Commission on the authority of *Dorb v. Stearns & Co.* (180 App. Div. 138). All concurred, except Kellogg, P. J., dissenting in memorandum, in which Lyon, J., concurred.

KELLOGG, P. J. (dissenting): The accident was May nineteenth, the death May twenty-seventh. Verbal notice was given May twenty-eighth. Upon the blanks furnished by the Commission they asked the claimant to state "Has notice been served on employer?" She answered, "Yes." To the question, "If so, how? (by delivery or registered mail)" she answered "verbally." To the question, "What date" she answered, "About May 28th, 1916." Neither party introduced any evidence upon that subject and the position of each must rest upon those answers. The notice referred to in the blanks furnished by the Commission evidently relates to notice of the facts required by law to be given. We must, therefore, conclude that the only defect in the notice of death was that it was verbal and not written. All reasonable inferences are in favor of the claim and of the service of proper notice. The Commission finds that after the injury the claimant was in no condition to give notice and that he died within the ten days, and that the employer having verbal notice of the death next day was not prejudiced. The requirement of notice is not to defeat the employee by a technicality, but is to secure to the employer an opportunity to investigate the facts and find whether it has a defense. When the employer received verbal notice, it had every advantage it could have acquired if a written notice had been given; it was enabled fully to ascertain the facts and defend itself. Upon the record it was a fair question of fact whether, the notice being verbal instead of written but being

within the statutory time, the employer and carrier were prejudiced by the fact that it was not in writing. The conclusion of the Commission upon that question of fact is binding upon us. I favor an affirmance. LYON, J., concurred.

GORDON v. HOLBROOK, CABOT & ROLLINS CORP., 181 App. Div. 959,

Dec. 28, 1917.

Appeal from an award of the State Industrial Commission, entered on the 30th day of July, 1917.

Award reversed and matter remitted to Commission on the authority of *Dorb v. Stearns & Co.* (180 App. Div. 138). All concurred, except Kellogg, P. J., dissenting in memorandum, in which Lyon, J., concurred.

KELLOGG, P. J. (dissenting): The accident was March 30, 1916. The disability did not occur until May 21st; up to that time the claimant did not consider his injury serious. The accident took place in the presence of the foreman and the facts of the injury were then stated to him. June third the employer wrote the insurance company the particulars of the accident and the company conceded on the hearing that it had notice of the accident June third. There is no evidence that the foreman did not tell the company of the accident at that time; it was clearly his duty to do so, and if the company claims that he did not, it should have made proof of that fact. The Commission finds that written notice was not given within ten days of the accident, but says the company or carrier was not prejudiced because the company knew of the facts. It overlooks the fact that the notice is to be given ten days after the disability, and not after the injury, and we have seen by the admissions of the company that on June third it had full notice, and that was but thirteen days after the disability. Upon this evidence it was a fair question for the Commission to determine as a matter of fact whether the company was prejudiced by failure to give notice, and its determination upon the facts appearing in the record and found by the Commission is conclusive upon us. I favor an affirmance. LYON, J., concurred.

Upon reconsidering the Berisso case, June 11, 1918, the Commission denied award upon the ground that it could not find that the employer and insurance carrier had not been prejudiced and that proof of the accident was wholly hearsay.

Upon reconsidering the Gordon case, the Commission renewed the award upon ground that the claimant's mother had given a sufficient written notice within ten days and the Appellate Division affirmed this renewed award unanimously and without opinion: S. D. R., vol. 17, p. 588, Bul., vol. 3, p. 219; June 11, 1918; — App. Div. —, May 7, 1919.

January 18, 1918, the Appellate Division, unanimously and without opinion, affirmed an award in the case of an employee who had died of pneumonia due to infection of a finger cut by him while washing bottles. He had worked for about ten days fol-

lowing the accident and then had reported the infection to the acting superintendent of his employer's plant. The Commission had excused failures to give statutory written notice of the accident and of the ensuing death: *Rodgers v. Borden's Condensed Milk Co.*, Death File, No. 27351, July 18, 1917; 182 App. Div. 906, Jan. 18, 1918.

The question of notice figured in another Appellate Division case of the same date with the Rodgers case: *Bader v. Goldstein Scrap Iron & Steel Co.*, Bul., vol. 2, p. 257, Aug. 14, 1917; 182 App. Div. 907, Jan. 18, 1918. In the Bader case the employer's bookkeeper admitted that the claimant had come to the plant and told him of the accident about four days after the alleged time of its occurrence and that he, the bookkeeper, had thereafter reported it to the employer. The case turned upon charges of perjury. The court remitted it for further findings. An agreement of the employer to pay Bader a lump sum finally on March 1, 1918, disposed of doubts and difficulties.

March 6, 1918, the Appellate Division affirmed awards in *McDowell v. New Film Corp. or Dispatch Film Corp.*, Bul., vol. 3, p. 10, Sept. 5, 1917; 183 App. Div. 910; and *Stein v. Bright Star Battery Co.*, S. D. R., vol. 14, p. 590, Bul., vol. 2, p. 254, Aug. 6, 1917; 183 App. Div. 911, cases of failure to give statutory notice. Two months later the Court of Appeals affirmed the Stein award: 223 N. Y. Rep. 688, May 14, 1918. Both of these were eye injury cases. In the McDowell case a moving picture film jumped from its reel and splashed film cement in the eye of an examiner, ruining its sight. The Commission excused failure of the examiner to give written notice upon the ground that the employer had known of the accident at once and the injured examiner had procured treatment with reasonable diligence. In the Stein case, the Commission found that the injured employee's immediate superior had witnessed the accident and had verbally informed the president of the company of it next day.

Following the McDowell and Stein decisions of the Appellate Division in point of time came the second decision of the Court of Appeals in *Bloomfield v. November* and its decision in *Hynes v. Pullman Co.*, the texts of which have been given above, pages 312, 315.

May 8, 1918, the Appellate Division affirmed an award involving failure to give written notice, unanimously and without opinion, notwithstanding that the employer asserted prejudice; the employee, a motorman, was rendered mentally incompetent by striking his head against his car in a collision; the employer was aware of the accident but claimed that the motorman's mental condition was due to syphilis; the question of notice was thoroughly argued in the briefs: *Gregson v. Union Railway Co.*, Case No. 50282, Dec. 10, 1917; 184 App. Div. 919.

May 17, 1918, the Appellate Division handed down an opinion affirming an award in *Twonko v. Rome Brass Co.*, the case of an employee who caught his foot in the floor of his employer's plant and sprained his ankle. The employee failed both to give written notice and to file a claim for compensation within the time limits. The Appellate Division found ground of excuse for him on both heads. On the score of notice it held that the employer's complete knowledge of the accident within ten days through sources other than written notice rendered the failure to serve such notice immaterial. The part of the opinion relating to notice is as follows:

TWONKO v. ROME BRASS & COPPER CO., 183 App. Div. 292, May 17, 1918,
in part.

H. T. KELLOGG, J.: The claimant caught his foot in a hole in a concrete floor while at work in the plant of his employer, and sprained his ankle. He continued to work throughout July 20, 1914, the day of the accident, and worked the following day. He then remained away from work until August 21, 1914, when he returned, worked for three days, and thereafter, leaving the employment, never worked again. He was confined to a hospital from September 23, 1914, to January 1, 1915. Infection had set in as a result of the accident, and the ankle bones had become diseased. When he left the hospital the ankle joint was stiff and useless. He failed to give a notice of claim to his employer within ten days after disability, and neglected to file a claim for compensation within a year. Nevertheless the Commission found an award, and this appeal was taken.

The claimant informed his immediate foreman of the facts of the accident on the day that it occurred, and within two or three days thereafter exhibited his injured leg to an upper foreman or "bigger boss." About two months after the accident he told physicians at the hospital, where he was confined, how the accident occurred, and they reported to the employer and insurance carrier. Thereafter the services of these physicians were paid by the insurance carrier. On September 26, 1914, or sixty-six days after the accident, the

employer made written report of the accident to the carrier. This report contained the following statement: "Date of accident: Twentieth day of July, 1914. Did accident happen on the premises? Yes. At the plant? Yes. Away from the plant of employer? No. Was employee injured in course of employment? Yes." It also contained the following: "Describe in full how the accident occurred. Turned his ankle over. He worked balance of the day and the following day, then stayed out until August 10th, when he came back and worked for three days only. Has been out ever since. State nature and extent of injury. Doctor reports that he cannot tell at this time as the ankle is so swollen."

The service of a notice of claim furnishes an employer with an opportunity to make immediate investigation before witnesses have dispersed, and while they may still remember the facts of an accident. If otherwise than through an investigation prompted by the service of a notice the employer has knowledge of the facts, a failure to serve a notice is not prejudicial, no matter at how late a date the knowledge is acquired. In this case we find that within two months of the accident the employer, without qualification, asserted entire knowledge as to the manner of its occurrence and the injury inflicted. It was a just inference from this proof that the employer through the agency of the foreman or otherwise did actually acquire information concerning the accident which was fully as illuminating as any information he might have received had the notice been served. Moreover, the employer in his statement made as upon knowledge, asserted facts in relation to the accident which exactly correspond to the facts as alleged in the statement of claimant. Since the employer did have perfect knowledge of the facts of the case, as clearly asserted by him, it is not material whether or not the acquisition of such knowledge had been rendered difficult by the lack of service of a written notice. Clearly, therefore, the employer was not prejudiced.

Upon appeal from the Appellate Division's order, the Court of Appeals handed down an opinion which passed over the question of notice but reversed the order of the court below because of the employee's failure to file his claim within the year's time limit. That part of the Appellate Division's text relating to such time limit and the Court of Appeals text are given above, pages 256-259.

May 24, 1918, the Appellate Division without opinion, two justices dissenting, affirmed an award in *Belcher v. Carthage Machine Co.*, in which the employer's brief asserted prejudice from failure to give written notice: 184 App. Div. 922. The Commission had excused the failure on ground that the employer's secretary and treasurer had had verbal notice within the ten days' limit and due care had been given. Upon appeal from the Appellate Division's order, the Court of Appeals reversed the order with opinion upon ground that the evidence was uncorroborated hearsay but said nothing about the failure to give notice. The

text of its opinion states the facts of the case and is given above, page 287.

July 1, 1918, the Appellate Division reversed the award in *DeGaglio v. Bradley Contracting Co.* upon ground that the claim for compensation had not been filed within a year; in its opinion, text of which appears above, page 265, it said nothing relative to the employee's failure to give written notice. Excusing the employee upon this score, the Commission had said:

DEGAGLIO V. BRADLEY CONTRACTING CO., S. D. R., vol. 15, p. 590, Dec. 11, 1917, *in part*.

John DeGaglio did not give his employer written notice of injury within ten days after disability, but the head superintendent on the work had knowledge of the accident at the day of the happening thereof and one of the members of the employer firm had knowledge of the accident at least on the day that the disability occurred, that is, on the day claimant had to stop work, the claimant on that day having verbally notified James Bradley of said accident; also the reasonable inference is that in giving the claimant lighter work after the accident, and in making payments hereinbefore referred to, that the employer had knowledge of the accident. Therefore, the employer and self-insurer was not prejudiced by such failure.

July 2, 1918, the Appellate Division approved the award in *O'Esau v. Bliss Co.*, though no written notice had been given. The Commission had found that the employer was aware of the accident to O'Esau's finger upon the date of its happening and provided immediate medical attention and, in a second and later finding, had simply held that neither the employer nor the insurance carrier had been prejudiced by O'Esau's failure to give notice. After review by the Commission and renewed appeal, the Appellate Division reversed the disability award of the O'Esau case for failure to file claim, with opinion given above, page 261.

September 26, 1918, the Appellate Division reversed the award and dismissed the claim, with opinion, in the case of a produce dealer's employee whose eye had been injured by a particle of dirt; though there had been unsatisfactory oral notice instead of written notice, the Commission and the court gave main attention to the question of coverage and the court's decision appears to have turned on such question: *Dugan v. McArdle*, S. D. R., vol. 16, p. 472, Bul., vol. 3, p. 199; May 10, 1918; 184 App. Div. 570, Sept. 26, 1918. The Appellate Division's order was affirmed by

the Court of Appeals, January 21, 1919. The case will be presented under the subject of coverage in a later bulletin.

November 13, 1918, the Appellate Division gave decisions on seven cases appealed on ground of absence of notice. In one of these, *Swart v. Town of Shelby*, commented upon above, page 332, the award was unanimously affirmed after having been reversed and remitted because of improper excuse of notice.

In a second case, the Court reversed the award and remitted the case for want of due notice, with opinion as follows:

COLON V. AMERICAN LINOLEUM MFG. CO., 184 App. Div. 734, Nov. 13, 1918.

COCHRANE, J.—The accident happened on July 14, 1917. The Commission has found that due notice of injury was given to the employer. This means such a notice as in required by section 18 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41),* and that it was given in the manner and to the appropriate person specified in that section. The only written notice was of the most informal nature and was not intended as a compliance with the statute. It was directed and delivered to an assistant foreman and accompanied a request that the wages of the claimant be paid to the messenger making the delivery. It consisted merely of a statement in a familiar style to a friend as to the injury which the writer had received. It naturally did not contain all the details required by the statute. The assistant foreman to whom it was personally delivered was not a person to whom the statutory notice might be so given. Due notice of the injury, therefore, was not given to the employer. (*Dorb v. Stearns & Co.*, 180 App. Div. 138.) The finding of the Commission is against the undisputed evidence. If the failure to give the statutory notice has not resulted in prejudice to the appellants, the Commission should make the appropriate findings.

The award should be reversed, and the matter remitted to the Commission. All concurred. Award reversed, and matter remitted to the Commission.

In a third case, the employer had failed to secure compensation and the court reversed the award and dismissed the claim apparently upon the ground that the employee had no right to pursue a compensation claim after electing to bring an action for damages and failing to prosecute the action; the employer also asserted lack of written notice but the claimant presented proof of oral notice followed by immediate medical attention from the employer; the court's majority and minority opinions in the case are presented above, pages 273, 274: *Crinieri v. Gross*, S. D. R., vol. 16, p. 432, Apr. 17, 1918; 184 App. Div. 817, Nov. 13, 1918.

* Since amd. by Laws, 1918, chap. 634. [Rep.]

In a fourth case, the clothing of a railroad roundhouse employee had caught fire and his employer had conveyed him to a hospital. In excusing failure to give written notice the Commission said:

The nature of the injury and the seriousness of the same constitute sufficient reason why written notice of injury could not be given to the employer within ten days after disability.

The court affirmed an award to the injured employee unanimously and without opinion: *Bianc v. New York Central R. R. Co.*, S. D. R., vol. 16, p. 424, April 8, 1918; 186 App. Div. 925, Nov. 13, 1918.

In a fifth case, a splinter of ivory had injured the eye of a piano key maker; the injured employee had informed his employer by telephone message within the ten days' limit; the court affirmed the award unanimously and without opinion: *Gollnick v. Steinway & Sons*, Case No. 52190, June 10, 1918; 186 App. Div. 926, Nov. 13, 1918.

In a sixth case, a trolley conductor had been struck by an automobile while lowering the running board of his car; the Commission's finding is of interest for its formal invocation of the presumption that notice had been given and for its assertion of estoppel by reason of agreement. The passage is as follows:

It does not appear whether written notice of injury was given to the employer within ten days after disability, but it has not been established as a fact that such notice was not given, and it is, therefore, presumed under section 21 of the Compensation Law that sufficient notice was given. On the other hand, the employer and self-insurer was not prejudiced by the failure, if any, to give written notice of injury to the employer within ten days after disability. The employer and self-insurer is also estopped to raise any question in respect to said notice by reason of the written agreement for the payment of compensation entered into on May 14, 1917.

The court found that no appeal had been taken in this case: *Marra v. Nassau Electric R. R. Co.*, S. D. R., vol. 16, p. 501, May 10, 1918; 186 App. Div. 923, Nov. 13, 1918.

In the seventh case, a pressroom foreman had fractured a rib by striking his side against a press; the accident had terminated fatally; there had been verbal but not written notice; the employer claimed prejudice but the court affirmed the award unanimously and without opinion: *Rinke v. Langer Printing Co.*, Case No. 69304, Apr. 29, 1918; 186 App. Div. 926, Nov. 13, 1918.

On the same date with the above seven decisions relative to excuses of notice by the Commission, the Appellate Division

handed down a decision unanimously affirming the Commission's refusal to excuse want of notice in the case of an employee who alleged an accident to his eye due to a spark flying from a furnace fire. The court emphasized the point that "the employer and the insurance carrier have a right to an opportunity to inquire into the happening of the accident." Its opinion is as follows:

ANDREWS v. BUTLER MANUFACTURING Co., 184 App. Div. 698, Nov. 13, 1918.

WOODWARD, J.: The claimant demanded compensation for an injury to his eye, practically destroying its usefulness, alleged to have been due to an accidental flying of a spark from a furnace fire under a boiler. The State Industrial Commission found the fact of the accident, that it was within the statute, but refused to make an award upon the ground that no notice in writing was given to the employer or the insurance carrier, and that both of these were prejudiced by the failure to comply with the requirements of section 18 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 18. Since amd. by Laws of 1918, chap. 634). The claimant appeals from this determination. The accident happened on November 23, 1917.

The determination of the State Industrial Commission should be affirmed. The presumption is, in the absence of evidence to the contrary, that the failure of the claimant to give the notice required by law is prejudicial to the employer and insurance carrier. It is only where the claimant is able to show that the notice could not have been given, or that the insurance carrier and employer were not, in fact, prejudiced by the failure to give the notice, that there is any justification for the State Industrial Commission to excuse the failure. (*Sicardi v. Sarnoff Hat Co., Inc.*, 176 App. Div. 13.) It is not enough, in a given case, that the injury might not have been limited in its effect by prompt action; the employer and the insurance carrier have a right to an opportunity to inquire into the happening of the accident. It is a very simple matter, on discovering an injury to an eye, to fix the time and place of the happening of the same, to come within the provisions of the Workmen's Compensation Law, though in fact it may have been received under circumstances involving no liability, and those who are called upon to pay for the injury have a right to have the matter called to their attention in the manner prescribed by the act. Where this is not done the claimant must afford the evidence to warrant the State Industrial Commission in excusing the neglect. That is the condition upon which the right to compensation, without respect to the negligence of the employer, is based, and it may not be disregarded.

The determination of the State Industrial Commission should be affirmed. Determination unanimously affirmed.

A week later than the above decisions the Appellate Division, without opinion, two justices dissenting, affirmed an award to a lard weigher whose eye had been hurt by a flying piece of steel and who had not stopped work for several days after the accident;

the Attorney-General asserted that the man to whom the accident should have been reported was on vacation and that the injured employee had reported verbally to the acting foreman; the employer declared that the eye might have been saved by prompt treatment and that syphilis had been an independent cause; the Appellate Division's order has been affirmed by the Court of Appeals: *Sanders v. National Biscuit Co.*, Case No. 71172, May 27, 1918; 186 App. Div. 930, Nov. 18, 1918; 226 N. Y. Rep. —, Mar. 11, 1919.

January 15, 1919, the Appellate Division affirmed unanimously and without opinion two awards in cases in which the insurance carriers had claimed prejudice for want of notice. One of the injured employees was a truckman who had been thrown from his truck by the sudden starting of his horses, had incurred injuries to his head and had died ten months later after suffering from headaches, dizziness and marked general weakness; he had been receiving compensation by agreement with his employer: *Sheridan v. Trainer Construction Co.*, Case No. 71651, Apr. 3, 1918; 187 App. Div. 915, Jan. 15, 1919. The other injured employee was a painter who had incurred injury by hitting his head on fresco work of the ceiling while painting; the employer had reported that he had seen the accident: *Levin v. Somer & Nestle*, Case No. 64885, Sept. 20, 1918; 187 App. Div. 915, Jan. 15, 1919.

May 7, 1919, the Appellate Division affirmed, unanimously and without opinion, four awards involving the question of failure to give notice, as follows: (1) a cabinet maker injured his knee: abscess set in and infected his eye; his wife orally notified his employer of the accident: *Abelson v. Steinway & Sons*, Case No. 42922, Nov. 1, 1918; — App. Div. —; (2) a tinshop foreman hurt himself by a fall; his employer knew of the accident the same day: *Marland v. Smith & Pearson*, S. D. R., vol. 18, p. 558. Bul., vol. 4, p. 35, Nov. 12, 1918; — App. Div. —; (3) a saw mill fireman injured his eye while at work; he reported the accident verbally to his foreman next day; the foreman did not report to the employer: *Kilbourn v. Woodcock*, Claim No. 26904, Oct. 11, 1918; — App. Div. —; (4) an iron worker injured his eye while at work; his mother gave sufficient written notice within ten days: *Gordon v. Hollbrook, Cabot & Rollins Corp.*, 181 App.

Div. 959, Dec. 29, 1917; S. D. R., vol. 17, p. 588, Bul., vol. 3, p. 219, June 11, 1918; — App. Div. —.

June 30, 1919, the Appellate Division affirmed, unanimously and with opinion, an award of death benefits in a case in which the injured employee had given timely notice of the accident but in which the widow had failed to give notice of the ensuing death (S. D. R. vol. 18, p. 579, Bul., vol. 4, p. 74). Pertinent part of the opinion is as follows:

FOLTS v. ROBINSON, — App. Div. —, June 30, 1919, *in part*.

Were the employer and insurance carrier prejudiced by the failure of the widow to give notice of the death? As we have seen, immediate notice was given of the accident. The employer was in constant touch with deceased during the whole of his last sickness. Days when he did not call in person he used the telephone and also talked with the doctor. The employer had notice the day he died. The son saw him. The employer testified, "Went to see him two or three days after he died. Shortly afterwards I saw the widow and children. They spoke of compensation." In answer to the question, "You don't claim, Mr. Robertson, that any lack of notice of this injury has been prejudicial to you? No." In fact it could not have been prejudicial to either the employer or insurance carrier. Notice to or knowledge of the employer is notice to and knowledge of the carrier. Dr. McKenna testified that in his opinion an autopsy would not have shown whether the man died as the result of a strain. An autopsy might not show anything. Probably at the time the autopsy would be absolutely negative. Not only that but the employer's first report of injury is signed May 7, 1917, which was within twenty days of the employee's death. Mrs. Folts was ill immediately following his death. The award was made, but was rescinded April 2, 1918. Additional testimony was taken on January 29, 1919, and the award appealed from was made. An opinion was written by Commissioner Sayer which was adopted as the opinion of the Commission.

The award should be affirmed. Award unanimously affirmed.

Failure of the employee to give notice of the accident, does not preclude his widow from claiming death benefits upon timely notice by her of his ensuing death: *O'Esau v. Bliss Co.*, above, page 253.

Instances of the Commission's denial of compensation because of failure to give notice are: *Sobolewski v. Union Porcelain Works*, S. D. R., vol. 13, p. 541, Bul., vol. 2, p. 128, Mar. 14, 1917; *Frohder v. Van Gelder*, S. D. R., vol. 14, p. 573, Bul., vol. 2, p. 213, June 19, 1917; *Muller v. Westcott Express Co.*, Bul., vol. 2, p. 226, July 5, 1917; *Edwards v. Havens & Wilde*, S. D. R., vol. 14, p. 594, Bul., vol. 2, p. 254, Aug. 6, 1917;

Kavanaugh v. Wolf, S. D. R., vol. 14, p. 648, Bul., vol. 3, p. 48, Sept. 29, 1917; *Bloom v. British American Chemical Co.*, S. D. R., vol. 15, p. 584, Bul., vol. 3, p. 117, Jan. 17, 1918; *Lantz v. Treyz & Co.*, S. D. R., vol. 16, p. 479, Bul., vol. 3, p. 200, May 10, 1918; *Montenari v. Rensselaer Valve Co.*, Bul., vol. 4, p. 73, Dec. 18, 1918; and *Seaman v. Long Island R. R.*, S. D. R., vol. 18, p. 611; Bul., vol. 4, p. 88, Dec. 23, 1918.

PRESUMPTIONS IN FAVOR OF COMPENSATION CLAIMS

(Workmen's Compensation Law, § 21)

Four presumptions in favor of the injured employee are established by Workmen's Compensation Law, § 21. To successfully resist a compensation claim the burden is upon the employer to bring forward substantial evidence either (1) that the industrial occupation of the employee and the thing he was doing at the time of the accident were not within the compensation law's coverage; or (2) that the employee did not give sufficient notice; or (3) that the injury was due to the willful intent of the employee to harm himself or another, for example, suicide or assault; or (4) that the injury was due solely to intoxication of the employee while on duty. The first of these is of a general character; the other three are specific. Earlier cases illustrative of the operation of these presumptions to advantage of the injured employee through neglect or failure of the employer to give evidence have been presented in Bulletin 81, pages 394-396.

A. *No presumption of occurrence of accident.*— The presumptions of § 21 do not put upon the employer the burden of proving no happening of an accident. The injured employee must show the occurrence of an accident before the presumptions can become operative. Disability or death of an employee due to disease, even though the disease leads to physical hurt, as when an attack of heart trouble causes the employee to fall and fracture his skull, is not an accident within the compensation law's meaning: *Collins v. Brooklyn Union Gas Co.*, Bulletin No. 81, p. 100; *Hyland v. Winant*, Bulletin No. 81, page 396; *Graffe v. Art Color Painting Co.*, Bul., vol. 3, p. 157, Mar. 14, 1918; *Farrell v. American Can Co.*, S. D. R., vol. 16, p. 444, Bul., vol. 3, p. 178, Apr. 23, 1918; *Caplan v. Belber Trunk & Bag Co.*, Bul., vol. 4, p. 54, Nov. 19, 1918.

In *Fleming v. Gair Co.* the employee's widow and daughter proved that the hernia which led to the death of the husband and father was due to an industrial accident. Text of the Appellate Division's opinion affirming their compensation has been given in Bulletin No. 87, Part 1, page 241.

Though the employee's life hung by a thread because of disease, his dependents proved that his death was due primarily to the heavy exertion of his work in *Gorton v. Eastman Kodak Co.*, Bul., vol. 2, p. 150, Apr. 11, 1917; 181 App. Div. 909, Nov. 14, 1917; and *Woodruff v. Comstock*, S. D. R., vol. 15, p. 648, Bul., vol. 3, p. 158, Mar. 14, 1918; 186 App. Div. 924, Nov. 13, 1918. Other such disease cases have been presented in Bulletin 87, Part 1, pages 208-248.

B. *Non-hazardous employment with incidental hazardous services.*—If an accidentally injured employee has been performing two distinct services for his employer, one hazardous and the other not, for example, janitorial work and repair of plumbing, the presumption of § 21, subd. 1, does not control. The employee must first prove that the accident arose out of and in the course of the hazardous service: *Fitzsimmons v. Wadsworth*: S. D. R., vol. 6, p. 351, Nov. 24, 1915; 177 App. Div. 938, Mar. 7, 1917; *Gleisner v. Gross & Herbener*, 170 App. Div. 37, Nov. 10, 1915; *Hermann v. Wolff*, S. D. R., vol. 18, p. 609, Dec. 23, 1918. Text of Commissioner Lyon's opinion in the *Fitzsimmons* case, which cites the *Gleisner* opinion, and text of the *Gleisner* opinion are in Bulletin 81, pages 89, 396.

C. *Presumption that the claim comes within the law's coverage.*—Occurrence of an accident having been proven, subdivision one of section twenty-one sets up a presumption that the injury has arisen out of and in the course of the employment.

1. *Operation of plant.*—No evidence having been offered to the contrary in *Kobyra v. Adams*, the court assumed under § 21, subd. 1, that the employer's plant was in operation on the night of the accident. Text of the *Kobyra* opinion is in Bulletin 87, Part 1, pages 94, 95.

2. *Unwitnessed accidents.*—The burden of proving that the unwitnessed accidental death of his employee has not arisen out of and in the course of the employment is upon the employer.

A hod carrier fell to his death from an upper story of a building under construction; on account of rain no one was at work and no one saw his fall; the Commission awarded death benefits to his widow and children: *Campanella v. Stola Construction & Building Co.*, S. D. R., vol. 9, p. 385, Aug. 15, 1916.

A watchman's body was taken from East river; his clenched hand held a pipe; his street clothes, watch and papers were found aboard his employer's boat which he had been watching when last seen; the Commission awarded death benefits to his father; *Contrafatto v. Spooner & Son*, S. D. R., vol. 7, p. 477, Mar. 8, 1916.

The flannel shirt of an oil refinery employee caught fire while he was alone in a locker room; he died from his burns the same day; in an opinion, Justice Kellogg of the Appellate Division advanced various theories as to the cause of the ignition but said that under the law he could not indulge in any presumption against the employee; the court affirmed an award of the Commission without dissent: *Chludzinski v. Standard Oil Co.*, S. D. R., vol. 9, p. 397, Aug. 15, 1916; 176 App. Div. 87, Dec. 28, 1916. Text of Justice Kellogg's opinion is in Bulletin 87, Part 1, pages 163-165.

An employee was found lying on the ground near the railroad platform, four or five feet high, upon which he had been working; the condition of his brain was such that he gave no account of the cause of his trouble; he died within a month; the Commission awarded death benefits to his widow and children: *Juharz v. Moline Plow Co.*, Bul., vol. 2, p. 128, Mar. 15, 1917.

A platform man for a motor railway was found lying on the platform with a fractured skull; he could not explain the accident; the Commission's findings advanced the hypothesis that he had either been assaulted by strikers or struck by a passing car; the insurance carrier alleged epilepsy, fainting or vertigo; the Appellate Division affirmed an award to him unanimously and without opinion: *Geidel v. Interborough R. T. Co.*, Case No. 14923, Oct. 25, 1917; 184 App. Div. 917, May 8, 1918.

A driver fell from his truck to the street, fractured his skull and never regained consciousness; no one saw the accident; the Appellate Division affirmed an award to his widow unanimously without opinion: *Hayes v. Lissberger & Son*, Death Case, No. 56450, Nov. 27, 1917; 184 App. Div. 918, May 8, 1918.

An elevator boy was found lying dead at the bottom of the elevator shaft with a fractured skull; there were no eye-witnesses to his death; the Appellate Division affirmed death benefits to his mother and sisters unanimously and without opinion: *White v.*

Argus Co., S. D. R., vol. 15, p. 632, Mar. 13, 1918; 186 App. Div. 924, Nov. 13, 1918.

A railroad company found one of its porters asphyxiated in a locker room of a station; a tin receptacle containing burning charcoal was in the locker; the insurance carrier alleged that the porter had abandoned his duties and hidden away from his boss for warmth, a nap and a rest; the Appellate Division affirmed death benefits to the porter's dependents: *Sumpter v. N. Y. Consolidated R. R. Co.*, Death File, No. 877, July 3, 1918; 187 App. Div. 911, Jan. 8, 1919.

The captain of a lighter was last seen alive on shore on a winter night; four months later his body was found in the water near the pier alongside which his lighter had lain with another lighter intervening. The Appellate Division affirmed an award to his widow apparently upon the presumption that he had reached his boat and had accidentally tumbled overboard. Its decision was without opinion except for a dissenting opinion of Justice Kellogg who held that under the majority's interpretation of the presumption of § 21 "a decision of fact, not in accordance with proof or probability, might be reached through an arbitrary rule, and property rights be gained or lost by a statutory pronouncement." The Court of Appeals has affirmed the Appellate Division's order, March 11, 1919, without opinion. Justice Kellogg's opinion is as follows:

DRISCOLL V. GILLEN & SONS, 187 App. Div. 908, Jan. 8, 1919.

KELLOGG, J. (dissenting).: The deceased was captain of the lighter *Harry*, which lay alongside the lighter *Greenpoint* in the East river at Pier Twenty-two in Brooklyn. The *Harry* was hooked fore and aft to the *Greenpoint*, about two feet therefrom, and the *Greenpoint* was secured to the pier, separated from it a similar distance. At six in the morning of December 31, 1917, the deceased left his home in Brooklyn to go to his boat, taking with him his breakfast and lunch, for he intended to spend the day and night thereon. At about six that night he was seen going to a cafe a block and a half from his boat; was seen at the cafe taking a glass of beer; and again was seen with a paper or package returning to the lighter. This package a witness believed to contain food. He was never seen alive again. Four months later, on May 2, 1918, his dead body was found in the water near Pier Twenty-two. We are asked to infer, from these meagre facts, that the deceased came to his death by drowning while in the course of his employment. Whether the deceased went to the cafe to get a drink of beer, or to procure a lunch to take with him to his boat, he was away

from the plant or premises of his employer upon a personal errand. Therefore, unlike an employee at the plant who, for personal reasons, temporarily suspends work, he had for the moment stepped out of his employment, and had not returned thereto unless before the accident he was actually back upon his boat. (*Manor v. Pennington*, 180 A. D. 130; *King v. Standard Oil Co.*, 184 id. 453.) He was last seen alive while still on shore. He may have fallen into the water while crossing the space between the *Greenpoint* and the pier, or between the *Greenpoint* and the *Harry*, or he may have fallen from the *Harry* after his arrival thereon. All these contingencies are equally probable. There can, therefore, be no just inference that he fell after arriving upon the *Harry*. Nor is the case assisted by any presumption under section 21 of the Workmen's Compensation Law. That section provides that "In the absence of substantial evidence to the contrary" it shall be presumed "that the claim comes within the provisions of this chapter." If this provision be taken at its face value, the presumption apparently asserted thereby provides conclusions of fact unsupported by proof, experience, probability or argument. It, in effect, declares that all assertions of fact made in an unsworn claim are true until the contrary is proven. In a majority of instances a rule of this character would merely influence procedure by altering the burden of producing evidence. In many other cases, where proof is unobtainable, it would determine the issue. Such is the frequent result of a common-law presumption. That presumption, however, requires but little more than the acceptance in law of a fact as true, which the lay mind, in its ordinary processes, as a result of reasoning, experience or common knowledge, concludes or assumes to be true, and places the risk of an untruth, where there is no proof, upon the party who antagonizes that which is generally taken for granted. In the instance of the fictitious presumption under consideration, however, unknown facts are installed as truths without such support, so that arbitrarily and through statutory pronouncement merely, property rights are lost or gained. It seems recently to have been determined that this provision has no such effect, and cannot be relied upon to establish a claim. In two recent cases, *Matter of Belcher v. Carthage Machine Co.*, 224 N. Y. 326, and *Matter of Hansen v. Turner Construction Co.*, id. 331, the occurrence of accidents causing deaths was supported by repeated declarations, yet the Court of Appeals squarely held that hearsay statements were not sufficient to justify the awards made. The so-called presumption of section 21 was not referred to in either case, but its application was nevertheless directly involved, for there was a total "absence of substantial evidence" to dispute the claims. In the *Belcher* case the court, speaking through McLaughlin, J., said: "There is nothing to sustain this award except hearsay evidence. The question, therefore, is squarely presented whether an award made under the Workmen's Compensation Law can be sustained upon hearsay evidence, uncorroborated by facts, circumstances or other evidence. I do not think it can." It also said: "This court has held that great liberality should be allowed in establishing claims under this statute, but in the final analysis, notwithstanding such liberality, there must be evidence setting forth facts of a probative character outside of hearsay statements, to prove the award and show it is fair and just." In

the *Hansen* case the court, speaking through the same judge, after reviewing the facts said: "Under such circumstances I do not see how an award could be made. If so, it had for its basis a mere guess or conjecture. The Workmen's Compensation Law should receive a liberal construction, but it ought not to be so construed as to take money from one person and give it to another without any legal basis therefor." If the presumption supported by hearsay does not establish that an accident occurred during the course of employment, then certainly the presumption alone cannot. It may not be assumed, therefore, that the deceased was back upon the lighter *Harry* and within the course of his employment when the accident occurred.

The award should be reversed and the claim dismissed. Woodward, J. concurred.

In a decision handed down upon the same day with the Driscoll decision, the Appellate Division, one justice dissenting, reversed the award and dismissed the claim in the case of a tug boat captain who had been last seen alive on a winter afternoon on board the tugboat and whose body had been found almost four months later in the river near the pier to which the tug boat had been tied up. Charges of intoxication figured in the case. Two opinions were handed down, one of which was written by Justice Kellogg who had written the above-given dissenting opinion in the Driscoll case. Justice Kellogg appears to base his opinion upon reasoning relative to the presumption of § 21 similar to his reasoning in the Driscoll case. The other opinion, written by Justice Cochrane, denies compensation on the ground that the presumption of § 21 has been overcome by "substantial evidence to the contrary;" namely, that the deceased employee had been discharged and had delayed unreasonably in getting his belongings and quitting the boat. The two opinions are as follows:

WHALEN V. STANWOOD TOWING Co., 186 App. Div. 190, Jan. 8, 1919.

H. T. KELLOGG, J.: The deceased was captain of a tugboat which was tied up at Pier 11 in the East river. On January 20, 1918, at about 9:30 A. M., he called up the office of his employer. The officer in charge assumed from his talk that he was intoxicated, and directed him to come to the office. He attended at about 11:30, was paid off and discharged. Thereafter, between eleven and one o'clock, he was seen in the pilot house of the tugboat, and at this time asked a friend to come aboard for something to eat. The engineer of the tugboat saw him when he came back from the office, at which time he stated that he was through, and had come for his clothes. The engineer had dinner with him, and last saw him at about 1:30 o'clock when he was still on board, though he had started for the shore. He was never seen alive again. On

May 3, 1918, his dead body was found in the river in the vicinity of Pier 11. If it be considered that, after the discharge of the deceased, his employment continued a reasonable length of time, to enable him to remove his belongings from the boat, it must nevertheless have ceased immediately upon his leaving it. It cannot be inferred that he fell into the water while in the act of leaving the boat, or prior thereto, rather than that, after leaving it he fell from the dock while proceeding along its edge in an intoxicated condition. Indeed, it would seem that if he fell while in the act of leaving, the engineer who saw him start for shore would have heard a splash of water when he struck it, or heard him cry for help. Only a mere guess leads to the conclusion that the deceased fell into the water prior to attaining a secure foothold upon the pier. There was no proof, therefore, that the deceased came to his death through an accident arising in the course of his employment.

The award should be reversed and the claim dismissed.

All concurred, except JOHN M. KELLOGG, P. J., dissenting.

COCHRANE, J. (concurring): In the absence of substantial evidence to the contrary the claim comes within the provisions of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], § 21). Substantial evidence to the contrary here appears and with the appearance of such evidence there simultaneously occurs the disappearance of the presumption on which alone the claimant relies. After his discharge from the employment the deceased was entitled to a reasonable opportunity to get his belongings and leave the boat. If he delayed unreasonably the risk was his and not his employer's. After returning to the boat he had his dinner thereon and delayed his departure far beyond the time necessary for that purpose. His presence on the boat when he fell from it into the water, assuming the accident to have happened in that manner, was not incidental to his employment or to his quitting the employment but was in fulfillment of a purpose personal to himself. (See *Pope v. Merritt & Chapman Derrick & Wrecking Co.*, 177 App. Div. 69.) Hence I concur in the result.

Award reversed and claim dismissed.

Other unwitnessed accidents in which the presumption of § 21, subd. 1, has been held to have been overcome by "substantial evidence to the contrary" are *Gifford v. Patterson* and *Nelson v. Scheier & Kohn*. Bulletin No. 87, Part 1, pages 154-156, takes notice of these two cases, and gives texts of court opinions in the Gifford case.

A pipe straightener went into his employer's engine room, no one else being there. The fly wheel or main belt threw him against the wall and killed him. He had no primary duty leading him into the room. There were various speculations as to what his errand may have been. The Commission upon opinion of Commissioner Sayer, discussing precedents and principles, held the

case compensatable under the presumptions of § 21: *Sedlar v. Mohegan Tube Co.*, Bul., vol. 4, p. 72, Dec. 18, 1918.

3. *Disease due to accident.*—In the course of his work an employee incurred a bump on the back of his head and a cut over his eyebrow. He lost about a day and a half. Ten weeks thereafter he became violently insane. The Commission denied compensation to him upon authority of an opinion which noted the history of insanity in his family and his own reputation for queer conduct, and which declared:

ZIMMER V. PFAUDLER Co., S. D. R., vol. 16, p. 419, Bul., vol. 3, p. 169, Apr. 2, 1918, *in part*.

Were it not for the very definite history of insanity in the family, and the almost certainty that the claimant might become insane from natural causes, we might invoke the presumptions of section 21 of the law. But in such a case as this it seems to me the presumption is overcome, and we must have some definite evidence tending to prove that the present condition of the claimant is due to the accident.

D. *Presumption that sufficient notice has been given.*—Section twenty-one declares:

"In any proceeding for the enforcement of a claim * * * it shall be presumed * * *

1. That the claim comes within this chapter,
2. That sufficient notice thereof has been given * * *

The word "thereof" in subdivision two would seem to have the word "claim" as its antecedent.

In a brief memorandum accompanying more formal findings in *Dorb v. Stearns & Co.*, the Commission said:

The proof of notice to the employer is far from satisfactory, but on the testimony of John Funcke that the claimant told him, as claimant's foreman, that he had a rupture, it will be found under the presumptions of section 21 of the Compensation Law that the said notice was sufficient.

But the Appellate Division, reversing an award to *Dorb*, said:

The reason assigned by the Commission for its action (in finding absence of prejudice to the employer) is that under section 21 of the act there is a presumption that the notice was sufficient. The presumption as to notice created by that section means the notice which the statute requires. It is the written notice of section 18 which is protected by the presumption of section 21. The presumption disappears simultaneously with the establishment of the fact that the claimant has not complied with section 18. Then

the burden properly falls on him to establish affirmatively that his failure has not been prejudicial.

Full text of the court's opinion in the *Dorb* case is given above, page 329.

The forms relative to failure to give notice which the Commission has been incorporating in its recent findings are of interest. Thus, in *Brockelbank v. Funk*, S. D. R., vol. 15, p. 651, Bul., vol. 3, p. 156, Mar. 14, 1918, it says:

It does not appear whether written notice of death was given to the employer within thirty days thereafter, but it has not been established as a fact that such notice was not given, and it is, therefore, presumed under section 21 of the law that sufficient notice was given.

And in *Haley v. Boston & Albany R. R.*, S. D. R., vol. 16, p. 518, May 15, 1918, it says:

It does not appear whether written notice of injury was given to the employer within ten days after disability, but it has not been established as a fact that such notice was not given, and it is, therefore, presumed under section 21 of the Compensation Law that sufficient notice was given. On the other hand, the employer and insurance carrier was not prejudiced by such failure, if any.

The *Brockelbank* and *Haley* awards have been affirmed by the Appellate Division unanimously and without opinion: 186 App. Div. 924, 926, Nov. 13, 1918; and the *Haley* award by the Court of Appeals without opinion: 225 N. Y. Rep. 669, Jan. 21, 1919.

The Commission's statement in such form has been challenged by Justice Woodward in his dissenting opinion in the following case. His review of the evidence may be compared with Commissioner Lyon's: S. D. R., vol. 18, p. 624, Bul., vol. 4, p. 96, Jan. 2, 1919.

SEIDENZAHN V. BEAULIEU VINEYARD DISTRIBUTING CO., — App. Div. —, May 9, 1919.

WOODWARD, J. (dissenting): There is no dispute that the claimant's husband was employed by the employer to work in its wine cellar handling heavy barrels, and that, as an incident of his work, he was called upon to use a freight elevator. On the 13th day of March, 1917, the decedent fell into the elevator well, but caught one of the operating ropes and saved himself from going to the bottom, finally getting to the floor above. He was wrenched and bruised and laid off for a period of ten days, when he returned to work, making a written statement to his employer that he had fully recovered

from his injuries. From this time up to the 27th day of the following October he continued at his regular employment, a period of about seven months, without making any complaint, and then abandoned his employment, and on the 25th day of November of the same year died of pleuro-pneumonia. No notice of this death was served on the employer until the 5th day of January, 1918, and the evidence is wholly undisputed that no information reached the employer that there was anything the matter with the decedent subsequent to the time that he returned to work in March, 1917, up to the time of his death, which had anything to do with the accident.

The evidence on which the State Industrial Commission has found that the death resulted from the injury is most unsatisfactory. His physician testified that the decedent was ill during the time that he was at work subsequent to the accident, but no evidence whatever appears to indicate that any one connected with the employer had any reason to believe that such was the case; and the physician to the State Industrial Commission was not convinced that there was any relationship between the accident and the death. There was an accident on the 13th day of March; on the 23d day of the same month the employee returned to his work and reported himself entirely well. Here that accident apparently ended. On the 27th day of October, with no complaint in the meantime, the decedent quit work, and about one month later died of pleuro-pneumonia. An interval of eight months between the injury and the alleged traumatic pneumonia, with no suggestion of illness in the meantime, and yet the State Industrial Commission has found that the employer was not prejudiced by a failure on the part of the claimant to give notice within the thirty days prescribed by the statute. No facts are shown to indicate that the employer was not prejudiced. There was no reason, after the return of this employee and his declaration that he had entirely recovered, to keep watch of him during the months that intervened; the employer had a right to have the fact called to its attention if there was to be a claim such as is here presented within the thirty days which the statute prescribes, unless it appears that the circumstances were such that the employer could not have been prejudiced. The statement by the Commission that it "does not appear whether written notice of death was given to the employer within thirty days thereafter, but it has not been established as a fact that such notice was not given, and it is, therefore, presumed under section 21 of the Compensation Law that sufficient notice was given," is not sustained by the record. Mr. Rodden, the employer's manager, testified distinctly, and without contradiction, that no written notice was served upon him with reference to this accident until the 18th day of January, 1918, which was nearly two months after the death of the decedent. The presumptions of section 21 of the Workmen's Compensation Law prevail only when there is no "substantial evidence to the contrary," and, as there is substantial evidence that the notice required by statute was not given, there can be no presumption in support of such a notice, and it has been held that this requirement of the statute was not to be excused, unless there was ground for holding that prejudice did not result to the employer. (*Matter of Bloomfield v. November*, 219 N. Y. 374; *Matter of Sawon v. Erie R. R. Co.*, 221 N. Y. 179, 182.) The evidence in this case discloses a situation which clearly tended to prejudice the employer. There was an accident, apparently of but little consequence; the employee returned to his work in ten days from the accident and reported himself entirely well.

He resumed heavy labor and continued it for seven months, and then, without giving any notice of illness, he left his employment and died a month later. Nearly two months afterward the employer is given notice of a claim through the State Industrial Commission for injuries resulting in death.

This claim is so obviously an afterthought, and the connection between the injury and the disease which concededly produced the death is so intangible, that it is improper to charge the employer, without a substantial compliance with the provisions of the statute.

The award should be reversed, and the claim dismissed.

Points relative to presumption of notice are involved in the recent Commission rulings in *Carney v. Lehigh Valley R. R. Co.*, S. D. R., vol. 17, p. 647, Bul., vol. 4, p. 25, Oct. 15, 1918; and *Devereaux v. 150 East 72nd St.*, S. D. R., vol. 18, p. 568, Bul., vol. 4, p. 53, Nov. 12, 1918.

E. *Presumption that the injury has not been due to the willful intent of the injured employee to harm himself or another.*—In the close case of *Slane v. Cording and Salzman*, in which the question was whether the claimant's decedent had started a fight with the fellow employee who fatally stabbed him, the Attorney-General argued that the presumption of the law ought to turn the balance in favor of the claim; the Appellate Division affirmed the award unanimously and without opinion. The *Slane* case and other cases of assault, as well as cases of alleged suicide, in which the presumption of § 21, subd. 3, has figured more or less, have been presented in Bulletin No. 87, pages 141-147, 200, 201.

F. *Presumption that the injury has not been due solely to intoxication of the injured employee.*—If death has resulted with no witness to the accident and charges of intoxication are brought, an award will probably follow under the presumption of § 21, subd. 4. Two cases of the kind have been affirmed by the Appellate Division and the Court of Appeals without opinion and without dissent: *Sorge v. Aldebaran Co.*, vol. 3, p. 390, Mar. 30, 1915; 171 App. Div. 959, Nov. 22, 1915; 218 N. Y. Rep. 636, May 2, 1916; *Burns v. Products Mfg. Co.*, Case No. 3278, June 15, 1917; 181 App. Div. 910, Nov. 14, 1917; 223 N. Y. Rep. 684, May 14, 1918. These cases and other cases of intoxication have been presented in Bulletin 87, Part 1, pages 201, 202. Consult also Bulletin 81, pages 115, 116.

COMMISSION'S POWER TO REVISE OR RESCIND ITS AWARDS AND DECISIONS

(Workmen's Compensation Law, §§ 22, 23, 74)

The question of review of its own compensation awards or findings by the Commission presents four aspects: (1) Review of cases generally; (2) Review by the Commission as an opening for appeal to the courts; (3) Review of cases that have been appealed to the courts; (4) Review of findings in the light of subsequent court decisions in similar cases.

A. *Review of cases generally.*—Sections twenty-two, twenty-three and seventy-four of the Workmen's Compensation Law are to be read together. Section seventy-four gives the Commission an unlimited or unqualified right to change its former findings or orders at will in each compensation case. Section twenty-two limits the power of review that it grants to awards instead of to findings or orders, permits such review upon ground of change in conditions and allows the Commission to end, diminish or increase compensation awarded by it in a previous decision, provided that it says within the maximum and minimum limits of the law and does not disturb payments already made. Section twenty-three declares that "an award or decision of the commission shall be final and conclusive upon all questions within its jurisdiction as against the state fund or between the parties, unless reversed or modified on appeal."

1. *Relation of §§ 22 and 74 to § 23.*—The Commission may review any finding or order made by it notwithstanding the above-quoted clause of § 23 which says that its awards or decisions shall be final unless changed by the courts upon appeal. The Appellate Division has so held in the following two opinions, one handed down a year and a half later than the other. Only the pertinent part of the first is given; the second is given in full. The order affirming an award in the second or *Kriegbaum* case has been affirmed by the Court of Appeals without opinion: 224 N. Y. Rep. 621, Oct. 22, 1918. The court appears, however, to establish a limit to the Commission's power of review under § 74 in the passage of the later case of *Fischer v. Genesee Construction Co.*, quoted below, page 368, wherein it declares that an

award is a property right not to be destroyed except as a matter of justice.

First Opinion

BECHMANN v. OELERICH & SON, 174 App. Div. 363, Sept. 13, 1916, in part.

On August twenty-seventh the Commission rendered its decision to the effect that the claimant's employment at the time of the accident was not covered by the Workmen's Compensation Law and that the decision of the Commission was to close the case on the award as made July twenty-sixth. A resolution was then passed that further award be denied on the ground that the employment did not come within the act. Notice of this decision was given the insurance carrier and also the claimant on or about August 30, 1915. No appeal was ever taken from the decision.

On October 6, 1915, upon application of the claimant the Commission opened the case, although the insurance carrier questioned the claimant's right to a rehearing upon the ground that the claimant's remedy was by appeal within thirty days after service upon him of a copy of the award, and that, not having taken such appeal, the decision of the Commission was final. A rehearing was ordered and had, further evidence taken, and an award made for the period of ten weeks from July 26 to October 4, 1915, at the rate of fifteen dollars per week, and the case continued for further hearing. From such award this appeal has been taken.

The insurance carrier bases its right to a reversal of the award upon three grounds, *first*, that the claimant's only remedy was by appeal under section 23 of the Workmen's Compensation Law (Consol. Laws, chap. 67; Laws of 1914, chap. 41), and that the Commission had no right after the time to appeal had expired to open the case and make an award; *second*, that the claimant, being the vice-president of the corporation, was not an employee within the meaning of the act, and, *third*, that the claimant's injury did not arise out of and in the course of a hazardous employment.

The pertinent portion of section 23 is as follows: "§ 23. Appeals from the commission. An award or decision of the commission shall be final and conclusive upon all questions within its jurisdiction, as against the state fund or between the parties, unless within thirty days after a copy of such award or decision has been sent to the parties, an appeal be taken to the appellate division of the supreme court of the third department." This provision is susceptible of but a single construction as applied to an appeal; but, as applied to a rehearing by the commission, the section must be read in connection with sections 22 and 74, which provide as follows: "§ 22. Modification of award. Upon its own motion or upon the application of any party in interest, on the ground of a change in conditions, the commission may at any time review any award, and, on such review, may make an award ending, diminishing or increasing the compensation previously awarded * * * ." "§ 74. Jurisdiction of commission to be continuing. The power and jurisdiction of the commission over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just."

The general purpose of the Workmen's Compensation Law, and the construction to be given its provisions, have been the subject of consideration

in several opinions both by the Court of Appeals and by this court, notably in the two cases: *Matter of Post v. Burger & Gohlke* (216 N. Y. 544) and *Matter of Rheinwald v. Builders' Brick & Supply Co.* (168 App. Div. 425). These expressions of the courts that a liberal construction is to be given the act in view of its humane purposes are applicable in the case at bar to the provisions of sections 22 and 74. Upon neither of the two hearings which preceded the decision of August twenty-seventh, denying further award, was the claimant represented by counsel, and upon the first hearing the testimony consisted wholly of answers to questions framed by the counsel for the insurance carrier and did not develop material matters relating to claimant's employment, which were very probably unknown to the counsel. Apparently, upon the application for a rehearing, facts were brought to the attention of the Commission indicating that its decision had been made without full knowledge of the facts, making it questionable in the judgment of the Commissioners whether the claim had been justly disposed of. Possessed of this uncertainty the Commission was not only within its rights, but in the discharge of a positive duty when it granted a rehearing, and when later confronted by additional evidence, and believing its former decision to be incorrect, it promptly corrected it. The right exercised by the Commission was the right often exercised by courts of record under like circumstances even after the determination of the case on appeal. Furthermore, on reopening the claim, it was practically consented by the counsel for the insurance carrier that the claim be heard upon its merits, and that if the claim should prove to be a just one the claimant should be awarded compensation, and, if not, compensation should be denied. We should, therefore, treat the claim as having been heard upon the merits without objection.

Second Opinion

KRIEGBAUM v. BUFFALO WIRE WORKS, 182 App. Div. 448, March 6, 1918.

LYON, J.: The question involved upon this appeal is whether the State Industrial Commission after having made an award for permanent partial disability, which award has been complied with by the employer and insurance carrier, has the power to reopen and rehear the claim and make an award for permanent total disability.

In July, 1914, the claimant, an employee of the Buffalo Wire Works Company, Inc., while engaged in a hazardous employment, sustained an accidental injury resulting in the total loss of the sight of his right eye. Notice by the claimant of injury, reports of the employer and attending physician, and a claim for compensation, were duly filed with the Commission. On September 8, 1914, the Commission made an award of compensation for the period of one hundred and twenty-eight weeks for the loss of the eye. The full amount of such award was duly paid, the final payment being made in January, 1917. About December 1, 1916, application was made to the Commission on behalf of the claimant to reopen and rehear the claim. Upon the hearing of such application by a deputy commissioner, it appeared that in 1901 the claimant had suffered an accidental injury to the left eye which had resulted in the permanent total loss of the vision of that eye, except as to 8/200 minus. This rendered the sight of that eye useless for any voca-

tional purpose. The fact of the left eye having been injured was not taken into account by the Commission, and in fact was not known to it at the time of making the award for the loss of the right eye. The only reference to the left eye having been previously injured which appeared in the papers upon which the Commission acted in making an award for the loss of the right eye in addition to the statement that both eyes were affected, was the statement of the claimant in response to the question, "Was your eye sight or hearing defective? A. Sight of left eye was little;" and the statement in the physician's report in answer to the question, "Has the injury resulted in a permanent disability? Yes. If so, what? Loss of sight of right eye, left was injured. 1901 — Vis.— 15/70." There was no appearance before the Commission by or on behalf of the claimant. Neither was any oral examination had as to the facts. The Commission understanding the case to be one of permanent partial disability only, made the award of September, 1914. That the claim was in fact one entitling the claimant to an award for permanent total disability cannot be questioned, nor can it be doubted that such award would have been made had the Commission been fully informed as to the facts. Upon the rehearing attended by all the parties interested, the Commission for the first time became advised as to the facts and thereupon made an award continuing the compensation granted by the prior award from the time of the last payment until such time as the State Industrial Commission should be shown that the claimant had some useful vision of his left eye. The employer and insurance carrier feeling aggrieved at the action of the Commission have taken this appeal basing their claim of right to reversal of the award mainly upon the ground that no appeal having been taken from the award of September 8, 1914, such award was final and conclusive between the parties.

Whether notice of filing the award or of the decision of the Commission was given to the claimant, and thus his time to appeal therefrom limited, was a subject of dispute between the parties. The decision of that question is, however, entirely immaterial upon this appeal. The Commission not only had the right, but was acting strictly within its duty when it modified an unjust award made under a mistake of fact, even though the claimant's time to appeal had expired when the application for modification was made.

Section 74 of the Workmen's Compensation Law (Consol. Laws, chap. 67) provides: "Jurisdiction of commission to be continuing. The power and jurisdiction of the commission over each case shall be continuing, and it may, from time to time, make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just."

The loss of the sight of the right eye having occurred in July, 1914, the award was not affected by the amendment of section 15, subdivision 6, by chapter 615 of the Laws of 1915, but the claim was governed by the law in force at the time of the decision of this court in *Matter of Schwab v. Emporium Forestry Co.* (167 App. Div. 614; *affd.*, 216 N. Y. 712), in which it was held that an employee who had suffered the loss of a hand by a previous injury, and who suffered the loss of a remaining hand by a subsequent injury, was entitled to an award for permanent total disability instead of an award simply for permanent partial disability on account of the loss of the remaining hand.

The facts also bring the case directly within the decision of this court in the case of *Beckmann v. Oelerich & Son* (174 App. Div. 353), in which it was held that the State Industrial Commission may, notwithstanding the time to appeal has passed, grant a rehearing and correct an award where its prior decision was made without full knowledge of the facts; also that the provisions of section 74 relating to the continuing jurisdiction of the Commission should be liberally construed.

The award of the Commission should be affirmed. Award unanimously affirmed.

The decisions of the courts in the *Beckmann* and *Kriegbaum* cases operate for the benefit of the employer and insurance carrier as well as for the benefit of the injured employee. The Commission has so held upon opinion of Commissioner Lyon as follows:

FISCHER V. GENESEE CONSTRUCTION Co., S. D. R. vol. 17, p. 616, Bul., vol. 3, p. 266, July 24, 1918, *in part*.

The right of the Commission to review this award is challenged by the attorney for the claimant on the sole ground that the recommendation of the deputy having been approved *pro forma*, the Commission is entirely without jurisdiction to change the award, even though it is convinced that the same is erroneous. In *Beckman v. Oelerich*, 174 App. Div. 353, an award had been denied the claimant. Upon application of the claimant for a rehearing the Commission opened the case, received further testimony and made an award. The insurance carrier in that case raised the same question as that presented by the claimant's attorney in this case, namely, that the award having once been made, the Commission was without jurisdiction to disturb it and that the claimant's only remedy was by way of appeal, relying upon sections 22 and 23 of the law which provide in section 22 that the Commission may vary an award where a change in conditions has taken place, and in section 23 that the award shall be final, unless reversed on appeal. The court, however, construed section 74 of the law, which gives the Commission continuing power and jurisdiction over all cases and the right to make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just otherwise and overruled the objection of the insurance carrier, saying: "Apparently, upon the application for a re-hearing, facts were brought to the attention of the Commission indicating that its decision had been made without full knowledge of the facts, making it questionable in the judgment of the Commissioners whether the claim had been justly disposed of. Possessed of this uncertainty the Commission was not only within its rights, but in the discharge of a positive duty when it granted a re-hearing, and when later confronted by additional evidence, and believing its former decision to be incorrect, it promptly corrected it. The right exercised by the Commission was the right often exercised by courts of record under like circumstances even after the determination of the case on appeal."

The attorney for the claimant apparently was familiar with this case for in his memorandum opposing the right of the Commission to review the award in this case, he mentioned the *Beckman* case and then in commenting upon it says: "The construction of the statute was based upon the

theory that the Act was enacted for humane purposes and that for the benefit of the employee a liberal construction had to be given in view of such purpose. The opening of the case, having been asked for by the employee, the theory of the court was undoubtedly correct. But where such application is made by the insurance carrier and against the employee, the reason for the rule fails."

And again: "The liberal construction invoked by the courts does not obtain in favor of the employer and insurance carrier because it is contrary to the scheme and scope of the statute to establish such an interpretation."

To me this is a startling statement, that a statute should have for its scheme the right of one party to a controversy to have a manifest error corrected while denying it to the other, and I do not for a moment believe that a proper interpretation of the statute would warrant any such conclusion. In the recent case of *Prendergast v. Berrian*, 184 App. Div. 240, the court said: "It has been the practice of the Commission and of the courts to administer the provisions of the Compensation Law in a liberal spirit and in disregard of formal and technical rules of procedure. No good reason suggests itself why the treatment of the claimant should be liberal and that of employers and carriers should be otherwise."

Certainly no reason in this case suggests itself to my mind why a different ruling should be adopted with reference to the insurance carrier from that which would be proper in case of the claimant. All the more so, since the **insurance carrier is the state fund, which has no right of appeal**, so that the error if not corrected by this Commission, must remain entirely uncorrected. I think the attorney for the claimant inferentially admits that the claimant's case for an award for the loss of an eye is without real substance, for in a somewhat vigorous letter of protest against a re-consideration of the case by the Commission, accompanied by a rather prolix memorandum, he nowhere intimates that the claimant ought to succeed on the merits of his claim, but bases his whole protest and argument on the proposition that though the Commission might very properly correct an error if it were against a claimant, it cannot correct an equally obvious error if it should turn out to be against an insurance carrier.

2. *Relation of § 22 to § 74.*—The Commission may review any finding or order made by it notwithstanding any limitation imposed by the phrase "on the ground of a change in conditions" or by other provisions of § 22. The broad jurisdiction conferred by § 74 gives it unlimited scope of action. The Commission has so held upon opinion of Commissioner Lyon in findings agreed upon for purposes of appeal. Commissioner Lyon's opinion is as follows:

MCCALL v. HECHT, S. D. R., vol. 17, p. 653, Bul., vol. 4, p. 22, Oct. 16, 1918.

LYON, Commissioner: The attorney for the claimant relies upon section 23 of the Compensation Law, which is in part as follows: "An award or decision of the commission shall be final and conclusive upon all questions

within its jurisdiction as against the state fund or between the parties, unless reversed or modified on appeal therefrom as hereinafter provided."

He admits, however, that in pursuance of section 22, the Commission may change its award where there is shown to be a change in conditions and he asserts that there can be no such change in an award after it has been made, unless proof is presented that the conditions upon which the award was made have changed and he quite rightly asserts that there is no such change in conditions in the present instance. If these were the only provisions in the law relative to the making of awards and review by appeal, the matter would hardly permit of argument, but section 74 of the Compensation Law gives the Commission continuing jurisdiction and the right "to make such modification or change with respect to former findings or orders relating thereto, as in its opinion may be just." The attorney for the claimant also quite rightly states that the Commission occupies a judicial position and from this statement he deduces an argument that the Commission is bound to follow the rules and procedure of courts, and in particular, is bound to follow the rules and decisions relative to appeals, and that its jurisdiction is limited, notwithstanding section 74, precisely as a court's jurisdiction would be and that it cannot disturb an award once made unless it be under section 22 on proof of a change in conditions.

If the attorney is right in his claim that the Commission is bound by all rules of the courts, and particularly by the Code of Civil Procedure, the necessities of the case would seem to demand that the Commission should be made up of practicing attorneys, instead of which there is only one lawyer on the Commission of five. As a matter of fact our conception of the Compensation Law is that while the Commission has judicial functions and has to pass upon conflicting claims very much as a court of law does, still it is not so much a matter of contest between employer and employee as it is one of adjustment on the basis of the inherent justice and equities of the case. Apparently the statute looks quite as much to the business judgment of laymen as to the acumen of those learned in law and in the practice of the courts. On this theory of the Compensation Law, claimants have been discouraged by the Commission from employing attorneys. They are continually told, and we think rightly, that they do not need expert legal advice, but that a full, fair and frank statement of the facts of the case will result in their receiving proper protection at the hands of the Commission. If the claim now made by the claimant is to prevail, all this, it would seem, must be changed and claimants must employ attorneys who are familiar with the Code of Civil Procedure and with the rules of courts, in order that they may not have their cases passed upon without proper legal protection. This apparently would mean that a very considerable proportion of every award which ought to go to the injured workman must be given to his attorney and the whole intent of the Compensation Law, as the Commission has understood it, would be very largely nullified, and the old abuses which flourished under the liability law would return. Insurance carriers are able to, and in fact do, have representatives present at our hearings who are familiar with legal principles and rules and nothing it seems would be more detrimental to the generality of injured workmen than to have the claim of the claimant here held to be valid.

The Commission's position that it should not be altogether bound by rules which apply in courts of justice seems to be in part, at least, sustained by

the express provision in the statute, that the Commission is not to be held down to technical legal rules of evidence, also by the provision of section 74 that the Commission has continuing jurisdiction and may vary its award as justice demands. It should further be said that the situation confronting the Commission, growing out of the enormous number of awards which have to be made, makes necessary the procedure which the Commission has adopted. It is stated that claims before the Commission amount to not less than 60,000 per year and many of these cases have to be heard many times. In order to handle this enormous amount of business, the Commission is compelled to have calendars heard in different parts of the State by its deputies who take the testimony and make the award, subject to confirmation by the Commission. These deputies for the most part are laymen and not learned in the law and it could hardly be that in this enormous number of cases the deputies and perhaps the Commission itself, would make awards which after more careful examination would be found not to stand the test of the Compensation Law. The law has been so amended that the conclusions of fact and rulings of law are not to be prepared by the Commission until after notice of appeal from the award, thus obviating the necessity for making findings in the vast number of cases where no appeals are taken. It thus happens that in many cases careful examination of the testimony by the Commission itself is only made after the matter has been sent to counsel for the purpose of having the findings prepared. The counsel then goes over the case carefully and if it finds that the award cannot be sustained or that the probabilities of sustaining it are very doubtful, he is instructed to send the matter to the Commission for a rehearing. Such cases of course can come to the Commission only after an appeal has been taken by one party or the other as was the case here. Great injustice would often be done if a *manifestly erroneous* decision on the facts could not be corrected by the Commission because our findings of fact cannot be reviewed by the courts. In fact, such would seem to be the case here.

No doubt an appreciation of the difficulties already enumerated was in the mind of the Legislature when section 74 of the law was inserted, notwithstanding the previous insertions of sections 22 and 23. I think it must be presumed that the Legislature saw that in many cases a proper and final determination could not be made in the first instance, and that, therefore, a discretion was given to the Commission by section 74 to review its own decisions at any time, whether the time to appeal has expired or not. In my opinion, it was because of the legal proposition that the time for a litigant to appeal from a final decision cannot be extended beyond the statutory period, and because the doctrine of *res adjudicata* is firmly fixed in the decisions of courts, that section 74 was put into the law, in order to relieve the situation in those respects. The attorney for the claimant cites the case of Clemens, 180 App. Div. 92, in support of the proposition that the insurance carrier's only remedy is by way of appeal, but that case I think when properly understood is not adverse to the position which the Commission takes with reference to section 74. In that case the Commission in its discretion had refused to open a case at the instance of an insurance carrier, and I think the decision may be held to be nothing more than an affirmation of the proposition that where a right rests in discretion, it cannot be reviewed on appeal unless there is clear abuse of discretion. In that case an award was made against the employer and the insurance carrier. The insurance carrier

claimed that it was not liable because the policy of insurance had been procured from it by fraud, raising a pure question of law. The Commission overruled this contention and made the award against both employer and insurance carrier, from which no appeal was taken by the insurance carrier. Thereafter the Commission brought suit upon the award against both the employer and the insurance carrier, in which the insurance carrier set up the defense that it was not liable because the policy had been procured by fraud. The court overruled that defense and judgment was entered. Thereupon the insurance carrier applied to the Commission for a rehearing under section 74 which the Commission refused and the Appellate Division simply ruled that so long as the Commission in its discretion did not open the case, the only remedy of the insurance carrier was to appeal from the original award. The decision, therefore, is not authority for the proposition that the Commission has no right to open an award under section 74, where there has been no change in conditions, especially where an erroneous finding of fact has been made.

The decision in this case might be based upon the opinion written in *Fisher v. Genesee Construction Company* and reported in our Bulletin, Volume 3. No. 12, at pages 266 and 267, now on appeal to the Appellate Division, but the energy with which the attorney for the claimant has presented his case here and the different angles from which he has approached it, makes it seem proper to re-examine the whole proposition. I am very clearly of the opinion that the claim that the Commission is without power to change the award, because there has been no change in conditions, must be overruled, but with the right to the claimant, under the stipulation made at the last hearing to have the case put on our calendar again for a rehearing upon the merits. Should the attorney for the claimant desire to further test the legal proposition on appeal, I should be in favor of giving the same right to a rehearing on the merits after a decision of the Appellate Division, if he wishes it. For the present, at least, I advise that the decision already made rescinding the award and dismissing the claim be affirmed.

Upon appeal in *Solotar v. Neuglass & Co.*, Death Case. No. 33580, Oct. 16, 1918; — App. Div. —, May 7, 1919, the insurance carrier argued that the right of review was limited to cases in which there had been change in conditions but the Appellate Division affirmed the award unanimously and without opinion.

Citing the phrase "on ground of a change in conditions" in § 22, an injured claimant's attorney argued upon appeal that it meant change in the condition of his client and that since there had been no such change the Commission had no authority to reopen the case; the Appellate Division upheld the Commission, however; *Blattner v. Pa Pro. Co.*, S. D. R., vol. 14, p. 669, Bull. vol. 3, p. 52, Oct. 18, 1917; 185 App. Div. 900, July 2, 1918.

3. *Commission's discretionary power to deny a rehearing.*— In two cases in which insurance carriers have appealed from

orders or decisions of the Commission denying applications to reopen and rehear awards the Appellate Division has unanimously affirmed the Commission's denial. In *Clemens v. Clemens & Grell*, full text of which is given below, page 381, it has said:

No new fact is presented to the Commission upon this motion, except that since the decision the Commission has determined as to the legality of policies and the court seems to maintain such practice.

Commissioner Lyon has commented at length upon this court opinion in the above text of his own opinion in *McCull v. Hecht* and has interpreted it to mean "nothing more than an affirmance of the proposition that where a right rests in discretion, it cannot be reviewed on appeal unless there is clear abuse of discretion."

In the second case the ground for affirming the denial is similar, the pertinent part of the court's opinion being as follows:

SCHLENKER v. GARFORD MOTOR TRUCK CO., 183 App. Div. 166, May 8, 1918,
in part.

Of course the insurer is entitled to a hearing and without such hearing such award could not be deemed conclusive as to the insurer. But the insurer in this case has had such hearing. On October 10, 1917, a hearing was given by the Commission, at which the insurer appeared by counsel, produced witnesses, and had them examined. The testimony of such witnesses tended in no respect to impeach the award previously made or to overcome the presumption of section 21 "that the claim comes within the provisions of this chapter." The injury consisted of a blow on the head. The employee died twenty-three days thereafter from tubercular meningitis, and one of the medical experts produced by the insurer testified that he found "a distinct tuberculosis of the base of the brain." All the medical testimony was to the effect that a trauma of the kind which the employee received could excite a dormant tubercular condition into activity and accelerate death. The appellants produced no evidence to the contrary but merely that there were no traumatic indications at the time of his death more than three weeks after the trauma, and the Commission adhered to its previous award. Again on December fifth the insurer asked to have the case reopened but presented no additional evidence nor did it claim to be able to do so. The refusal of the Commission to then reopen the case was discretionary. The insurer had had its day in court.

The award and decisions should be affirmed. Award and decisions unanimously affirmed.

4. *Review after commuting award to lump sum.*—The widow of an alien who had been killed by an industrial accident requested commutation of her award to a lump sum upon the ground that

she did not intend to remain in the United States. The Commission acceded to her request but restored the periodic payment plan when she changed her mind about going abroad. Upon appeal of the employer and carrier the Appellate Division affirmed this action of the Commission, saying:

SPADUCCINO v. HAYES & Co., 180 App. Div. 37, Nov. 14, 1917, *in part*.

At the time the Commission rescinded the award no payment had been made thereon, nor any appeal taken therefrom, nor had the rights of any third party intervened, so far as appears. The payment of the award in a lump sum would not only have been most unwise, but the Commission was fully justified as a matter of law in rescinding the award. Section 74 of the Workmen's Compensation Law provided that the power and jurisdiction of the Commission over each case should be continuing, and that the Commission might from time to time make such modification or change with respect to former findings or orders relating thereto, as in its opinion might be just. The broad powers given to the Commission by this section were in keeping with the general scope of the law, and were ample, we think, to justify the Commission in rescinding an award which had been procured under an error of fact for which the Commission was in no way responsible.

Upon further appeal, the Court of Appeals, by a vote of five to four, affirmed the Appellate Division's order without opinion: 223 N. Y. 681, May 14, 1918. Full text of the Appellate Division's opinion has been given above, page 190.

April 5, 1917, the Commission made award for temporary total disability and closed a case upon ground of the claimant's full recovery. July 19, 1917, more than three months later, a deputy commissioner reopened the case and made what appeared to be a compromise with the employer. On the ground that the claimant's then condition was possibly due more to his age than to his accident the deputy, the employer consenting, awarded him "33 $\frac{2}{3}$ weeks compensation at \$6.42, amounting to \$216.14 from April 5 to November 26, 1917, to be paid claimant in a lump sum and the case closed." The Commission accordingly made an award of \$216.14 on September 7, 1917. Nine months later, June 6, 1918, the Commission reopened the case, made further award for twenty-eight weeks from November 26, 1917, to June 10, 1918, and continued the claim for further hearing. From this last award the employer took appeal. It based its protest on the so-called lump sum agreement which it declared had

become an act of the Commission under Workmen's Compensation Law, § 65. It distinguished the case from *Bechmann v. Oelerich & Son* and *Kriegbaum v. Buffalo Wire Works*, the texts of which appear above, upon ground that the Commission had had all the facts before it when it approved the deputy's lump sum award on September 7, 1917, and that there had been no change of conditions in the interval between September 7, 1917, and June 6, 1918, the date of the later award. The Appellate Division affirmed the award, however: *Bates v. Elgar*, Claim No. 54188, June 6, 1918; 186 App. Div. 926, Nov. 13, 1918.

5. *Method of review.*—Workmen's Compensation Law, § 20, prescribes the method of making or denying awards. It declares, for one thing, that the Commission must order a hearing upon the application of either party. In revising awards the Commission should use the same methods and legal formalities as in the original making of them. It should give the interested parties notice and opportunity for a hearing and should thereafter formally vacate or modify the original award or decision. A resolution like that adopted by the Commission, May 21, 1918, wherein it required all mutual insurers and self insurers to pay into the state fund the present value of death benefit awards is an attempted revision of previous awards and as such does not comply with the requisite methods and formalities. Therefore it is invalid. The Court of Appeals has so stated for guidance of the Commission in remarks appended to its opinion dismissing the appeal in *Sperduto v. N. Y. City Interborough Ry. Co.*, the full text of which is given above, page 177.

In another case the Appellate Division has commented to like effect, as follows:

FISCHER V. GENESEE CONSTRUCTION CO., 187 App. Div. 850, May 7, 1919,
in part.

JOHN M. KELLOGG, P. J.: An award was duly made October 8-11, 1917, and upon a motion to reopen, was duly affirmed, January 14, 1918, and several payments were made thereon. It was well sustained by the reports of the employer, the employee, and Dr. Schuhart, who treated the arm, and by the testimony of Dr. Snell, the oculist who treated the eye, and the testimony of Dr. Lewy and Dr. Gelser for the State Fund. The claimant was present, without counsel, but was not called as a witness. An adjournment was had for a week to enable the Fund to have the claimant examined by a physician, but upon the adjourned day counsel for the fund stated that "the general opin-

ion seems to be that the loss of his eye is due to the accident," and the record shows that no further testimony was introduced, "largely due to the fact that the representatives of the State Fund, the physician who examined him, and those familiar with the case were of the opinion that the claimant had sustained a systemic septicaemia as the result of the injury to the hand and that caused the iritis, and subsequent loss of use of the right eye."

July 24, 1918, by the order under review, the Commission annulled the award and dismissed the claim. Its decision is based upon the written opinions of two physicians. One of the opinions was written after the hearing was closed, and neither opinion seems to have been made a part of the record at any hearing, and the claimant apparently had no knowledge of them and no chance to cross-examine or to be heard with reference to them. This practice did not give him the fair hearing contemplated by the statute, and the order should therefore be reversed. (*Matter of Holmes v. Communipaw Steel Co.*, 186 App. Div. 645.)

6. *When the Commission cannot review.*—A cause of action having been once assigned under § 29, the Commission cannot divest the assignee of title to it without the assignee's consent: *Sabatino v. Crimmins Construction Co.*, 102 Misc. 172, Jan. 9, 1918. The court said in this case: "Sections 20, 22 and 74 of the act fix the powers of the commission as to changing or modifying its awards and rulings. In none is there a suggestion that the original awards are by any modification or change made void *ab initio*. The language in section 22, that no review shall affect such awards as regards any moneys already paid, is just to the contrary." Full text of the Sabatino opinion is in Bulletin No. 87, Part 1, pages 268-273.

7. *When the Commission ought not to review.*—The Commission should not disturb its decisions "except for some compelling reason in order to prevent a miscarriage of justice or a manifest wrong." The Appellate Division so advises, as follows:

**FISCHER v. GENESEE CONSTRUCTION CO., — App. Div. —, May 7, 1918,
in part.**

The award was final and conclusive against the State Fund, no appeal having been taken. (Workmen's Compensation Law, § 23.) Nevertheless, the Commission had continuing jurisdiction over the case, with power to change its determination as justice may require. (Sec. 74.) The presumption raised by section 21, and the provisions of section 23 and of section 20 (as amd. by Laws of 1917, chap. 705) prevent an interference with the award on the facts, unless there is substantial evidence of a mistake which, in the interest of justice, compelled such action. Sections 22 and 74 must be given

a broad and liberal interpretation, and, as circumstances arise, must be held to cover cases which we cannot in advance anticipate. They are intended to remedy an apparent injustice. The State Fund so far assented to this award that it would not be permitted a review upon appeal. (*Cunningham v. Buffalo Copper and Brass Rolling Mills*, 171 A. D. 955, 956.) Neither, upon its application, should the Commission annul the award except upon new evidence clearly showing its injustice, and that the counsel for the Commission was deceived, overreached or acted upon a clear mistake of fact. The mere fact that cumulative evidence has been found which might bear negatively upon a question of fact already amply proved and understandingly conceded, is not in itself a basis for annulling the award. Public policy requires that there should be a reasonable end to litigation, and that issues once fairly tried and stipulated, with full knowledge of the facts, should not be disturbed except for some compelling reason in order to prevent a miscarriage of justice or a manifest wrong. The power to change an award is not an arbitrary one, but a judicial discretion, to be exercised only in the interest of justice. The award was a property right, which cannot be destroyed unless it definitely appears that, as a matter of justice, it should not stand.

The Commission was asked on July 11, 1916, to reverse a decision of its predecessor, the Workmen's Compensation Commission, denying compensation to a claimant on March 19, 1915, attempt having been made meantime to enforce the claimant's rights at common law. The Commission denied the application upon advice of Commissioner Lyon, who said:

ADLER v. THOMASHEFSKY THEATRE Co., S. D. R., vol. 9, p. 348, July 11, 1916, *in part*.

I have very serious doubts whether a decision rendered considerably more than a year ago by a Commission whose personnel is different from that of the present Commission ought to be disturbed, especially in view of the fact that the claimant apparently acquiesced in that decision and attempted to enforce her rights at common law, on the theory that the decision of the Workmen's Compensation Commission was correct. In any event I am of the opinion that we ought not to reverse the decision of the former Commission under the circumstances, unless the case as now made is very clear showing that a grave injustice has been done. I am unable to see that such a clear case has been made out.

Commissioner Lyon is of opinion, however, that while the close legal questions of the Workmen's Compensation Law are in an unsettled condition, the Commission ought to be very lenient in reconsidering cases: *Blattner v. Pa. Pro. Co.*, S. D. R., vol. 14, p. 669, Bul., vol. 3 p. 52, Oct. 18, 1917.

B. *Review as an opening for appeal.*—If the thirty days' limit fixed for appeal to the courts by § 23 has expired, either party

to a compensation case may secure a new opportunity to appeal if it can induce the Commission to review its findings. This is illustrated by the Commission's proceedings in *Prendergast v. Berrian Bros.*, Death Case, No. 28681, Oct. 10, 1917. The insurance carrier understood in this case that a rehearing had been granted and gave formal notice of appeal; the Commission said that no rehearing had been granted but that it had ordered the taking of further testimony to determine whether there should be a rehearing. The insurance carrier thereupon obtained from the Appellate Division an opinion that a letter it had written within the thirty days' time limit constituted notice of appeal. Text of the opinion appears below, page 379.

C. *Review of cases after appeal.*—In its opinion in *Bechmann v. Oelerich & Son*, quoted above, the Appellate Division upheld the Commission's right to reopen and rehear a case after expiration of the time limit for appeal. It is a proper inference from the opinion that the Commission may also reopen and rehear a case after appeal has been taken.

Pending an application for a rehearing by the Commission and in order to preserve his right for review by the court, a claimant took appeal to the Appellate Division. The Commission reheard the case, reversed its action denying an award and made award to the claimant, while the appeal to the court was pending. In defense of such course Commissioner Lyon said:

McNALLY v. DIAMOND MILLS PAPER CO., S. D. R., vol. 9, p. 352, July 11, 1916, *in part*.

The insurance carrier claims that the Commission is ousted of jurisdiction by the appeal which has been taken. The carrier admits that section 74 gives the Commission jurisdiction to rehear a case at any time before an appeal is taken. In my opinion the "continuing" jurisdiction given the Commission by section 74 of this act is not cut off by an appeal. The act intends that hearings before the Commission should be quite informal and specifically provides that the Commission shall not be bound by technical rules of procedure. The cases before the Commission are so numerous that rehearings often could not be had and decisions rendered until after the time to appeal has expired, and injustice would frequently be done to injured workmen, who have their cases heard without the aid of counsel, if they could not preserve their right by a notice of appeal while their application for a rehearing is pending.

The pending appeal appears to have been dropped by the claimant and a new appeal to have been taken by the employer and insurance carrier: 178 App. Div. 342.

Some argument for the right and necessity of review pending appeal is made by Commissioner Lyon in *McCall v. Hecht*, the text of which is given in full above, page 361. He calls attention to the fact that in many cases the Commission makes careful examination of the testimony only after the law's demand for formal findings has arisen out of appeal. "Great injustice," he says, "would often be done if a manifestly erroneous decision on the facts could not be corrected by the Commission because our findings of fact cannot be reviewed by the courts."

The Appellate Division having affirmed the award in *Woolley v. Geneva Cutlery Co.*, 181 App. Div. 909, Nov. 14, 1917, the insurance carrier made application to the Commission to have the award vacated on ground of new evidence. The Commission reheard the case and denied the application: S. D. R., vol. 15, p. 637, Bul., vol. 3, p. 156, Mar. 14, 1918.

The Appellate Division having affirmed the award in *Cummings v. Underwood Silk Fabric Co.*, 184 App. Div. 456, Sept. 11, 1918, the Court of Appeals six weeks later reversed the award in the very similar case of *Litts v. Risley Lumber Co.*, 224 N. Y. 321, Oct. 29, 1918. Thereupon the insurance carrier applied to the Commission for rehearing of the Cummings case. Upon rehearing, November 18, 1918, "the Commission deemed it inadvisable to reverse the order of the Appellate Division and rescind the award, but rather believed that motion for reargument should be had in the Appellate Division, and the case reversed there." Accordingly the carrier, with the Attorney-General's assent, asked the Appellate Division for a rehearing. The Appellate Division granted this request and reversed the award, January 14, 1919.

The Appellate Division and the Court of Appeals having sustained an erroneous award in *Skarpeletzos v. Counes & Raptis Corp.*, the Commission took up the case anew and corrected the mistake in its findings, whereupon the insurance carrier again carried the case to the courts; details of the transaction are given above, pages 138, 139.

D. Review of findings in the light of subsequent court decisions in similar cases.—The Commission reconsidered and reversed an award in the light of subsequent court interpretation in another case, Commissioner Lyon saying, "The facts are remarkably alike." The following statement of the record is self-explanatory:

LUPKE v. SIMON, S. D. R., vol. 11, p. 617, Bul., vol. 2, p. 45, Nov. 22, 1916,
in part.

An award was made in this case and an appeal was taken to the Appellate Division which was dismissed. After the decision by the Appellate Division of the case of *Bargey v. Massaro Macaroni Company*, application was made to vacate the award on the ground that that case was controlling in the decision of the present claim. The application to reopen the case was granted and the Commission voted to hold the matter in abeyance until the Bargey case had been passed upon by the Court of Appeals. The decision of the Appellate Division reversing the award in the Bargey case having been affirmed, this matter now comes on for final disposition.

An insurance carrier asked the Commission to discontinue awards and close a case in which its action had been affirmed by the Appellate Division. The carrier argued that a subsequent decision of the Court of Appeals in a similar case had overruled the Commission and the Appellate Division in the case in hand. The Commission denied the motion to discontinue awards upon advice of Commissioner Lyon, as follows:

REDDY v. NATIONAL EXCAVATING & FOUNDATION Co., S. D. R., vol. 14, p. 602,
Bul., vol. 2, p. 256, Aug. 14, 1917, in part.

LYON, Commissioner: I have very serious doubts whether this Commission has a right, after its award has been affirmed by the Appellate Division, to make a further decision, on the same testimony, which necessarily proceeds upon the theory that its former findings are wrong, because the Court of Appeals, in another case, has made a decision which may seem to be at variance with the law of this case.

The decision which we are now asked to make, presupposes that our former decision which has been affirmed is wrong. If it be so, it would seem that the orderly administration of the law would require that the decision of the Appellate Division should be rescinded by that court or reversed by the Court of Appeals.

We can hardly hope to find precedents for the proceedings in the law books, because the compensation law provides for repeated awards for disability growing out of the same accident, whereas, at common law, one recovery exhausts the plaintiff's remedy. It is true that the statute gives the Commission continuing jurisdiction and the courts have held that this gives us the right to reconsider and modify or rescind our awards in the interest of

justice, but I do not understand that this gives us the right to reverse findings of fact and conclusions of law, which by the affirmance of our award have become *res adjudicata*. It would seem that by the affirmance of the Appellate Division the law of the case has been established until reversed by a higher court.

An insurance carrier assented to an award upon stipulation by it that if at any subsequent time a court ruling adverse to the Commission's ruling should be handed down it might have the right to reopen the case and to recover paid compensation. Later in the light of some subsequent court decisions it applied for a reopening of the case. A deputy commissioner denied the application partly on the ground that the carrier's remedy had been appeal, the right to which it had lost by expiration of the time limit. The Commission reopened and reheard the case, however, upon opinion of Commissioner Lyon as follows:

BLATTNER v. PA PRO Co., S. D. R., vol. 14, p. 669, Bul., vol. 3, p. 52, Oct. 18, 1917, *in part*.

LYON, Commissioner: The attorney for the claimant insists that the stipulation inserted in the record when the award for loss of the hand was made ought not to be given any effect, because it was made in the absence of the claimant. This is probably true if it be taken strictly as a stipulation, but it does show on its face that the insurance carrier did not acquiesce in the Commission's finding, but was willing that the matter should stand in abeyance until after the courts had made some decisions which would further guide the Commission in such cases. I do not think the Commission should now take the position that it will not give a further hearing in the matter. The position which the carrier took when the case was first decided certainly makes for expedition in handling cases, and does not put upon the Commission the burden of handling useless appeals where questions which arise can be disposed of by rulings in other pending cases, but even if there had been no such saving clause inserted in the record, I should be disposed to grant the insurance carrier's application to reopen the case under section 74 of the law. While these very close legal questions are in an unsettled condition, I am of the opinion that we ought to be very lenient in reconsidering cases if need be, in order that the real intent of the law may be carried out. This, perhaps, will not be so necessary after the puzzling legal questions have been definitely decided by the higher courts.

The Commissioner having denied compensation to the widow of an employee who had contracted anthrax in the course of his employment because the port of entry for the anthrax germ had been a scratch incurred in a barber shop, reopened the case two years and a half later and made an award upon authority

of a decision of the Court of Appeals affirming an award to the widow and children of a janitor who had contracted a fatal infection in the course of his employment, the port of entry for the infection having been a finger cut incurred at his own home: *Eldridge v. Endicott, Johnson & Co.*, S. D. R., vol. 8, p. 445. Bul., vol. 1, No. 8, p. 8, Apr. 16, 1916; Bul., vol. 4, p. 53. Nov. 12, 1918; S. D. R., vol. 19. p. 431, Jan. 20, 1919; *Horrigan v. Post-Standard Co.*, Death Case, No. 3-178, Jan. 17, 1918; 184 App. Div. 921, May 21, 1918; 224 N. Y. Rep. 620, Oct. 22, 1918.

APPEALS

(Workmen's Compensation Law, § 23)

The relation of the Commission's right to reconsider compensation cases to the review of its rulings and decisions by the courts has been treated at length in the foregoing topic. Earlier court opinions relative to the subject of appeal are in Bulletin 81, pages 398-406.

A. Court of Appeals will not hear appeals from answers to certified questions.—The Commission may certify questions of law to the Appellate Division: Workmen's Compensation Law, § 23. The Appellate Division permitted an appeal to the Court of Appeals from its reply to such a certified question. The Court of Appeals dismissed the appeal upon the ground that giving advice was not one of its functions. Its opinion is as follows:

MATTER OF RESOLUTION STATE INDUSTRIAL COMM., 224 N. Y. 13, May 28, 1918.

CARDOZO, J.: On July 2, 1917, one of the members of the State Industrial Commission proposed to that body a resolution that every mutual compensation insurance company and every self-insurer should pay into the State fund, under section 27 of the Workmen's Compensation Law, as amended by chapter 705 of the Laws of 1917, the present value of death benefits under every award against such insurance carriers for deaths occurring between July 1, 1914, and July 1, 1917, inclusive.

The resolution was neither adopted nor rejected. All that the Commission did was to recite that there was doubt about its power, and to certify to the Appellate Division a question of law to be answered by that court. The following is the question certified: "Has the state industrial commission power and authority under the provisions of section 27 of the Workmen's Compensation Law, as amended by chapter 705 of the Laws of 1917, to require the payment into the state fund, in accordance with the provisions of said section, of the present value of unpaid death benefits in cases in which awards were made prior to July 1, 1917?"

At the Appellate Division the Self-Insurer's Association, an unincorporated body of insurers, was allowed to appear and file a brief. Like permission was granted to the New York Central Railroad Company. Till then the attorney-general stood before the court alone. Even afterwards there were no adverse parties. There were merely friends of the court striving to enlighten its judgment. The Appellate Division did not order anything to be done or foreborne. It could not. It merely answered a question. Its order was that the question propounded be answered in the affirmative. It there-

upon granted leave to the intervenors to appeal to this court. The same question that was certified to the Appellate Division has been certified to us.

The determination of such an appeal is not within our jurisdiction. The practice is said to be justified under section 23 of the act. That section authorizes an appeal to the Appellate Division from an award or decision of the commission. It then provides that "the commission may also, in its discretion certify to such Appellate Division of the Supreme Court, questions of law involved in its decision." Appeals may be taken to this court subject to the same limitations as in civil actions (*Matter of Harnett v. Steen Co.*, 216 N. Y. 101).

Nothing in these provisions sustains the practice followed. The commission made no decision. There was no case or controversy before it. No summons to attend a hearing had been given to the insurance carriers. No carrier had appeared. The members of the commission, debating their powers among themselves, asked and obtained the advisory opinion of a court. Without notice to the carriers to be affected by their action, they fortified themselves in advance by judicial instruction. In such circumstances the answer of the Appellate Division bound no one and settled nothing. We do not know that the commission will ever adopt the proposed resolution. If it does, and so notifies the carriers, the legality of its action will remain open for contest in the courts. No advice that may now be given in response to a request for light and guidance can prejudice the issue or control the outcome.

In that situation our duty is not doubtful. The function of the courts is to determine controversies between litigants (*Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 475; *Osborn v. Bank of U. S.*, 9 Wheat. 738, 819; *Mills v. Green*, 159 U. S. 651; *Marye v. Parsons*, 114 U. S. 325, 330; *Am. Book Co. v. Kansas*, 193 U. S. 49). They do not give advisory opinions. The giving of such opinions is not the exercise of the judicial function (Thayer, *Cases on Constitutional Law*, vol. 1, p. 175; *American Doctrine of Const. Law*, 7 *Harvard Law Review*, 153). It is true that in England the custom of the constitution makes the judges of the high court the assistants of the Lords, and requires them, upon the demand of the Lords, to give "consultative" opinions (Thayer, *supra*; *Opinions of the Justices*, 126 *Mass.* 557, 562). But that custom is a survival of the days when the judges were members of the great council of the realm (Thayer, *supra*; T. E. May, *Parliamentary Practice* [12th ed.] pp. 55, 56, 182; Anson, *Law and Custom of the Constitution*, pp. 45, 52, 449). In the United States no such duty attaches to the judicial office in the absence of express provision of the Constitution (*Dinan v. Swig*, 223 *Mass.* 516, 519; *Opinion of Court*, 62 N. H. 704, 706; *Rice v. Austin*, 19 *Minn.* 108). Even in those States, e. g., Massachusetts, Maine and New Hampshire, where such provisions are found, the opinions thus given have not the quality of judicial authority. The judges then act, "not as a court, but as the constitutional advisers of the other departments" (*Opinion of Justices*, 126 *Mass.* 557, 566; *Laughlin v. City of Portland*, 111 *Me.* 486, 497). In this state the legislature is without power to charge the courts with the performance of non-judicial duties (*Matter of Davies*, 168 N. Y. 89). It has not attempted to do so by this statute. The questions to be certified under section 23 of the act must be incidental to a pending controversy with adverse parties litigant. Those limitations apply to the Appellate Division. Even more explicit are the restrictions in this court. Our

jurisdiction is to be exercised subject to the same limitations as in civil actions (Workmen's Comp. Act, § 23; Code Civ. Pro., § 190). The order under review is not one which finally determines a special proceeding (*Matter of Droege*, 197 N. Y. 44, 50; *Matter of Jones*, 181 N. Y. 389). It is not an intermediate order in a special proceeding. There has been no judicial proceeding at all. There has been a tender of advice which may be accepted or rejected.

The record now before us supplies a pointed illustration of the need that the judicial function be kept within its ancient bounds. Some of the arguments addressed to us in criticism of the resolution apply to all awards for death benefits; others to awards made before June, 1916; others to awards where one of the dependents is a widow. It is thus conceivable that the proposed resolution may be valid as to some carriers and invalid as to others. We are asked by an omnibus answer to an omnibus question to adjudge the rights of all. That is not the way in which a system of case law develops. We deal with the particular instance; and we wait till it arises.

The appeal must be dismissed without costs to either party. HISCOCK, CH. J., COLLIN, CUDDERBACK, POUND, CRANE and ANDREWS, JJ., concur. Appeal dismissed.

Commissioner Lyon is of opinion that a case that "has gone to the Appellate Division on a certified question cannot apparently be taken to the Court of Appeals": *Kifer v. Buffalo Chair Works*, S. D. R., vol. 11, p. 642, Bul., vol. 2, p. 66, Dec. 27, 1916.

In *Schwab v. Emporium Forestry Co.*, the Commission certified a question to the Appellate Division which answered the question in the affirmative and — six days later — ordered the Commission to make an award in accordance with its answer; the employer, having taken an appeal from this order, the Court of Appeals affirmed it: Claim No. 1124, Sept. 22, 1914, and Jan. 2, 1915; 167 App. Div. 614, May 5 and 11, 1915; Claim No. 1124, May 12, 1915; 216 N. Y. Rep. 712, Nov. 30, 1915.

B. Courts will not hear appeal from award made after claimant's death, no substitution having been made.—The Court of Appeals dismissed an appeal from an order of the Appellate Division affirming an award of the Commission to an employee who had died pending consideration of his claim, with the following per curiam opinion:

O'ESAU v. BLISS Co., 224 N. Y. Rep. 701, Nov. 26, 1918.

PER CURIAM: One John M. O'Esau was an employee of E. W. Bliss Company and as such engaged in a hazardous employment. On March 28, 1916, while engaged in his employment he received an injury. Objection was made

by appellants before the industrial commission that the claim made by O'Esau was not filed with the commission within the time required by law. An award was made by the commission November 17, 1917, the decision of the commission reciting that the claim for compensation was filed with the commission more than one year after the date of the injury, to wit, June 6, 1917. The employer and carrier appealed from the determination of the commission to the Appellate Division. Upon the argument of the appeal the Attorney-General contended that a letter written by claimant to the commission under date of October 22, 1916, was a claim for compensation. The Appellate Division on March 5, 1918, remitted the case to the commission "to make such findings as it sees fit in reference to filing a claim within the year." March 22, 1918, the case was brought on before the commission and additional evidence presented. The commission thereupon made amended findings wherein it recited the proceedings already noted; also that it appeared at the time, March 22, 1918, that John M. O'Esau had died March 21, 1918; and that the letter of Mr. O'Esau of October 22, 1916, constituted a claim. Further argument of the appeal was had in the Appellate Division upon the amended findings and the determination of the State Industrial Commission affirmed at the May term, 1918. The employer and carrier appeal from the order of affirmance to this court.

If we were at liberty to consider this appeal on the merits we would feel compelled to hold that the letter of October 22, 1916, did not constitute a claim for compensation under the requirements of the statute. But the appeal is not properly before us.

By section 23 of the Workmen's Compensation Law (Cons. Laws, ch. 67), appeals to the Appellate Division and this court from determinations made by the commission, save as in said section excepted, are subject to the law and practice applicable to appeals in civil actions.

Concededly the commission made a final award in favor of Mr. O'Esau, subsequent to his death, and thereafter the Appellate Division affirmed the award upon findings disclosing the death of the adverse party. The appellants now seek to have this court reverse the order of the Appellate Division, and the Attorney-General, representing the commission, urges an affirmance of an order in favor of a deceased party, no substitution having been made. Such practice is contrary to the provisions of the Code. (§§ 1297, 1298; *Reed v. Farrand*, 198 N. Y. 207.)

The appeal should be dismissed, without costs. *HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK, HOGAN, McLAUGHLIN and CRANE, JJ., concur.* Appeal dismissed.

Citing the O'Esau decision, the Appellate Division suspended decision of an appeal in a later case to await action of the parties. with opinion as follows:

WAITE v. BLISS Co., 186 App. Div. 398, Jan. 8, 1919.

LYON, J.: The appeal is not properly before this court for hearing. The Commission made the award of date July 8, 1918, to Harold C. Waite, for forty-one weeks covering the period from August 28, 1916, to June 11, 1917, evidently erroneously stated in the findings as July 11, 1917, and continued the claim for further hearing, the Commission stating, "it appearing that

Harold C. Waite, claimant herein died on or about August 9, 1917, said award is directed to be paid to the estate of Harold C. Waite, deceased."

The law and practice of this court require that following the death of the plaintiff a substitution must be had of a representative of the estate before an appeal can be heard. It was recently held by the Court of Appeals in *Matter of O'Esau v. Bliss Co.* (224 N. Y. 701) that by section 23 of the Workmen's Compensation Law appeals to the Appellate Division and to the Court of Appeals from determinations made by the Commission, save as in said section excepted, are subject to the law and practice applicable to appeals in civil actions. Furthermore, there is nothing in the case showing that Emily K. Waite was the widow. According to the record Harold C. Waite was not married.

The hearing of the appeal must be suspended in this court awaiting such action as the parties may see fit to take.

All concurred. Decision of appeal suspended in this court to await such action as the parties may see fit to take.

C. *Courts will not hear appeal from notices or directions of the Commission other than "awards" or "decisions."*—Workmen's Compensation Law, § 23, limits appeals to "awards" or "decisions." A notice by the Commission instructing an insurance carrier to change its method of payment of an award is not an "award" or "decision" and therefore is not appealable. The Appellate Division was in error in entertaining appeal from such a notice. The Court of Appeals so holds in the opinion upon which it dismisses appeal in *Sperduto v. N. Y. City Interborough Ry. Co.*, full text of which is given above, page 177. For guidance of the Commission, the Court appends some remarks as to the nature of, and the method of revising "awards."

D. *Form of notice.*—The courts will be liberal in regard to the form of notice of appeal, as the following opinion of the Appellate Division bears witness:

PRENDEGAST V. BERRIAN BROS., 194 App. Div. 240, July 1 and Sept. 17, 1918.

H. T. KELLOGG, J.: This award was made on October 10, 1917, and notice thereof was served on October 26, 1917. No formal notice of appeal was served until January 4, 1918. The Commission declined to make any statement of its conclusions of fact and rulings of law, as required to be done within thirty days after taking an appeal, for the reason that the appeal itself was not taken in time. As the formal notice of appeal was not served within thirty days from the service of the notice of the award the notice of appeal was ineffectual. (Workmen's Compensation Law [Consol. Laws, chap.

380 COURT DECISIONS ON WORKMEN'S COMPENSATION LAW

67; Laws of 1914, chap. 41], § 23.) However, within such thirty days the insurance carrier did send to the Commission a letter, reading as follows:

November 21, 1917.

"THE STATE INDUSTRIAL COMMISSION,

"230 Fifth Avenue, New York.

"11587 — P. Prendergast v. Berrian Bros. 28681.

"GENTLEMEN.— For the purpose of protecting our interest we hereby file notice of our intention to appeal from the award made in the above entitled case under date of October 10th. Notice of this award is dated October 26th and was received in this office three days later. On the 31st of October a rehearing was allowed for the purpose of introducing further testimony and at the conclusion of the hearing Commissioner Archer stated that the evidence would be carefully reviewed as if given in the first place and decision reserved. It is my impression that the award made on October 10th was thereby rendered null and void, but in order to be on the safe side I am filing this notice of appeal.

"Yours very truly,

"GENERAL ACCIDENT, FIRE & LIFE ASSUR. CORP.

HAD/E/

By H. A. DICKER."

It will be observed that in the first paragraph of this letter the writer merely gives notice of an intention to appeal. However in the concluding sentence of the letter these words will be found: "In order to be on the safe side I am filing this notice of appeal." It has been the practice of the Commission and of the courts to administer the provisions of the Workmen's Compensation Law in a liberal spirit in disregard of formal or technical rules of procedure. No good reason suggests itself why the treatment of claimants should be liberal and that of employers and carriers should be harsh. The letter in question does state that the writer thereof is thereby filing an appeal. It should, therefore, be regarded as a notice of appeal. Accordingly, the Commission should make a statement of its conclusions of fact and rulings of law. The case is remitted to the Commission for such purpose. All concurred. Matter remitted to the State Industrial Commission for a statement of its conclusions of fact and rulings of law thereon.*

E. Relation of rehearing to appeal. Having allowed the thirty days time limit upon appeal under § 23 to go by, an insurance carrier asked the Commission for a rehearing under § 22. From denial of its request by the Commission the insurance carrier took an appeal to the Appellate Division which unanimously affirmed the Commission's determination with opinion as follows:

* As amended on September 17, 1918.—[Rep.

CLEMENTS v. CLEMENTS & GRILL, 180 App. Div. 92, Nov. 14, 1917.

KELLOGG, P. J.: The claim was heard before the Commission and the hearing, March 22, 1915, resulted in an award. The appellant made a motion, July 6, 1917, for the reopening of the case upon the ground that the accident occurred before the policy was issued upon the statement that no accident except a trivial one (other than this) had occurred, and that the policy was, therefore, obtained by fraud. The appellant made the same contention before the Commission upon the original hearing. It is true the Commission did not set aside the policy for fraud, but ruled that it would not go into the question of the fraud so long as the policy had in fact been issued. No new fact is presented to the Commission upon this motion, except that since the decision the Commission has determined as to the legality of policies and the court seems to maintain such practice. (*Matter of Skoczlois v. Vinocour*, 221 N. Y. 276.)

If timely appeal has been taken, the question may be considered and justice done on the appeal. If the appellant has allowed its time to appeal to expire the award is conclusive against it under section 23 of the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd. by Laws of 1916, chap. 622, and Laws of 1917, chap. 705), and it should not, therefore, be accorded the right of a review under the name of a rehearing. Unless the award is reversed on appeal it should stand. The determination appealed from is, therefore, affirmed. Determination of the Commission unanimously affirmed.

Since the State Fund cannot appeal to the courts, rehearing is the only remedy in the case of an improper award against the State Fund: *Fischer v. Genesee Construction Co.*, S. D. R., vol. 17, p. 616, July 24, 1918. Denial of the right of state fund insurers to appeal was made in *Crockett v. International Ry. Co.*, 170 App. Div. 122, Nov. 20, 1915, text of which is in Bulletin No. 81, pages 398, 399.

F. Second award and appeal in case of rehearing.—If the Commission opens a case and receives further testimony while the case is pending in court upon appeal, it should make a new award, with due formalities, and from the new award, new appeal should be taken. The advice of the Appellate Division to such effect is as follows:

BEHRENS v. STEVENS Co., — App. Div. — May 7, 1919, in part.

COCHRANE, J.: Confusion has arisen growing out of the practice of appeals under the Workmen's Compensation Law. It is claimed by the Attorney-General that the appeal in this case has not been properly taken. For the purpose of clarifying the practice and obviating mistakes we are calling

attention to the requirements of the statute relative to appeals (sections 20 and 23). When the Commission makes a decision it is required to file the same in its office and immediately after such filing "send to the parties a copy of the decision" (section 20) with "notice of the filing of the award or the decision" (section 23). Within thirty days after such notice the appeal must be taken. Since the amendment to section 20 by Laws of 1917, chapter 705, the decision need not contain a statement of the conclusions of fact and rulings of law by the Commission. But where an appeal is taken "the commission shall within thirty days thereafter serve upon the parties in interest a statement of its conclusions of fact and rulings of law" (section 23). The purpose of the statute plainly is to relieve the Commission from the necessity of formulating findings except in cases which are appealed. Undoubtedly the Commission has power after an appeal to open the proceeding and receive further testimony. When it does so it should make and file another award or decision and send a copy thereof with notice of the filing to the parties and an appeal should be taken from such subsequent award or decision so as to bring up the entire record. In the present case the Commission has not followed these plain requirements of the statute and is primarily responsible for whatever confusion exists. The record shows that it made an award to the claimant September 26, 1918, for a period terminating September 27, 1918. On the following day it sent to the parties a notice stating that an award had been made but containing no copy thereof. No notice of filing the award was given. The appellants, however, appealed from the award thus made and the Commission cannot complain of its own omissions. Subsequently and on November 18, 1918, the case was reconsidered and on November 20, 1918, the Commission sent to the parties a communication that "the action of the commission was to affirm the award previously made to September 27, 1918." The decision of November 18, 1918, is not in the record nor was any copy thereof or notice of filing thereof sent to the appellants nor have the appellants appealed therefrom. But inasmuch as no testimony was taken on November 18, 1918, bearing on what we regard as the pivotal point in the case we think we may consider the appeal from the award of September 26, 1918. The statement of the conclusions of fact and rulings of law was properly made after the service of the notice of appeal (section 23).

G. Court remedy when Commission denies compensation for want of coverage.—The Commission, in *Naud v. King Sewing Machine Co.*, having denied compensation upon the ground that there had been no accident, the Trial Term of the Supreme Court, Fourth Department, held that the claimant was barred from an action for negligence and that his only court remedy was appeal to the Appellate Division, Third Department, as provided in Workmen's Compensation Law, § 23. The opinion of the trial term to such effect has been given in Bulletin 81, pages 402-404. But the Appellate Division, Fourth Department, and the Court

of Appeals have reversed the Trial Term's judgment, the former with opinion and the latter without opinion but with categorical replies to certified questions (223 N. Y. 567, Mar. 12, 1918). The Appellate Division's opinion is as follows:

NAUD v. KING SEWING MACHINE Co., 178 App. Div. 31, April 4, 1917.

KRUSE, P. J.: 1. If the complaint does not state facts sufficient to make out a cause of action, the answer would not be demurrable, although insufficient, because, as has been stated, "a bad answer is good enough for a bad complaint." (*Baxter v. McDonnell*, 154 N. Y. 432, 436.)

2. But the complaint states a good cause of action. While some of the allegations of the complaint are germane to a claim under the Workmen's Compensation Law (Consol. Laws, chap. 67 [Laws of 1914, chap. 41], as amd.), it does not affirmatively appear by the complaint as a whole that the claim is of that character.

3. The answer setting up the determination of the Commission is insufficient in law upon the face thereof. It appears by the allegations of the answer that the Commission determined that the claim was not founded upon an accident and was disallowed. Such determination is not an adjudication that the claim is covered by the Workmen's Compensation Law, but quite the reverse.

The interlocutory judgment overruling the demurrer should be reversed, with costs, and demurrer sustained, with the usual leave to the defendant to plead over, if so advised, upon the payment of costs.

All concurred, Foote and Lambert, JJ., in result only, except DeAngelis, J., who dissented. Interlocutory judgment reversed, with costs, and demurrer sustained, with costs, with leave to the defendant to plead over within twenty days upon payment of the costs of the demurrer and of this appeal.

It follows, therefore, that a claimant denied compensation for want of coverage, on account of non-occurrence of an accident, or on other account, has two remedies, namely, appeal to the Appellate Division, Third Department, and action for negligence in a court of competent jurisdiction.

LIST OF CASES

(Note.—S. D. R. is an abbreviation for State Department Reports; Bul., for Monthly Bulletin of the Department of Labor. The texts of cases are indicated by stars preceding their page numbers.)

	PAGE
Abelson v. Steinway & Sons, Case No. 42922, Nov. 1, 1918; — App. Div. —, May 7, 1919.....	342
Ackerly v. Long Island R. R. Co., S. D. R., vol. 19, p. 533, Bul., vol. 4, p. 151, Apr. 15, 1919.....	103
Adams v. Boorum & Pease Co., File No. 29745, Mar. 1, 1917; 179 App. Div. 412, July 3, 1917.....	*53, *152
Adams v. N. Y., Ontario & Western Ry. Co., 175 App. Div. 714, Nov. 29, 1916; 220 N. Y. Rep. 579, Jan. 30, 1917.....	87, 163, *164, *167, 184, 186
Adler v. Thomashefsky Theatre Co., S. D. R., vol. 9, p. 348, July 11, 1916..	369
Anderson v. Smith & Sons Co., S. D. R., vol. 9, p. 346, July 10, 1916; appeal to Appellate Division withdrawn, Feb. 15, 1917.....	151
Andrews v. Butler Mfg. Co., Case No. S-2295, Feb. 26, 1918; 184 App. Div. 698, Nov. 13, 1918.....	*341
Angelucci v. Kerbaugh, S. D. R., vol. 9, p. 387, Aug. 15, 1916.....	95, 254
Aprea v. David & Co., S. D. R., vol. 16, p. 489, Bul., vol. 3, p. 195, May 10, 1918	223, 233, 240
Arcangelo v. Gallo & Laguidara, 177 App. Div. 31, Mar. 7, 1917....	63, 65, *66
Azzalina. See Profeta v. Retsof Mining Co.	
Bacon v. Townsend & McCarthy, S. D. R., vol. 11, p. 638, Bul., vol. 2, p. 66, Dec. 27, 1916; 179 App. Div. 965, Sept. 25, 1917.....	140
Bader v. Goldstein Scrap Iron & Steel Co., Bul., vol. 2, p. 257, Aug. 14, 1917; 182 App. Div. 907, Jan. 18, 1918; Case No. 3819, Mar. 1, 1918....	335
Bailey v. Columbia Rope Co., 184 App. Div. 718, Nov. 13, 1918.....	*169, 184
Banks v. Adams Express Co., S. D. R., vol. 7, p. 471, Mar. 7, 1916; 176 App. Div. 916, Dec. 29, 1916; 221 N. Y. Rep. 606, July 11, 1917.....	101
Baron v. National Metal Spinning & Stamping Co., Case No. 4065, Sept. 17, 1917; 182 App. Div. 284, Mar. 6, 1918.....	*47
Barringer v. Clark, S. D. R., vol. 17, p. 584, June 5, 1918; 184 App. Div. 695, Nov. 13, 1918	*54, 159
Bates v. Elgar, Claim No. 54188, June 6, 1918; 186 App. Div. 926, Nov. 13, 1918	366, 367
Beals v. Eureka Paper Co., Death File, No. 20057, Oct. 10, 1917; 183 App. Div. 914, Mar. 15, 1918.....	96, 97
Beatty v. McAllister Dry Dock Co., N. Y. State Depts., Apr. 14, 1917, p. 819	19
Beaudet v. Mertz's Sons, Case No. 4047, July 17, 1917; 181 App. Div. 963, Dec. 28, 1917; — N. Y. Rep. —, May 28, 1918.....	240
Beckmann v. Oelerich & Son, 174 App. Div. 353, Sept. 13, 1916..	*357, 367, 370

	PAGE
Beckwith v. Bastian Bros. Co., S. D. R., vol. 13, p. 538, Mar. 14, 1917; 181 App. Div. 909, Nov. 14, 1917.....	16, 19, 20
Beers v. Beers Bros., File No. 64972, May 9, 1917; 180 App. Div. 760, Dec. 28, 1917	*148, 247
Behrens v. Stevens Co., Case No. 2192, Nov. 18, 1918; — App. Div. —, May 7, 1919	*51, *381
Belcher v. Carthage Machine Co., Death Case, No. 3757, Oct. 4, 1917; 184 App. Div. 922, May 17, 1918; 224 N. Y. 326, Oct. 29, 1918.....	*287, 337
Bell v. Terry & Tench Co., 177 App. Div. 123, Mar. 7, 1917.....	*97
Bellafiore v. Roman Bronze Works, Bul., vol. 2, p. 213, June 19, 1917; 181 App. Div. 910, Nov. 14, 1917.....	332
Bend v. Austen Mfg. Co., S. D. R., vol. 16, p. 441, Bul., vol. 3, p. 177, Apr. 23, 1918; 186 App. Div. 926, Nov. 13, 1918.....	122
Benjamin v. Rosenberg Bros., S. D. R., vol. 13, p. 525, Bul., vol. 2, pp. 126, 147, Mar. 13, 1917; 180 App. Div. 234, Nov. 28, 1917; 223 N. Y. Rep. 569, Mar. 19, 1918.....	202, *203, 206, 295
Benson v. Gault Bros. & Hassett, Claim No. 1116 B, June 21, 1918; 187 App. Div. 915, Jan. 15, 1919.....	74
Benson v. Penney, S. D. R., vol. 8, p. 462, Apr. 27, 1916; 175 App. Div. 959, Nov. 15, 1916.....	37
Berisso v. Leagan, Death Case, No. 2143, July 6, 1917; 181 App. Div. 958, Dec. 29, 1917	*333, 334
Bermann v. Reliance Metal S. & S. Co., Case No. 200174, Dec. 13, 1918; S. D. R., vol. 19, p. 482, Bul., vol. 4, p. 134, Feb. 25, 1919; 187 App. Div. 816, May 7, 1919.....	*42, 156
Bianc v. New York Central R. R. Co., S. D. R., vol. 16, p. 424, Apr. 8, 1918; 186 App. Div. 925, Nov. 13, 1918; — N. Y. Rep. —, Apr. 8, 1919	74, 340
Bianco v. Diana Paper Co., Death File, No. 3135, May 24, 1917; 181 App. Div. 908, Nov. 14, 1917.....	134
Birmingham v. Westinghouse Electric & Mfg. Co., 180 App. Div. 48, Nov. 14, 1917.....	*105
Blaes v. Bliss Co., S. D. R., vol. 9, p. 288, May 26, 1916; 177 App. Div. 370, Mar. 7, 1917.....	31, 64, 65
Blank v. Tumminelli, S. D. R., vol. 20, p. —, Apr. 30, 1919.....	209
Blattner v. Pa Pro Co., S. D. R., vol. 14, p. 669, Bul., vol. 3, p. 52, Oct. 18, 1917; 185 App. Div. 900, July 2, 1918.....	*59, 364, 369, *373
Bloom v. British-American Chemical Co., S. D. R., vol. 15, p. 584, Bul., vol. 3, p. 117, Jan. 17, 1918.....	344
Bloom v. Jaffe, 94 Misc. 222, Mar. 13, 1916.....	22, 23
Bloomfield v. November, S. D. R., vol. 5, p. 385, Aug. 2, 1915; 172 App. Div. 917, Jan., 1916; 219 N. Y. 374, Dec. 12, 1916; 180 App. Div. 240, Nov. 28, 1917; 223 N. Y. 265, Apr. 23, 1918.....	303, 305, *306, *312, 333, 335
Boice v. Patent Specialty Supply Co., S. D. R., vol. 17, p. 614, Bul., vol. 3, p. 265, July 24, 1918.....	15
Bonke v. Shippers & Son, Death File 4621, Dec. 2, 1916; 181 App. Div. 912, Nov. 14, 1917.....	115
Bonnano v. Metz Bros. Co., Case No. 20062-B, Jan. 20, 1919; — App. Div. —, June 30, 1919.....	*129

Boscarino v. Carfagno & Dragonette, Claim No. 43262, Oct. 29, 1915;	175
App. Div. 286, Nov. 15, 1916; 220 N. Y. 323, Mar. 13, 1917..55, 63, *64, *68, 73	
Bottjer v. Wall Rope Works, S. D. R., vol. 18, p. 546, Bul., vol. 4, p. 28,	
Oct. 30, 1918, — App. Div. —, May 9, 1919.....	112, 113
Brastowicz v. Doehler Die Casting Co., S. D. R., vol. 17, p. 650, Bul., vol.	
4, p. 24, Oct. 16, 1918; 187 App. Div. 961, Mar. 5, 1919.....	12, *18
Brewinski v. Pullman Co., S. D. R., vol. 17, p. 644, Bul., vol. 4, p. 24,	
Oct. 15, 1918.....	254
Brockelbank v. Funk, S. D. R., vol. 15, p. 651, Bul., vol. 3, p. 156, Mar. 14,	
1918; 186 App. Div. 924, Nov. 13, 1918.....	353
Brotherton v. Rock Salt Corp., Death Claim, No. 128-R, Sept. 28, 1917;	
183 App. Div. 911, Mar. 6, 1918.....	126
Bryant v. Pullman Co., S. D. R., vol. 19, p. 456, Feb. 18, 1919; — App.	
Div. —, June 30, 1919.....	156, *221
Buono v. Stanley Co., Case No. 200516, Mar. 7, 1919; — App. Div. —,	
June 30, 1919.....	47
Burns v. Products Mfg. Co., Case No. 3278, June 15, 1917; 181 App. Div.	
910, Nov. 14, 1917; 223 N. Y. Rep. 684, May 14, 1918.....	356
Bylow v. St. Regis Paper Co., S. D. R., vol. 12, p. 526, Jan. 3, 1917; 179	
App. Div. 555, Sept. 13, 1917.....	101, 114, *141
Calamari v. Winston & Co., Death Claim, No. 67471, June 15, 1917; 184	
App. Div. 923, May 17, 1918; 224 N. Y. Rep. 622, Oct. 22, 1918.....	251
Camardi v. Snare & Triest Co., Bul., vol. 4, p. 29, Oct. 30, 1918.....	237
Cameron v. Acheson Graphite Co., S. D. R., vol. 14, p. 683, Bul., vol. 3,	
p. 77, Nov. 15, 1917.....	95, *151
Campanella v. Stola Construction and Building Co., S. D. R., vol. 9, p. 385,	
Aug. 15, 1916.....	346
Caplan v. Belber Trunk & Bag Co., S. D. R., vol. 18, p. 563, Bul., vol. 4,	
p. 54, Nov. 19, 1918.....	345
Carkey v. Island Paper Co., S. D. R., vol. 6, p. 321, Nov. 3, 1915; 177	
App. Div. 73, Mar. 7, 1917.....	28, *52, *158
Carman v. Loper Bros., S. D. R., vol. 14, p. 727, Bul., vol. 3, p. 117, Jan.	
2, 1918; 185 App. Div. 901, July 2, 1918.....	291
Carney v. Lehigh Valley R. R. Co., S. D. R., vol. 17, p. 647, Bul., vol. 4,	
p. 25, Oct. 15, 1918.....	355
Carroll v. Knickerbocker Ice Co., 169 App. Div. 450, Sept. 15, 1915; 218	
N. Y. 435, July 11, 1916.....	287, 296
Casella v. McCormick, Death Case, No. 505, May 24, 1917; 180 App. Div.	
94, Nov. 14, 1917.....	*136
Chabot v. Terry Bros. Co., Death File, No. 21735, Nov. 14, 1917; 184	
App. Div. 917, May 8, 1918.....	117
Charvat v. Wilson & Co., S. D. R., vol. 14, p. 555, Bul., vol. 2, p. 162, May	
14, 1917; 181 App. Div. 962, Dec. 28, 1917.....	*223
Chase v. Eastern Estate Tea Co., S. D. R., vol. 18, p. 577, Nov. 21, 1918;	
— App. Div. —, May 20, 1919.....	74
Chase v. Fairbanks, Morse & Co., S. D. R., vol. 4, p. 369, Apr. 30, 1915;	
181 App. Div. 908, Nov. 14, 1917.....	119
Chludzinski v. Standard Oil Co., S. D. R., vol. 9, p. 397, Aug. 15, 1916;	
176 App. Div. 87, Dec. 28, 1916.....	347

Cianco v. West End Paper Co., Death Case, No. 188, Nov. 15, 1918; — App. Div. —, June 30, 1919.....	131
Ciarla v. Solvay Process Co., S. D. R., vol. 16, p. 469, Bul., vol. 3, p. 230, May 10, 1918; 184 App. Div. 629, Nov. 13, 1918; 226 N. Y. Rep. —, Mar. 11, 1919.....	158
Cirringione v. Ritz Realty Corp., Death Case No. 46556, Sept. 26, 1917; 182 App. Div. 907, Jan. 18, 1918.....	115
Claremont v. DeCoss, S. D. R., vol. 7, p. 463, Mar. 2, 1916; 175 App. Div. 952, Nov. 16, 1916; 220 N. Y. Rep. 671, Mar. 20, 1917.....	143, 195, 206
Clemens v. Clemens & Grell (No. 2), 180 App. Div. 92, Nov. 14, 1917.....	350, 351
Cobb v. Library Bureau, S. D. R., vol. 8, p. 418, Mar. 22, 1916; 176 App. Div. 91, Dec. 28, 1916; 221 N. Y. Rep. 574, June 12, 1917.....	55, 56
Cohen v. Berman, et al., S. D. R., vol. 14, p. 599, Bul., vol. 2, p. 256, Aug. 14, 1917.....	233, 234
Cohen v. Rothstein & Pitofsky, S. D. R., vol. 9, p. 302, June 9, 1916; 176 App. Div. 35, Dec. 28, 1916.....	141, 142, 247
Collins v. Brooklyn Union Gas Co., S. D. R., vol. 4, p. 449, July 13, 1915; 171 App. Div. 381, Jan. 18, 1916.....	34
Colon v. American Linoleum Mfg. Co., S. D. R., vol. 15, p. 670, Apr. 1, 1918; 184 App. Div. 734, Nov. 13, 1918.....	55
Combes v. Geibel, Cases No. 45622 and 45623; 187 App. Div. 912, Jan. 15, 1919; 226 N. Y. 291, Apr. 29, 1919.....	51
Comi v. Smith & Sons, S. D. R., vol. 12, p. 559, Bul., vol. 2, pp. 93, 102, Jan. 24, 1917.....	10
Conley v. Hickey, Case No. 6547, Apr. 26, 1917; 181 App. Div. 911, Nov. 14, 1917.....	2
Connolly v. Tucker Electrical Construction Co., Case No. 9217, Apr. 16, 1917; — App. Div. —; S. D. R., vol. 14, p. 716, Bul., vol. 3, p. 119, Jan. 2, 1918; 184 App. Div. 921, May 21, 1918.....	25
Connors v. Semet-Solvay Co., Bul., vol. 2, p. 115; 94 Misc. 405, Mar., 1916.....	7
Contrafatto v. Spooner & Son, S. D. R., vol. 7, p. 477, Mar. 8, 1916.....	34
Cooley v. American LaFrance Fire Engine Co., S. D. R., vol. 16, p. 429, Apr. 15, 1918; 185 App. Div. 918, Sept. 17, 1918.....	56
Coopersmith v. Silverstein & Wallin, S. D. R., vol. 14, p. 613, Bul., vol. 3, p. 11, Sept. 5, 1917.....	22
Crawford v. New York Consolidated R. R. Co., S. D. R., vol. 14, p. 605, Bul., vol. 3, p. 13, Sept. 5, 1917.....	7
Crinieri v. Gross, S. D. R., vol. 16, p. 432, Apr. 17, 1918; 184 App. Div. 817, Nov. 13, 1918.....	268, 271, 272, *273, 274
Crockett v. International Railway Co., Bul., vol. 2, p. 97; 170 App. Div. 122, Nov. 10, 1915; 176 App. Div. 45, Dec. 28, 1916.....	*85, 100, 119
Crotty v. Pa. R. R. Co., S. D. R., vol. 9, p. 364, July 19, 1916.....	19, 20
Cummings v. Underwood Silk Fabric Co., Death File, No. 2296, Mar. 20, 1917; 184 App. Div. 456, Sept. 11, 1918; — App. Div. —, Jan. 14, 1919.....	7
Dale v. Hual Construction Co., S. D. R., vol. 9, p. 282, May 24, 1916; 175 App. Div. 284, Nov. 15, 1916.....	*210, 213

Dale v. Saunders Bros., S. D. R., vol. 5, p. 372, July 16, 1915; 171 App. Div. 528, Mar. 15, 1916; 218 N. Y. 59, Apr. 25, 1916.....	210, 213
Dalecky v. Berkowitz, S. D. R., vol. 14, p. 706, Bul., vol. 3, p. 102, Dec. 11, 1917	95, 100
Daw v. Underwriters' Association of N. Y., S. D. R., vol. 16, p. 454, Bul., vol. 3, p. 198, May 10, 1918.....	74
Days v. Trimmer & Sons, S. D. R., vol. 9, p. 285, May 25, 1916; 176 App. Div. 124, Dec. 28, 1916.....	38
Dearborn v. Peugeot Auto Import Co., 170 App. Div. 93, Nov. 10, 1915; S. D. R., vol. 7, p. 413, Feb. 3, 1916; 175 App. Div. 957, Nov. 15, 1916	154, 279
Deecke v. Huyler's Corp., S. D. R., vol. 15, p. 671, Bul., vol. 3, p. 169, Apr. 2, 1918	257, 266, 304
DeGaglio v. Bradley Contracting Co., S. D. R., vol. 15, p. 590, Bul., vol. 3, p. 120, Dec. 11, 1917; Claim No. 75360, Jan. 18, 1918; 184 App. Div. 243, July 1, 1918.....	257, *264, *265, 338
DeNoyer v. Cavanaugh, S. D. R., vol. 10, p. 599, Sept. 28, 1916; 177 App. Div. 939, Mar. 21, 1917; 221 N. Y. 273, July 11, 1917.....	*211, 218
Devereaux v. 150 East 72d St., S. D. R., vol. 18, p. 568, Bul., vol. 4, p. 53, Nov. 12, 1918.....	156, 355
Devorak v. Wilson & Co., S. D. R., vol. 14, p. 555, Bul., vol. 2, p. 162, May 14, 1917; 181 App. Div. 962, Dec. 28, 1917.....	*223
Dietz v. Solomonwitz, S. D. R., vol. 12, p. 555, Bul., vol. 2, p. 102, Jan. 24, 1917; 179 App. Div. 560, Sept. 13, 1917.....	193
Dissosway v. Jallade, S. D. R., vol. 7, p. 449, Feb. 17, 1916.....	224, 225
Divota et al. v. Wilson & Co., S. D. R., vol. 14, p. 555, Bul., vol. 2, p. 162, May 14, 1917; 181 App. Div. 962, Dec. 28, 1917.....	*223
Dodd v. 461 Eighth Avenue Co., S. D. R., vol. 16, p. 427, Apr. 8, and Nov. 12, 1918; — App. Div. —, May 7, 1919.....	93, 97, 99, 186
Doey v. Howland Co., Death Case. No. 6079, Sept. 14, 1917; 182 App. Div. 152, Mar. 7, 1918; 224 N. Y. 30, June 4, 1918.....	249
Dollard v. Transit Development Co., S. D. R., vol. 8, p. 449, Apr. 12, 1916; 176 App. Div. 924, Dec. 28, 1916.....	328
Donohue v. McKaig-Hatch, Claim No. 57432, June 27, 1916; 177 App. Div. 938, Mar. 7, 1917; 223 N. Y. Rep. 572, Mar. 19, 1918.....	56, 59
Dorb v. Stearns & Co., Case No. 5795, Mar. 7, 1917; 180 App. Div. 138, Nov. 14, 1917.....	*329, 332, 333, 352
Draper v. International Ry. Co., S. D. R., vol. 19, p. 543, Bul., vol. 4, p. 162, Apr. 30, 1919.....	95
Drennan v. Buffalo Dry Dock Co., S. D. R., vol. 12, p. 574, Feb. 13, 1917...	63
Driscoll v. Gillen & Sons, Bul., vol. 3, p. 264, July 31, 1918; 187 App. Div. 908, Jan. 8, 1919; 226 N. Y. Rep. —, Mar. 11, 1919.....	*348
Drummond v. Isbell-Porter Co., Death Case, No. 1872, Dec. 18, 1918; — App. Div. —, June 30, 1919.....	*131
Dugan v. McArdle, S. D. R., vol. 16, p. 472, Bul., vol. 3, p. 199, May 10, 1918; 184 App. Div. 570, Sept. 26, 1918; 225 N. Y. Rep. 668, Jan. 21, 1919	338
Dutcher v. American Express Co., S. D. R., vol. 15, p. 594, Jan. 30, 1918; 183 App. Div. 162, May 8, 1918.....	56, *57

Easter v. Washington Heights Van Co., S. D. R., vol. 16, p. 438, Bul., vol. 3, p. 176, Apr. 23, 1918.....	254, *255
Edsall, State Industrial Commission v., Death File, No. 2064, Nov. 29, 1916; 179 App. Div. 481, July 3, 1917; 222 N. Y. 651, Jan. 29, 1918....	*29
Edwards v. Havens & Wilde, S. D. R., vol. 14, p. 594, Bul., vol. 2, p. 254, Aug. 6, 1917.....	343
Eldridge v. Endicott, Johnson & Co., S. D. R., vol. 8, p. 445, Bul., vol. 1, No. 8, p. 8, Apr. 12, 1916, Bul., vol. 4, p. 53, Nov. 12, 1918; S. D. R., vol. 19, p. 431, Jan. 20, 1919; — App. Div. —, argued May 7, 1919.....	373, 374
Elsinger v. Remhof, Bul., vol. 3, p. 99, Dec. 11, 1917.....	321
Erickson v. Preuss, Case No. 12625, Sept. 18, 1917; 183 App. Div. 912, Mar. 6, 1918; 223 N. Y. 365, May 7, 1918.....	33, *73
Fagnani v. Empire Construction Co., S. D. R., vol. 16, p. 464, May 8, 1918; 186 App. Div. 927, Nov. 13, 1918.....	219
Fahey v. Boland Co., Case No. 26849, Mar. 20, 1918; 186 App. Div. 923, Nov. 13, 1918; 226 N. Y. Rep. —, Apr. 22, 1919.....	116
Farrell v. American Can Co., S. D. R., vol. 16, p. 444, Bul., vol. 3, p. 178, Apr. 23, 1918.....	345
Farrell v. Swett Iron Works, Case No. 8433, May 7, 1917; Death Case, No. 9257, Aug. 16, 1917; 184 App. Div. 919, May 8, 1918.....	16, 252, 304
Fawcett v. Lagenbacher Bros., Claim No. 40370, June 25, 1917; 181 App. Div. 911, Nov. 14, 1917; 223 N. Y. Rep. 680, May 14, 1918.....	188
Feinman v. Albert Manufacturing Co., S. D. R., vol. 4, p. 365, Apr. 26, 1915; 170 App. Div. 147, Nov. 10, 1915.....	48
Fielding v. Flinn-O'Rourke Co. See LeFevre v. Flinn-O'Rourke Co.	
Finch v. Sullivan, S. D. R., vol. 19, p. 500, Bul., vol. 4, p. 148, Mar. 11, 1919.....	160
Finley v. Empire Construction Co., S. D. R., vol. 17, p. 607, June 17, 1918; 186 App. Div. 926, Nov. 13, 1918.....	239
Fiocca v. Dillon, S. D. R., vol. 7, p. 399, Feb. 1, 1916; 175 App. Div. 957, Nov. 15, 1916.....	143
Fischer v. Genesee Construction Co., S. D. R., vol. 17, p. 616, July 24, 1918; 187 App. Div. 850, May 7, 1919.....	*291, 356, 360, 367, 368, 381
Fitzsimmons v. Wadsworth, S. D. R., vol. 6, p. 351, Nov. 24, 1915; 177 App. Div. 938, Mar. 7, 1917.....	346
Fleming v. Gair Co., S. D. R., vol. 10, p. 564, Aug. 30, 1916; 176 App. Div. 23, Dec. 20, 1916.....	345
Flori v. Stewart & Co., S. D. R., vol. 8, p. 503, May 17, 1916.....	60
Foley v. Pierce-Arrow Motor Car Co., — App. Div. —, Dec., 1917; File No. 6861, Nov. 8, 1918; — App. Div. —, May 7, 1919.....	73
Folts v. Robertson, S. D. R., vol. 18, p. 579, Bul., vol. 4, pp. 74, 87, Nov. 26, 1918; — App. Div. —, June 30, 1919.....	*542
Fredenberg v. Empire U. Railways, Claim No. 44696, Jan. 28, 1915; 168 App. Div. 618, July 1, 1915; 170 App. Div. 942, Sept. 14, 1915; Claim No. 44696, May 13, 1916, and Apr. 27, 1917.....	32, 188
Frey v. McLoughlan Bros., S. D. R., vol. 17, p. 591, Bul., vol. 3, p. 215, June 11, 1918; 187 App. Div. 824, May 7, 1919.....	*100
Frings v. Pierce-Arrow Motor Car Co., Claim No. 6259, Dec. 10, 1917; 182 App. Div. 445, Mar. 6, 1918.....	69, *70

	PAGE
Frohder v. Van Gelder, S. D. R., vol. 14, p. 573, Bul., vol. 2, p. 213, June 19, 1917	343
Galas v. Capital Seat and Novelty Co., S. D. R., vol. 16, p. 487, Bul., vol. 3, p. 200, May 10, 1918	55
Gallagher v. N. Y. Central R. R. Co., S. D. R., vol. 9, p. 335, Bul., vol. 1, No. 11, p. 21, June 20, 1916	*222
Gandy v. Bass Holding Co., S. D. R., vol. 14, p. 561, Bul., vol. 2, p. 204, June 6, 1917	154
Gardner v. Horseheads Construction Co., S. D. R., vol. 4, p. 437, June 30, 1915; 171 App. Div. 66, Jan. 5, 1916; Claim No. 60909, Apr. 27, 1917; 181 App. Div. 915, Nov. 28, 1917	295
Garlapow v. Zuckmaier Bros., Death File, No. 18541, Apr. 18, 1917; 181 App. Div. 962, Dec. 28, 1917	115, 254
Geidel v. Interborough Rapid Transit Co., Case No. 14923, Oct. 25, 1917; 184 App. Div. 917, May 8, 1918	347
Geiger v. Gotham Can Co., S. D. R., vol. 9, p. 249, June 8, 1916; 177 App. Div. 29, Mar. 7, 1917	*43
Gifford v. Patterson, Bul., vol. 2, p. 129, Mar. 15, 1917; 179 App. Div. 420, July 2, 1917; 222 N. Y. 4, Nov. 20, 1917	351
Gilbert v. Des Lauriers Column Mould Co., 180 App. Div. 59, Nov. 14, 1917	240
Glaxon v. Moritz, S. D. R., vol. 19, p. 425, Nov. 15, 1918; — App. Div. —, June 30, 1919	220
Gleason v. Hall, S. D. R., vol. 12, p. 547, Jan. 15, 1917	39, 79
Gleasoner v. Gross & Herbener, 170 App. Div. 37, Nov. 10, 1915	346
Goldflam v. Kazemier & Uhl, 181 App. Div. 140, Dec. 28, 1917	11, 16, *27, 193
Goldstein v. Centre Iron Works, 167 App. Div. 526, May 5, 1915	295
Gollnick v. Steinway & Sons, Case No. 52190, June 10, 1918; 186 App. Div. 926, Nov. 13, 1918	340
Gordon v. Holbrook, Cabot & Rollins Corp., 181 App. Div. 959, Dec. 29, 1917; S. D. R., vol. 17, p. 588, Bul., vol. 3, p. 219, June 11, 1918; — App. Div. —, May 7, 1919	*72, 333, *334, 342
Gorman v. N. Y. Railways Co., S. D. R., vol. 18, p. 585, Bul., vol. 4, p. 87, Dec. 11, 1918	113
Gorton v. Eastman Kodak Co., Bul., vol. 2, p. 150, Apr. 11, 1917; 181 App. Div. 909, Nov. 14, 1917	346
Grafte v. Art Color Printing Co., Bul., vol. 3, p. 157, Mar. 14, 1918	345
Grammici v. Zinn, Bul., vol. 2, pp. 55, 61, S. D. R., vol. 5, p. 400, Aug. 18, 1915; 173 App. Div. 922, Mar. 8, 1916; 219 N. Y. 322, Nov. 28, 1916	52, 65, 68
Granofsky v. Bing & Bing Construction Co., Claim No. 28900, Apr. 5, 1916; 181 App. Div. 909, Nov. 14, 1917	96, 255
Greenwood v. Champlain Silk Mills, File No. 25971, July 29, 1918; 187 App. Div. 911, Jan. 8, 1919	41
Gregory v. Suffolk Light, Heat & Power Co., S. D. R., vol. 12, p. 520, Bul., vol. 2, p. 65, Dec. 27, 1916	126
Gregson v. Union Ry. Co., Case No. 50282, Dec. 10, 1917; 184 App. Div. 919, May 8, 1918	336

Gressert v. Mousette Co., Death Case, No. 13788, Jan. 10, 1919; 187 App. Div. 965, Mar. 14, 1919.....	117
Grubesich v. Valley Mills Co., S. D. R., vol. 14, p. 666, Bul., vol. 3, p. 54, Oct. 18, 1917.....	96, 135, 192
Gurnett v. Ross Co., S. D. R., vol. 13, p. 535, Mar. 13, 1917, Bul., vol. 2, p. 126, Mar. 14, 1917; 181 App. Div. 910, Nov. 14, 1917.....	143, 154
Hadden v. Stanton, S. D. R., vol. 9, p. 294, June 5, 1916; 177 App. Div. 938, Mar. 7, 1917.....	194, 211
Haley v. Boston & Albany R. R., S. D. R., vol. 16, p. 518, May 15, 1918; 186 App. Div. 926, Nov. 13, 1918; 225 N. Y. Rep. 669, Jan. 21, 1919....	353
Halstead v. Bull, Death File, No. 18775, Nov. 19, 1917; 184 App. Div. 919, May 8, 1918.....	115, 116
Hanke v. N. Y. Consolidated R. R. Co., 168 N. Y. Supp. 234, Dec. 21, 1917.....	279
Hansen v. Turner Construction Co., Death Case, No. 55931, Jan. 28, 1918; 185 App. Div. 901, July 2, 1918; 224 N. Y. 331, Oct. 29, 1918.....	*289
Hargraves v. Shevlin Mfg. Co., S. D. R., vol. 10, p. 641, Nov. 6, 1916; 179 App. Div. 477, July 2, 1917; 222 N. Y. 646, Jan. 22, 1918... 232, 233, 234, *235	
Harrison v. American Cooperage Co., S. D. R., vol. 8, p. 402, Mar. 14, 1916; — App. Div. —, Sept., 1916; Death File, No. 422, Feb. 13, 1917; — App. Div. —, May 4, 1917; Death File, No. 422, July 13, 1917	290, 291, 319
Hartell v. Simonson & Son Co., 164 App. Div. 873, July, 1914; 218 N. Y. 345, June 6, 1916.....	213
Hartman v. American Meter Co., S. D. R., vol. 17, p. 600, June 13, 1918....	42
Hassen v. Elm Coal Co., Bul., vol. 3, p. 98, Dec. 11, 1917; 184 App. Div. 715, Nov. 13, 1918.....	*248, *249
Hayes v. Lissberger & Son, Death Case, No. 56450, Nov. 27, 1917; 184 App. Div. 918, May 8, 1918.....	347
Henderson v. Donovan Co., Case No. 16407, Feb. 3, 1917; 178 App. Div. 946, May 17, 1917; Death Case, No. 19214, Jan. 24, 1918; 185 App. Div. 901, July 2, 1918.....	328
Herald v. Cohen & Symanski, Claim No. 26892, Aug. 28, 1918; 186 App. Div. 933, Nov. 22, 1918.....	240, 241
Herkey v. Agar Manufacturing Co., 90 Misc. 457, May, 1915.....	278
Hermann v. Wolff, S. D. R., vol. 18, p. 609, Bul., vol. 4, p. 88, Dec. 23, 1918	346
Hernon v. Holihan, S. D. R., vol. 14, p. 597, Bul., vol. 3, p. 4, Aug. 13, 1917; 182 App. Div. 126, Mar. 6, 1918.....	291
Hirsch v. Zurich General A. & L. Ins. Co., 97 Misc. 360, Nov., 1916....	*22, 23
Hoag v. Ulster & Delaware R. R. Co., 177 App. Div. 433, Mar. 22, 1917; Bul., vol. 3, p. 134, Nov., 1917.....	96
Hobertis v. Columbia Shirt Co., S. D. R., vol. 17, p. 582, June 5, 1918; 186 App. Div. 397, Jan. 8, 1919.....	*72
Hogan v. Edward Engineering Co., Case No. 56857, Apr. 11, 1918; 186 App. Div. 921, Nov. 13, 1918; 226 N. Y. Rep. —, Mar. 11, 1919.....	135
Holmes v. Communipaw Steel Co., Disability Case, No. 57623, Death Case No. 57553, June 19, 1918; 186 App. Div. 645, Mar. 5, 1919.....	296
Homann v. Weeks, S. D. R., vol. 7, p. 447, Feb. 17, 1916; 175 App. Div. 959, Nov. 15, 1916.....	37

	PAGE
Hoover v. Vulco Engineering Co., S. D. R., vol. 13, p. 513, Mar. 6, 1917.....	60
Horrigan v. Post-Standard Co., Death Case, No. 3-178, Jan. 17, 1918; 184 App. Div. 921, 922, May 21, 1918; 224 N. Y. Rep. 620, Oct. 22, 1918.....	374
House v. Robinson & Carpenter, File No. 7796, July 2, 1917; 181 App. Div. 911, Nov. 14, 1917.....	20
Hudec et al. v. Wilson Co., S. D. R., vol. 14, p. 555, May 14, 1917; 181 App. Div. 961, Dec. 28, 1917.....	*223
Hudspeth v. Pierce-Arrow Motor Car Co., 180 App. Div. 147, Nov. 14, 1917	*256
Hungerford v. Bonn, S. D. R., vol. 14, p. 720, Bul., vol. 3, p. 121, Jan. 2, 1918; 183 App. Div. 818, July 1, 1918.....	*239
Hyland v. Wynant, S. D. R., vol. 6, p. 304, Sept. 23, 1915.....	345
Hynes v. Pullman Co., Case No. 17253, Mar. 20, 1917; 179 App. Div. 966, Sept. 27, 1917; 223 N. Y. 342, Apr. 30, 1918.....	314, *315, 329, 335
Iacomini v. O'Rourke Contracting Co., S. D. R., vol. 16, p. 449, Apr. 29, 1918	27
Ide v. Faul & Timmins, 179 App. Div. 567, Sept. 13, 1917....	*45, 47, 78, *159
Jackson v. Sherman Paper Co., S. D. R., vol. 10, p. 605, Bul., vol. 2, p. 1, Oct. 19, 1916.....	100
Jelliff v. Crescent Bread Co., S. D. R., vol. 16, p. 511, May 13, 1918.....	254
Jenkins v. Hogan & Sons, S. D. R., vol. 9, p. 380, July 31, 1916; 177 App. Div. 36, Mar. 7, 1917.....	240
Jobst v. Broadway-Fort Washington Corp. or Lawyers Mortgage Co., S. D. R., vol. 17, p. 595, Bul., vol. 3, p. 219, June 11, 1918.....	224
Juharz v. Moline Plow Co., Bul., vol. 2, p. 128, Mar. 15, 1917.....	347
Junk v. Terry & Tench Co., 176 App. Div. 855, Mar. 9, 1917; S. D. R., vol. 16, p. 495, Bul., vol. 3, pp. 201, 227, 230, May 10, 1918. *14, 17, 22, *245	
Kackel v. Serviss, 180 App. Div. 54, Nov. 14, 1917.....	*199, 206
Kaempfer v. Automobile Club of America, S. D. R., vol. 10, p. 591, Bul., vol. 2, p. 10, Sept. 15, 1916.....	79
Kanzar v. Acorn Manufacturing Co., S. D. R., vol. 5, p. 418, Bul., vol. 2, pp. 55, 76, Oct. 1, 1915; 173 App. Div. 988, May 3, 1916; 219 N. Y. 326, Nov. 28, 1916.....	52
Kavanaugh v. Wolf, S. D. R., vol. 14, p. 648, Bul., vol. 3, p. 48, Sept. 29, 1917	344
Keigher v. General Electric Co., 173 App. Div. 207, May 3, 1916. 13, 17, 22, 23	
Kelly v. Borden's Condensed Milk Co., File No. 25418, July 25, 1917.....	103
Kennedy v. Central City Roofing Co., S. D. R., vol. 15, p. 618, Bul., vol. 3, p. 145, Feb. 27, 1918.....	117, *118
Kennedy v. Loggie Bros., S. D. R., vol. 7, p. 411, Feb. 3, 1916; 175 App. Div. 957, Nov. 15, 1916.....	113
Kerrigan v. Interborough Rapid Transit Co., Bul., vol. 2, p. 149, Apr. 24, 1917	123, *124
Kifer v. Buffalo Chair Works, S. D. R., vol. 11, p. 642, Bul., vol. 2, p. 66, Dec. 27, 1916.....	84, 377
Kilbourn v. Woodcock, Claim No. 26904, Oct. 11, 1918; — App. Div. —, May 7, 1919.....	342
Klein v. Brooklyn Heights R. R. Co., Case No. 275248, Dec. 30, 1918; — App. Div. —, June 30, 1919.....	110, *111

Klein v. Stoller & Cook Co., S. D. R., vol. 8, p. 440, Apr. 10, 1916; 175 App. Div. 958, Nov. 15, 1916; 220 N. Y. Rep. 670, Mar. 20, 1917.....	249
Knerr v. Asbestos Protected Metal Co., S. D. R., vol. 12, p. 589, Bul., vol. 2, p. 106, Feb. 21, 1917.....	32, 160, *184
Kobyra v. Adams, S. D. R., vol. 8, p. 491, May 8, 1916; 176 App. Div. 43, Dec. 28, 1916.....	346
Koenig v. Howes Construction Co., S. D. R. vol. 18, p. 555, Bul., vol. 4, p. 35, Nov. 12, 1918.....	219
Kolb v. Brummer, Case No. 56514, May 10, 1918; 185 App. Div. 835, Nov. 22, 1918; 226 N. Y. Rep. —, Mar. 18, 1919.....	*230, 234
Kossoff v. Macy & Co., S. D. R., vol. 7, p. 430, Feb. 10, 1916; 175 App. Div. 959, Nov. 15, 1916.....	37
Kriegbaum v. Buffalo Wire Works, Bul., vol. 2, p. 230, July 5, 1917; 182 App. Div. 448, Mar. 6, 1918; 224 N. Y. Rep. 621, Oct. 22, 1918..	28, *358, 367
Kucharuk v. McQueen, Claim Nos. 38627 and 17895, June 5, 1916; 176 App. Div. 923, Dec. 29, 1916; 221 N. Y. Rep. 607, July 11, 1917.....	212
Kulp v. Stabell Co., S. D. R., vol. 17, p. 629, Aug. 16, 1918.....	75, 252, 304
Kunasek v. N. Y. Consolidated Car Co., 176 App. Div. 135, Dec. 28, 1916..	*20
Lantz v. Treyz & Co., S. D. R., vol. 16, p. 479, Bul., vol. 3, p. 200, May 10, 1918	344
Leczowski v. Lafave & Bellinger, S. D. R., vol. 14, p. 701, Bul., vol. 3, p. 81, Nov. 15, 1917.....	254
Lee v. Cranford Co., 182 App. Div. 191, Feb. 21, 1918.....	*212
Lee v. Transit Development Co., S. D. R., vol. 16, p. 528, May 27, 1918; 185 App. Div. 919, Sept. 20, 1918.....	116, *213
Leesman v. Drew Bros., S. D. R., vol. 14, p. 679, Bul., vol. 3, p. 50, Oct. 18, 1917; 182 App. Div. 907, Jan. 18, 1918.....	143, 144, *145, 146
LeFevre v. Flinn-O'Rourke Co., File No. 11063, Mar. 14, 1917; 181 App. Div. 908, Nov. 14, 1917.....	104, 105, 119
Leiser v. General Drop Forge Co., S. D. R., vol. 7, p. 467, Mar. 3, 1916..	188, 249
Lettiere v. Degnon Contracting Co., S. D. R., vol. 15, p. 604, Feb. 15, 1918	252, 304
Levin v. Somer & Nestle, Case No. 64885, Sept. 20, 1918; 187 App. Div. 915, Jan. 15, 1919.....	342
Levine v. Fox, S. D. R., vol. 16, p. 503, Bul., vol. 3, p. 197, May 10, 1918..	234
Liebenberg v. Rosenthal, S. D. R., vol. 12, p. 535, Bul., vol. 2, p. 89, Jan. 10, 1917	225
Liiamaa v. Johnson, Case No. 20877, Aug. 2, 1918; 187 App. Div. 911, Jan. 8, 1919.....	176
Lindfors v. Wheeler, Death Case, No. 101283, Aug. 8, 1898; 187 App. Div. 961, Mar. 5, 1919.....	97
Lindsay v. Gallagher, S. D. R., vol. 9, p. 275, May 18, 1916. Bul., vol. 2, p. 50, Nov., 1916; — App. Div. —, Mar. 20, 1917.....	19
Littler v. Fuller Co., Case No. 23951, Sept. 14, 1917; 182 App. Div. 907, Jan. 18, 1918; 223 N. Y. 369, May 7, 1918.....	143, 146, *147
Litts v. Risley Lumber Co., S. D. R., vol. 14, p. 714, Bul., vol. 3, p. 119, Jan. 2, 1918; 184 App. Div. 919, May 8, 1918; 224 N. Y. 321, Oct. 29, 1918	371
Lupke v. Simon, S. D. R., vol. 11, p. 617, Bul., vol. 2, p. 45, Nov. 22, 1916..	372

	PAGE
McCall v. Hecht, S. D. R., vol. 17, p. 653, Bul., vol. 4, p. 22, Oct. 16, 1918	*361, 365, 371
McDowell v. New Film Corp. or Dispatch Film Corp., Bul., vol. 3, p. 10, Sept. 5, 1917; 183 App. Div. 910, Mar. 6, 1918.....	335
McGuire. See Yonkers R. R. Co., No. 1, Matter of.	
McNally v. Diamond Mills Paper Co., S. D. R., vol. 8, p. 431, Bul., vol. 1, No. 7, p. 8, Apr. 5, 1916, S. D. R., vol. 9, p. 352, July 11, 1916; 178 App. Div. 342, May 2, 1917; 223 N. Y. 83, Mar. 12, 1918.....	370, 371
McNeil v. N. Y. Central R. R. Co., Death Claim No. 14239, July 11, 1916; 181 App. Div. 912, Nov. 14, 1917.....	17
Mack v. N. Y. Dock Co., Death Case, No. 24142, July 16, 1917; 181 App. Div. 963, Dec. 29, 1917; 223 N. Y. Rep. 683, May 14, 1918.....	16
Mahatcek v. Gordon & Son, Bul., vol. 2, p. 232, July 24, 1917; Death Case, No. 100335, July 3, 1918; 186 App. Div. 932, Nov. 22, 1918.....	116
Maley v. O'Boyle, S. D. R., vol. 10, p. 612, Oct. 25, 1916.....	193
Marhoffer v. Marhoffer, S. D. R., vol. 8, p. 438, Apr. 6, 1916; 175 App. Div. 52, Nov. 15, 1916; 220 N. Y. 543, May 1, 1917.....	32, *33, *35
Mark et al. v. Berman, S. D. R., vol. 14, p. 599, Bul., vol. 2, p. 256, Aug. 14, 1917	233, 234
Marland v. Smith & Pearson, S. D. R., vol. 18, p. 558, Bul., vol. 4, p. 35, Nov. 12, 1918; — App. Div. —, May 7, 1919.....	342
Marra v. Nassau Electric Co., S. D. R., vol. 16, p. 501, May 10, 1918; 186 App. Div. 923, Nov. 13, 1918.....	252, 340
Martelliano v. O'Mara Specialty Co., File No. 7661, Dec. 2, 1915; 175 App. Div. 959, Nov. 15, 1916.....	37
Martin v. Roff Underwear Co., S. D. R., vol. 7, p. 481, Mar. 8, 1916; 176 App. Div. 925, Dec. 28, 1916.....	249
Matta v. Dennings Point Brick Works, Death File, No. 14895, Oct. 25, 1917; 182 App. Div. 907, Jan. 18, 1918; 224 N. Y. Rep. 596, Oct. 1, 1918	193, 278
Matter of Petrie, 165 App. Div. 561, Jan. 6, 1915; 215 N. Y. 335, June 15, 1915; 218 N. Y. 116, June 16, 1916.....	42
Matter of Resolution State Industrial Comm., 181 App. Div. 962, Dec. 28, 1917; 224 N. Y. 13, May 28, 1918.....	169, *375
Meens v. Thompson-Starrett Co. et al., S. D. R., vol. 13, p. 553, Bul., vol. 2, p. 153, Apr. 13, 1917.....	223
Mezeritsky v. Mezeritsky & Miller, S. D. R., vol. 15, p. 613, Bul., vol. 3, p. 145, Feb. 26, 1918; 185 App. Div. 919, Sept. 20, 1918.....	12, *13
Mike v. Glens Falls Portland Cement Co., S. D. R., vol. 7, p. 435, Feb. 10, 1916	79
Miller v. Ludlum Steel Co., Bul., vol. 2, pp. 15, 21, Sept. 15, 1916.....	79
Miller v. U. S. Radiator Corp., File No. 12862, June 12, 1917; 183 App. Div. 914, Mar. 15, 1918.....	17
Minardi v. Acheson Graphite Co., Death Case, B-208, May 27, 1918; 187 App. Div. 912, Jan. 8, 1919.....	134
Minniece v. Terry Bros. Co., S. D. R., vol. 11, p. 625, Bul., vol. 2, p. 42, Nov. 22, 1916; 179 App. Div. 949, July 3, 1917; 223 N. Y. Rep. 570, Mar. 19, 1918.....	*149

	PAGE
Mockler v. Hawkes, 173 App. Div. 333, May 3, 1916.....	42
Modra v. Little, Case No. 22337, May 18, 1917; 181 App. Div. 914, Nov. 28, 1917; 223 N. Y. 452, May 28, 1918.....	*60
Mohan v. Cluett & Sons, Bul., vol. 4, p. 56, Nov. 19, 1918.....	12
Molner v. Terry Bros. Co., Bul., vol. 2, p. 227, July 5, 1917.....	*111
Montenari v. Rensselaer Valve Co., S. D. R., vol. 18, p. 592, Bul., vol. 4, p. 73, Dec. 18, 1918.....	291, 344
Moquin v. Robeson Process Co., S. D. R., vol. 7, p. 479, Mar. 8, 1916; 175 App. Div. 957, Nov. 15, 1916.....	113, 114
Moran v. Rodgers & Haggerty, Death File, No. 822, July 5, 1917; 180 App. Div. 821, Dec. 28, 1917.....	*125, 294
Morey v. Worden, S. D. R., vol. 2, p. 494, Jan. 28, 1915.....	11
Mosier v. ———, Bul., vol. 3, p. 178.....	96
Muller v. Westcott Express Co., Bul., vol. 2, p. 226, July 5, 1917.....	343
Murray v. Union Ry. Co., 170 N. Y. Supp. 601; 183 App. Div. 924, May 10, 1918.....	219, *220
Myshekia v. Hall, Death Case, No. 67252, May 8, 1918; 187 App. Div. 961, Mar. 5, 1919.....	122
Napolitano v. Baratz, Death File, No. 351, Apr. 27, 1916; 176 App. Div. 924, Dec. 29, 1916.....	123
Naro v. Rueckheim Bros. & Eckstein, S. D. R., vol. 7, p. 484, Mar. 9, 1916; 175 App. Div. 958, Nov. 15, 1916.....	37
Naud v. King Sewing Machine Co., 95 Misc. 676, June 20, 1916; 178 App. Div. 31, Apr. 4, 1917; 223 N. Y. Rep. 567, Mar. 12, 1918.....	382, *383
Nelson v. Scheier & Kohn, Bul., vol. 3, p. 51, Oct. 18, 1917.....	351
Neuner v. Hanschman, S. D. R., vol. 8, p. 419, Mar. 25, 1916.....	79
New York Central R. R. Co. v. White, 243 U. S. 188, Mar. 6, 1917.....	242
Newman, State Industrial Commission v., S. D. R., vol. 11, p. 645, Jan. 11, 1917; 179 App. Div. 481, July 3, 1917; 222 N. Y. 363, Jan. 29, 1918.....	*29, *30
Newman v. Singer, S. D. R., vol. 12, p. 579, Bul., vol. 2, p. 106, Feb. 17, 1917.....	229
Nolan v. Shevlin Manufacturing Co., S. D. R., vol. 15, p. 640, Bul., vol. 3, p. 155, Mar. 14, 1918; 186 App. Div. 927, Nov. 13, 1918.....	232, 233
North v. McCreery Realty Corp., S. D. R., vol. 6, p. 329, Nov. 17, 1915.....	103, 117
Novembrini v. Holahan, S. D. R., vol. 18, p. 603, Bul., vol. 4, p. 90, Dec. 23, 1918.....	38
Nulle v. Hardman, Peck & Co., 185 App. Div. 351, Dec. 13, 1918.....	*274
Nybroe v. Mills Estate, S. D. R., vol. 18, p. 637, Bul., vol. 4, p. 104; — App. Div. —, May 20, 1919.....	*39
O'Brien v. Flinn-O'Rourke Co., Case No. 26047, Jan. 29, 1917; 179 App. Div. 949, July 3, 1917; 222 N. Y. Rep. 644, Jan. 22, 1918.....	104, 113
O'Connell v. Modern Machine & Tool Co., S. D. R., vol. 7, p. 395, Jan. 26, 1916; 175 App. Div. 959, Nov. 15, 1916.....	37
O'Esau v. Bliss Co., Death Claim, 186 App. Div. 536, Mar. 5, 1919.....	*253, 343

O'Eau v. Bliss Co., Disability Claim, S. D. R., vol. 14, p. 696, Bul., vol. 3, p. 79, Nov. 15, 1917; — App. Div. —, Mar. 5, 1918; File No. 35053, Mar. 22, 1918; 185 App. Div. 900, July 2, 1918; 224 N. Y. Rep. 701, Nov. 26, 1918; S. D. R., vol. 19, p. 444, Jan. 27, 1919; — App. Div. —, June 30, 1919.....	16, *38, 254, 255, 257, 259, *260, *261, 338, *377, 378
O'Shaughnessy v. Empire Construction Co., S. D. R., vol. 16, p. 467, May 8, 1918; 186 App. Div. 927, Nov. 13, 1918.....	234, 238, 239
Owens v. New York Mills Corp., S. D. R., vol. 9, p. 367, July 19, 1916; 178 App. Div. 942, May 2, 1917.....	114
Pallettiere v. Germania Life Ins. Co., S. D. R., vol. 16, p. 461, May 8, 1918	159
Pavia v. Petroleum Iron Works Co., S. D. R., vol. 9, p. 378, July 27, 1916; 178 App. Div. 345, May 2, 1917.....	268, *271
Peake v. Lakin, S. D. R., vol. 9, p. 290, May 31, 1916; 176 App. Div. 917, Dec. 29, 1916; 221 N. Y. 496, May 8, 1917.....	*195, 196, 206
Peck v. Allison, S. D. R., vol. 15, p. 621, Bul., vol. 3, p. 147, Feb. 27, 1918	11, 321
Pellegrino v. Skowfoe, S. D. R., vol. 8, p. 417, Mar. 22, 1916; 175 App. Div. 958, Nov. 15, 1916.....	319
Perlis v. Lederer, S. D. R., vol. 19, p. 507, Bul., vol. 4, p. 146, Mar. 11, 1919	42, 156
Petermann v. Steiner Sons & Co., S. D. R., vol. 8, p. 458, Apr. 20, 1916; 175 App. Div. 963, Nov. 29, 1916.....	37
Petrie, Matter of, 165 App. Div. 561, Jan. 6, 1915; 215 N. Y. 335, June 15, 1915; 218 N. Y. 116, June 16, 1916.....	42
Phonville v. N. Y. & Cuba Steamship Co., Case No. 69787, Aug. 9, 1918; 187 App. Div. 912, Jan. 8, 1919; 226 N. Y. Rep. —, Apr. 22, 1919...	41, *160
Piekarski v. Doehler Die Casting Co., S. D. R., vol. 16, p. 447, Apr. 23, 1918	252, 304
Pifumer v. Rheinstein & Haas, Death Case, No. S-91, Oct. 21, 1918; 187 App. Div. 821, May 7, 1919.....	*128, 139
Pinco v. St. Lawrence Pyrites Co., S. D. R., vol. 19, p. 514, Bul., vol. 4, p. 149, Apr. 9, 1919.....	136, 255
Pirk v. Buffalo Forge Co., S. D. R., vol. 8, p. 492, May 10, 1916.....	148
Powers v. Auburn Button Works, Bul., vol. 2, p. 193.....	59
Prendergast v. Berrien Bros., Death Case, No. 28681, Oct. 10, 1917; 184 App. Div. 240, July 1, 1918; — App. Div. —, Sept. 17, 1918; 186 App. Div. 932, Nov. 22, 1918.....	370, *379
Prentice v. N. Y. State Rys., Files of Commission, Claim No. 29483, Nov. 15, 1915; 181 App. Div. 144, Dec. 28, 1917.....	*143, 149
Profeta v. Retsof Mining Co., Death Case, No. 2137-R, Jan. 3, 1919; — App. Div. —, June 30, 1919.....	*130
Prokopiak v. Buffalo Gas Co., S. D. R., vol. 7, p. 390, Jan. 21, 1916; 176 App. Div. 128, Dec. 28, 1916.....	319, *320
Ramsey v. Fairbanks, Morse & Co., S. D. R., vol. 4, p. 369, Apr. 30, 1915; 181 App. Div. 908, Nov. 14, 1917.....	295
Reddy v. National Excavating Co., S. D. R., vol. 10, p. 621, Oct. 25, 1916; 178 App. Div. 943, May 2, 1917; S. D. R., vol. 14, p. 602, Bul., vol. 2, p. 256, Aug. 14, 1917.....	*372

	PAGE
Redner v. Faber & Son, Bul., vol. 2, p. 162, May 14, 1917; 180 App. Div.	
127, Nov. 14, 1917; 223 N. Y. 379, May 14, 1918.....	84
Reiter v. North Shore Gravel Co., — App. Div. —, Dec. 28, 1917; 185	
App. 910, Sept. 11, 1918.....	*94
Remington v. Briggs Bros. & Co., S. D. R., vol. 14, p. 558, Bul., vol. 2,	
p. 164, May 14, 1917; 179 App. Div. 966, Sept. 27, 1917.....	126, 127
Renda v. Occuizzo, S. D. R., vol. 10, p. 581, Sept. 15, 1916, Bul., vol. 2,	
pp. 14, 46, Nov. 22, 1916.....	224
Rendino v. Continental Can Co., Case No. 68754, Apr. 19, 1918; 186 App.	
Div. 924, Nov. 13, 1918; 226 N. Y. Rep. —, Mar. 11, 1919.....	41
Repo v. Bartlett All-Steel Scythe Co., S. D. R., vol. 17, p. 604, June 17,	
1918	42
Resolution State Industrial Comm., Matter of, 181 App. Div. 962, Dec. 28,	
1917; 224 N. Y. 13, May 28, 1918.....	169, *375
Rhyner v. Hueber Building Co., 171 App. Div. 56, Jan. 5, 1916.....	295
Ricco v. Rome Brass & Copper Co., S. D. R., vol. 19, p. 461, Bul., vol. 4,	
p. 132, Feb. 25, 1919.....	95
Richardson v. Builders' Exchange Assn., S. D. R., vol. 9, p. 317, June 14,	
1916; 179 App. Div. 949, July 3, 1917.....	328, 329
Ridout v. Rodgers & Haggerty, S. D. R., vol. 14, p. 710, Bul., vol. 3,	
p. 101, Dec. 11, 1917; 185 App. Div. 901, July 2, 1918; 224 N. Y. 711,	
Nov. 26, 1918.....	39, 40, 79, 148, 254
Rinke v. Larger Printing Co., Case No. 69304, Apr. 29, 1918; 186 App.	
Div. 926, Nov. 13, 1918.....	340
Rodgers v. Borden's Condensed Milk Co., Death File, No. 27351, July 13,	
1917; 182 App. Div. 906, Jan. 18, 1918.....	334, 335
Rosen v. Jacobwitz, File No. 32203, Aug. 31, 1916; 179 App. Div. 967,	
Sept. 28, 1917.....	329
Rosenblatt v. Royal Table Co., S. D. R., vol. 7, p. 456, Feb. 28, 1916.....	188
Rosenwald v. Fine Hat Mfg. Co., S. D. R., vol. 12, p. 576, Feb. 16, 1917.....	39
Roso v. State Insurance Fund, S. D. R., vol. 11, p. 600, Nov. 10, 1916.....	254
Rudewicz v. Wendell & Evans Co., S. D. R., vol. 6, p. 408, Jan. 18, 1916...	249
Sabatino v. Crimmins Construction Co., 102 Misc. 172, Jan. 9, 1918.....	368
Saccoccio v. Bradley Contracting Co., S. D. R., vol. 6, p. 410, Jan. 26, 1916..	79
Sampson v. O'Dell & Eddy Co., S. D. R., vol. 9, p. 272, May 5, 1916; 176	
App. Div. 923, Dec., 1916.....	114
Sanders v. National Biscuit Co., Case No. 71172, May 27, 1918; 186 App.	
Div. 930, Nov. 18, 1918; 226 N. Y. Rep. —, Mar. 11, 1919.....	341, 342
Sayers v. Bill, Bell & Co., Claim No. 17931, S. D. R., vol. 8, p. 393, Dec.	
22, 1915; 176 App. Div. 938, Jan., 1917; 181 App. Div. 907, Nov. 14,	
1917; 184 App. Div. 923, May 17, 1918.....	188, 236, 241
Schlemovitz v. Goldberg, S. D. R., vol. 19, p. 466, Bul., vol. 4, p. 131, Feb.	
25, 1919	113
Schlenker v. Garford Motor Truck Co., Case No. 34568, Nov. 7, 1917;	
183 App. Div. 166, May 8, 1918.....	*250, *365
Schoor v. Colonial Painting Co., Case No. 70163, May 21, 1918; 187 App.	
Div. 912, Jan. 8, 1919.....	176
Schuler v. Petroll, S. D. R., vol. 15, p. 628, Mar. 11, 1918.....	39

	PAGE
Schwab v. Emporium Forestry Co., Claim No. 1124, Sept. 22, 1914, and Jan. 2, 1915; 167 App. Div. 614, May 5, 1915; — App. Div. —, May 11, 1915; Claim No. 1124, May 12, 1915; 216 N. Y. Rep. 712, Nov. 30, 1915	28, 377
Schweizer v. Schreiner, S. D. R., vol. 9, p. 337, June 21, 1916; 178 App. Div. 945, May, 1917.....	238
Seaman v. Long Island R. R., S. D. R., vol. 18, p. 611, Bul., vol. 4, p. 88, Dec. 23, 1918.....	344
Sedlar v. Mohegan Tube Co., S. D. R., vol. 18, p. 596, Bul., vol. 4, p. 72, Dec. 18, 1918.....	351, 352
See v. Luther, Claim No. 19265, June 20, 1917; 181 App. Div. 910, Nov. 14, 1917	199, 206
Seidenzahl v. Beaulieu Vineyard Distributing Co., S. D. R., vol. 18, p. 624, Bul., vol. 4, p. 96, Jan. 2, 1919; — App. Div. —, May 9, 1919.....	*353
Semmen v. Butterick Publishing Co., 101 Misc. 285, Sept., 1917.....	23, *24
Serafini. See Cianoa v. West End Paper Co.	
Shanley v. American Sugar Refining Co., S. D. R., vol. 14, p. 623, Bul., vol. 3, p. 14, Sept. 11, 1917.....	248
Sheridan v. Fuller Co., Bul., vol. 3, p. 8, Sept. 5, 1917.....	122, 123
Sheridan v. Trainer Construction Co., Case No. 71651, Apr. 3, 1918; 187 App. Div. 915, 964, Jan. 15, 1919.....	252, 295
Shinnick v. Clover Farms Co., 90 Misc. 1, April, 1915; 169 App. Div. 236, July 9, 1915.....	73
Sicardi v. Sarnoff Hat Co., S. D. R., vol. 9, p. 345, July 6, 1916; 176 App. Div. 13, Dec. 28, 1916; Bul., vol. 2, p. 151, Apr. 11, 1917.....	*321, 327
Simonson v. Montauk Metallic Bed Co., Death Case, No. 71526, May 8, 1918; 186 App. Div. 932, Nov. 22, 1918.....	122
Skarpeletzos v. Coumes & Raptis Corp., Case No. 34631, Mar. 20, 1918; 185 App. Div. 900, July 2, 1918; 224 N. Y. Rep. 606, Oct. 15, 1918; — App. Div. —, May 7, 1919.....	*138, 139, 371
Skoczlois v. Vinocur, S. D. R., vol. 7, p. 443, Feb. 17, 1916; 176 App. Div. 924, Dec. 29, 1916; 221 N. Y. 276, July 11, 1917.....	*226, 234
Slane v. Cording & Salzmann, S. D. R., vol. 11, p. 631, Bul., vol. 2, pp. 9, 64, Dec. 20, 1916; 179 App. Div. 952, July 3, 1917.....	355
Sloat v. Rochester Taxicab Co., S. D. R., vol. 8, p. 498, May 12, 1916; 177 App. Div. 57, Mar. 7, 1917; 221 N. Y. 491, May 8, 1917.....	*154, 249
Smith v. Bartle Mfg. Co., S. D. R., vol. 19, p. 458, Bul., vol. 4, p. 143, Feb. 25, 1919	160
Smith v. F. & B. Construction Co., S. D. R., vol. 16, p. 516, May 13, 1918; 185 App. Div. 51, Nov. 18, 1918.....	*71
Smith v. Washburn & Co., Case No. 18733, Sept. 6, 1917; 183 App. Div. 911, Mar. 5, 1918; 224 N. Y. Rep. 619, Oct. 22, 1918.....	266, 267
Sobolewski v. Union Porcelain Works, S. D. R., vol. 13, p. 541, Bul., vol. 2, p. 128, Mar. 14, 1917.....	343
Solotar v. Neuglass & Co., Death Case, No. 33580, Oct. 16, 1918; — App. Div. —, May 7, 1919.....	116, 160, 364
Sorge v. Aldebaran Co., S. D. R., vol. 3, p. 390, Mar. 30, 1915; 171 App. Div. 959, Nov. 22, 1915; 218 N. Y. Rep. 636, May 2, 1916.....	355
Spaduccino v. Hayes & Co., 180 App. Div. 37, Nov. 14, 1917; 223 N. Y. Rep. 681, May 14, 1918.....	*190, 365, 366

	PAGE
Sperduto v. N. Y. City Interborough Ry. Co., Case No. 71632, May 21, 1918; 186 App. Div. 145, Jan. 8, 1919; 226 N. Y. 73, Mar. 18, 1919.	*170, 176, *177, 184, 186, 367, 379
Stagurnos v. Tunnessassa Lumber Co., S. D. R., vol. 14, p. 687, Bul., vol. 3, p. 80, Nov. 15, 1917; 183 App. Div. 751, July 2, 1918.	135, 143, *206
State Industrial Commission, Matter of Resolution, 181 App. Div. 962, Dec. 28, 1917; 224 N. Y. 13, May 28, 1918.	169, *375
State Industrial Commission v. Edsall, Death File, No. 2064, Nov. 29, 1916; 179 App. Div. 481, July 3, 1917; 222 N. Y. 651, Jan. 29, 1918.	*29
State Industrial Commission v. Newman, S. D. R., vol. 11, p. 645, Jan. 11, 1917; 179 App. Div. 481, July 3, 1917; 222 N. Y. 363, Jan. 29, 1918.	*29, *30
State Industrial Commission v. Yonkers R. R. Co. (No. 1), Resolution of Commission, May 21, 1918; — App. Div. —, Jan. 8, 1919.	176
State Industrial Commission v. Yonkers R. R. Co. (No. 2), Resolution of Commission, July 30, 1918; 186 App. Div. 192, Jan. 8, 1919.	*242
Staufenberg v. Muller & Son, S. D. R., vol. 10, p. 563, Aug. 28, 1916; 178 App. Div. 942, May 2, 1917.	49
Stein v. Bright Star Battery Co., S. D. R., vol. 14, p. 590, Bul., vol. 2, p. 254, Aug. 6, 1917; 183 App. Div. 911, Mar. 6, 1918; 223 N. Y. Rep. 688, May 14, 1918.	335
Stolhoff v. Asch, Bul., vol. 4, p. 171, Apr. 30, 1919.	305
Stolte v. N. Y. State Sewer Pipe Co., Death File, No. 18389, Dec. 18, 1916; 179 App. Div. 949, July 3, 1917.	19
Straight v. Stearns, S. D. R., vol. 15, p. 645, Bul., vol. 3, p. 154, Mar. 14, 1918.	219
Struzycki v. Smith Contracting Co., Bul., vol. 4, p. 177, May 13, 1919.	305
Sugg v. Erie Railroad Co., S. D. R., vol. 10, p. 609, Oct. 19, 1916; 180 App. Div. 133, Nov. 14, 1917.	*50, 75
Sullivan v. Industrial Engineering Co., S. D. R., vol. 6, p. 401, Dec. 29, 1915; 173 App. Div. 65, May 3, 1916; S. D. R., vol. 14, p. 642, Bul., vol. 3, p. 44, Sept. 20, 1917.	100
Sullivan v. Preston, S. D. R., vol. 10, p. 566, Sept. 5, 1916; 177 App. Div. 110, Mar. 7, 1917.	143, *196, *198, 206
Sumpter v. N. Y. Consolidated R. R. Co., Death File, No. 877, July 3, 1918; 187 App. Div. 911, Jan. 8, 1919.	348
Supple v. Erie Railroad Co., S. D. R., vol. 10, p. 611, Oct. 19, 1916; 180 App. Div. 135, Nov. 14, 1917.	*49, 73
Swart v. Town of Shelby, Death File, No. 17112, Jan. 25, 1917; 181 App. Div. 915, Nov. 28, 1917; S. D. R., vol. 16, p. 520, May 15, 1918; 186 App. Div. 927, Nov. 13, 1918.	332, 339
Sweeting v. American Knife Co., Claim No. 2407-S, May 23, 1918; 186 App. Div. 926, Nov. 13, 1918; 226 N. Y. 199, Apr. 8, 1919.	74, *75, 186
Sztorc v. Stansbury, S. D. R., vol. 18, p. 621, Bul., vol. 4, p. 102, Dec. 31, 1918.	278
Ten Broeck v. Levenson & Cohen, S. D. R., vol. 18, p. 587, Bul., vol. 4, p. 71, Dec. 11, 1918; — App. Div. —, June 30, 1919.	73, 160, 220, 321
Testa v. Burns Co., S. D. R., vol. 9, p. 277, Bul., vol. 2, p. 208, May 18, 1916; 176 App. Div. 924, Dec. 29, 1916; Bul., vol. 2, p. 208, June 19, 1917.	327

	PAGE
Tetro v. Superior Printing & Book Co., Claim No. 19305, June 24, 1918; 185 App. Div. 73, Nov. 13, 1918.....	*45, 47
Thompson v. Sherwood Shoe Co., 178 App. Div. 319, May 2, 1917; Case No. 75635, Jan. 18, 1918.....	*44
Travelers Insurance Co. v. Padula Co., 184 App. Div. 791, June 12, 1918; 224 N. Y. 397, Nov. 12, 1918.....	*279, *281
Tremberger v. Pape & Co., Death File, No. 394, Jan. 19, 1916.....	87, 96
Tsangournos v. Smith, S. D. R., vol. 14, p. 687, Bul., vol. 3, p. 80, Nov. 15, 1917; 183 App. Div. 751, July 2, 1918.....	135, 143, *207
Twonko v. Rome Brass & Copper Co., Claim No. 35302, Oct. 22, 1917; S. D. R., vol. 15, p. 598, Bul., vol. 3, p. 148, Feb. 5, 1918; 183 App. Div. 292, May 17, 1918; 224 N. Y. 263, Oct. 15, 1918.....	84, 256, *257, *258, *336
Urban v. Frank & Co., S. D. R., vol. 11, p. 612, Bul., vol. 2, p. 46, Nov. 22, 1916.....	100
Vance v. Frazee & Co., S. D. R., vol. 12, p. 568, Bul., vol. 2, p. 103, Feb. 6, 1917; 178 App. Div. 947, May, 1917; 179 App. Div. 963, Sept. 13, 1917.....	*208
Vaughn v. Clark Knitting Co., Claim No. 35470, Bul., vol. 3, p. 114, May 23, 1918; 186 App. Div. 925, Nov. 13, 1918; — N. Y. —, Apr. 8, 1919.....	74
Vissaggio v. N. Y. Consolidated R. R. Co., Case No. 375271, Nov. 26, 1918; 188 App. Div. 49, May 7, 1919.....	*296
Volk v. Gretsche & Co., Death Case, No. 77456, Oct. 21, 1918; — App. Div. —, May 7, 1919.....	302
Wagner v. American Bridge Co., 172 App. Div. 876, May 12, 1916.....	78
Wagner v. Fuld & Hatch Knitting Co., Claim No. 1918-A, June 5, 1918; — App. Div. —, May 20, 1919.....	74
Waite v. Bliss Co., Case No. 38666, July 8, 1918; 186 App. Div. 398, Jan. 8, 1919.....	*378
Walz v. Holbrook, Cabot & Rollins Corp., 170 App. Div. 6, Nov. 10, 1915.....	104
Webb v. Joseph & Bros. Co., Bul., vol. 2, p. 166, May 22, 1917; 181 App. Div. 910, Nov. 14, 1917.....	209
Whalen v. Stanwood Towing Co., S. D. R., vol. 17, p. 626, Aug. 12, 1918; 186 App. Div. 190, Jan. 8, 1919.....	350
White v. Argus Co., S. D. R., vol. 15, p. 632, Mar. 13, 1918; 186 App. Div. 924, Nov. 13, 1918.....	159, 347
White v. Lodge, S. D. R., vol. 18, p. 542, Bul., vol. 4, p. 27, Oct. 16, 1918.....	32
Wilkes v. Rome Wire Co., Death Case, No. 35746, Dec. 14, 1917, and June 11, 1918; 184 App. Div. 626, Nov. 13, 1918.....	*108, 158
Winkler v. N. Y. Car Wheel Co., Death Case, No. 18469, July 6, 1917; 181 App. Div. 239, Dec. 28, 1917.....	100, *102, 123
Winters v. Marcotte & Co., 174 App. Div. 936, Sept. 15, 1916; S. D. R., vol. 10, p. 639, Nov. 3, 1916; 178 App. Div. 943, May 2, 1917.....	328
Wood v. DeLaval Separator Co., S. D. R., vol. 16, p. 476, Bul., vol. 3, p. 194, May 10, 1918.....	12
Wood v. Tupper Lake Chemical Co., S. D. R., vol. 9, p. 372, July 20, 1916; 178 App. Div. 942, May 2, 1917; 221 N. Y. Rep. 660, Oct. 23, 1917.....	213
Woodcock v. Walker, 170 App. Div. 4, Nov. 10, 1915.....	250, 279
Woodruff v. Comstock & Co., S. D. R., vol. 15, p. 648, Bul., vol. 3, p. 158, Mar. 14, 1918; 186 App. Div. 924, Nov. 13, 1918.....	346

Woodward v. Conklin & Son, S. D. R., vol. 4, p. 432, June 28, 1915; 171 App. Div. 736, Mar. 8, 1916.....	268, *269
Woolley v. Geneva Cutlery Co., File No. 18487, Apr. 6, 1917; 181 App. Div. 909, Nov. 14, 1917; S. D. R., vol. 15, p. 637, Bul., vol. 3, p. 156, Mar. 14, 1918.....	371
Wozneak v. Buffalo Gas Co., Files of Comm., No. 47691, Apr. 28, 1916; 175 App. Div. 268, Nov. 15, 1916.....	*79, 188
Yamin v. Harris Raincoat House, S. D. R., vol. 7, p. 485, Mar. 9, 1916; 175 App. Div. 959, Nov. 15, 1916.....	38
Yeople v. Rose Co., Bul., vol. 3, p. 5, Aug. 13, 1917; 182 App. Div. 438, Mar. 6, 1918; 223 N. Y. Rep. 687, May 14, 1918.....	100, 119, *120
Yonkers R. R. Co., No. 1, Matter of, Resolution of Commission, May 21, 1918; 187 App. Div. 911, Jan. 8, 1919.....	176
Yonkers R. R. Co., No. 2, Matter of, Resolution of Commission, July 30, 1918; 186 App. Div. 190, June 8, 1919.....	*242
Zalewski v. Gair Co., Death Case, No. 17659, July 5, 1917; 181 App. Div. 964, Dec. 28, 1917.....	101
Ziegler v. Cassidy's Sons, S. D. R., vol. 4, p. 343, Mar. 30, 1915; 171 App. Div. 959, Nov. 10, 1915; 220 N. Y. 98, Feb. 27, 1917.....	*88, 99
Zimmer v. Pfaudler Co., S. D. R., vol. 16, p. 419, Bul., vol. 3, p. 169, Apr. 2, 1918.....	352
Zubradt v. Shepherd Estate, S. D. R., vol. 13, p. 509, Mar. 5, 1917; 180 App. Div. 20, Nov. 14, 1917.....	*40, 154

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HEALTH HAZARDS
OF THE
CHEMICAL INDUSTRY

Prepared by
THE DIVISION OF INDUSTRIAL HYGIENE
BUREAU OF INSPECTION

INTRODUCTION

The chemical industry in the State of New York has grown to such a degree and seemed to present so many dangers, both to the employer and employee, that an investigation was undertaken, by the Bureau of Inspection of the State Industrial Commission, to study those hazards which accompany the industry.

The reporting of occupational diseases, some of which terminated fatally, and the occurrence of fires and explosions, which resulted in injury to human beings as well as great property loss, emphasized the need of a tentative survey to determine what rules were necessary to be added to the Industrial Code to reduce accidents and injuries.

Partly covering the industry, three hundred and thirty-five plants were visited and particular attention given to those conditions to which the present laws and rules do not apply, the following conditions being carefully studied, viz.: (1) The heating of factories with the fire hazards presented thereby; (2) Lighting of factories, and the location of switches, fuse plugs, and electric bells particularly where inflammable liquids were used and the danger of explosion was present; (3) Tanks, particularly those in which there was the possibility of the generation of excessive pressure; (4) Hazards due to breaking up of raw materials; (5) Spontaneous combustion occurring in certain materials; (6) Industrial poisoning not reported to the Industrial Commission because they are not included in the list enumerated in Section 65 of the Labor Law; (7) Causes of explosions which occurred during the course of the investigation; (8) Lack of knowledge, by the men employed, of the character of the materials handled as shown by the careless modes of handling both raw material and finished products; and, (9) General safe and unsafe practices.

HEALTH HAZARDS OF THE CHEMICAL INDUSTRY

Chemistry has only taken its place as an exact branch of science, based upon accurate experimental investigation, within comparatively recent times, but its origin dates back to the time of the earliest philosophical studies.

The ancient Phoenicians, Egyptians, and Greeks had a knowledge of several substances the preparation of which, from ores, did not differ in any material degree from the processes used at the present time. These people were acquainted with the production of gold, silver, lead, copper, and tin from which they made various articles as statues, cups, and ornaments; the processes for manufacturing soap, glass, leather, and certain organic and inorganic colors were also known and carried on in the earliest times.

We find records of the application in medicine of many chemical products at a comparatively early period; the Arabians appear to have been the first race who tried to prepare new medicines by chemical methods. Gabor, who lived in the eighth century and was the most noted Arabian chemist, knew the method of obtaining vinegar by distillation, was acquainted with arsenic, sodium chloride (common salt), nitre and alum, and was familiar with much of the chemical apparatus used prior to his time.

From the eighth to the seventeenth century, little progress was made as the work was principally carried on by the alchemists whose methods and efforts seemed devoted almost entirely to quackery. The efforts of these workers to discover methods to convert all of the baser metals into gold and to make the "elixir of life" occupied much of their time, but these efforts unconsciously resulted in the obtaining of many new substances used in medicine; although many of the writings of these early researchers are preserved, the greater part of them are entirely worthless from a scientific standpoint.

Robert Boyle, who lived from 1627 to 1691, must be credited with the honor of being the "father of modern chemistry" for it was he who discredited the old "earth, fire, air and water" theory of substances and gave to elements their proper definitions.

To Lavoisier, 1743 to 1794, must be given the honor of determining that combustion was the result of the union of a combustible substance with the oxygen of the air, and the determination of the composition of sulphuric acid, phosphoric acid, and a number of metallic oxides. Berthollet, Davy, Scheele, Wohler, and many others added greatly to this knowledge by the discovery of new metals, gases, and laws; volumes could be written on the history of the gradual introduction of new substances which are now numbered by tens of thousands.

The greatest strides along the line of chemical research have taken place within the past century, the growth of the technical chemical industry within the borders of our own State having been most phenomenal within the past ten years.

The chemical industry in the State of New York had its beginning in 1810 when two small factories began the manufacture of gunpowder; small as these establishments were, they produced about thirteen tons of gunpowder in the first year of operation.

As early as 1788, salt from the Onondaga region was sold by white men of that region who secured the salt by evaporating the brine from the salt springs; the presence of these springs resulted in the establishment of the largest and most prosperous corporation of the chemical industry, located at Solvay, N. Y., which now employs over two thousand persons in the manufacture of ten or more chemical products.

In 1823, the Chemical Bank of New York City began the manufacture of sulphuric acid in a small factory located on Bank street, New York city. This firm had for its foreman a man named Martin Kalbfleisch who in 1829 began the manufacture of sulphuric acid on the banks of Newtown creek, Brooklyn; in 1847 this business was transferred to White street, Brooklyn, where it is still carried on, its principal output being a large variety of acids and metallic salts. In 1847, Charles Pfizer and Company started in Brooklyn to manufacture santonin, and purify camphor by sublimation, but the business has now expanded to such an extent that the output of the factory includes over two hundred different products.

The manufacture of dry colors, a branch of the industry which was started in 1868, is largely carried on in New York city, the

largest factory engaged in the business now producing thirty-six different colors besides numerous other chemicals. Since this firm began the manufacture of this line, fully a dozen factories have been added to the number engaged in this industry, the last addition to the list, within the past year, being one in which over two million dollars have been invested for the purpose of manufacturing dyes, lakes and dry colors in sufficient quantities to render this country independent of foreign-manufactured goods.

In 1880, a certain firm in Buffalo, N. Y., engaged in the purification of methyl alcohol; the plant, now grown to be the largest in this country, has facilities for purifying fifteen thousand gallons daily.

Since 1823, the production of sulphuric acid has steadily increased; compared with 1880, when but a few tons were made daily in the entire State, the growth of the industry can be seen by the fact that one plant alone, located at Laurel Hill, Queens county, New York city, now manufactures a thousand tons a day.

In 1881, the first building was erected at Solvay, N. Y., for the manufacture of sodium products. The corporation which erected it now possesses, in that village, a plant covering about 106 acres and owns salt beds, practically inexhaustible, located at Tully Farms from which the sodium products are made. Water from Tully lake is pumped into the salt beds and by compressed air the brine is lifted to the surface and by gravity flows in pipes to the brine reservoir to the Solvay plant at Solvay, twenty-two miles distant. Large deposits of limestone at Jamesville, eight miles distant, owned by the company, an abundant supply of pure water, and good facilities for obtaining coal by rail all tend to make this the largest and most prosperous company engaged in the chemical industry in the State of New York.

Development of electrical power from the water fall was begun in Niagara Falls, N. Y. in 1886. and in 1895 power was first delivered by the Niagara Falls Power Company to the Pittsburg Reduction Company of Niagara Falls which is now known as the Aluminum Company of America; this company operates in Niagara Falls three factories, employs more than one thousand men, uses more than seventy-five thousand electrical horsepower daily, and is one of the largest consumers of electricity in the

United States. For a distance of more than three miles in this city factories using electric power for electro-metallurgical processes are situated along the bank of the Niagara river, these factories manufacturing eighty-nine per cent of all the electro-chemical products made in the United States. Fourteen million pounds of aluminum, in the form of pigs and rolled metal, are annually turned out from three of these factories, while the factories manufacturing chlorinated lime, also located here, produce more than half of the total output of the world.

Cheap electrical power, produced at Niagara Falls, has made possible the production of artificial graphite in large quantities, the artificial product being far superior to the natural, which is always found with impurities as sand, mica, and other associated substances. The cheap production of this substance led to the manufacture, in large quantities, of electrodes which are largely used in connection with electric furnaces, thus adding a number of manufacturing interests to the long list centered in this city.

The production of ferro alloys, as ferro-chromium, ferro-titanium, and ferro-manganese, and other substances, as sodium hydroxide, sodium peroxide, liquid chlorine, carborundum, aluminum, and many others, add to the long list of manufactured products which make Niagara Falls the chief city of the electro-chemical industry of the United States.

The products of the chemical industry of the State of New York, as can be judged by the few factories previously mentioned, are decidedly numerous and varied in character, and, while many come into the hands of the manufacturer and consumer as finished products, a great number are used only for making other substances. Thus, acids which are made in one factory may be used in another to chlorinate, nitrate, or acetate organic or inorganic materials; salts made in one factory may be used to manufacture pigments in another; ferro alloys made in one factory are necessary in another to add to certain metals to give the necessary percentages of substances required in new products; and many of the articles ultimately enter into the manufacture of substances which are used in various pharmaceutical preparations. The products or waste of one industry are often the raw materials of another; hence, it can easily be seen that the chemical industry is one of a

great variety of intermingling processes, one dependent on the other.

The products of this industry are so vast and numerous and involve so many processes that it would be an impossibility in this Bulletin to point out and describe all operations in which risks occur, it being the intention to show some of the most commonly occurring accidents for which remedies, to prevent their occurrence, may be applied. Many experimenters, some of whom may be classed as amateurs, are constantly engaged in chemical research work for themselves or for others, but their sole object is to manufacture new products or to reduce the cost of those now being manufactured to a minimum.

The attainment of the necessary knowledge to prevent fires, avoid explosions, and eliminate poison risks is only reached through a technical chemical training, practical knowledge only acquired by hard work, and, in some cases, bitter experience. The average workman met with in certain chemical plants, in many cases, knows little or nothing of the nature or effect of the substances which he constantly handles, this ignorance being fostered by some manufacturers for the purpose of protecting their secrets from their competitors, or keeping the men at work in positions which they would refuse to hold if they realized the dangers of their occupations. Many of the materials are referred to only as "dope," "stuff," "liquor," or by initials which have no relation to the name or real composition of the material.

Thousands of combinations, resulting in explosive mixtures, can be made with chemicals, among these being the action of sulphuric acid on sugar, nitric acid on turpentine, chlorate of soda with sulphur, chlorate of soda and a cyanide ground together, and sodium peroxide when combined with resins or mineral oils. Certain processes carried on in rooms containing inflammable gases or vapors may readily cause an explosion: the nitrating of cotton, starch, or wood, by persons unfamiliar with the nature of the resultant product is of grave importance as is the storage of certain chemical products, even in small bulk, near steam pipes, in sunlight, or in rooms or closets which are not properly ventilated and may thus permit the combination of vapors with a resultant explosion and fire.

The range of explosibility of certain gases, evolved in various processes of manufacture, when mixed with air is fortunately somewhat limited, being controlled by certain physical conditions as method of ignition, volume of gas, moisture content of air, temperature, or dilution in a vessel or room. For alcohol vapor the percentage mixed with air is from 4 to 13.6 to cause explosion: for benzol vapor 2.7 to 63; for hydrogen gas 9.5 to 66.5; for carbon monoxide 16.6 to 74.8; and for ether 2 to 6. Above and below these percentages no explosion will occur because in the former the gas is present in too small an amount, while in the latter there is not sufficient air present to support combustion of the gaseous mixture.

ARTIFICIAL LIGHTING OF FACTORIES

Many processes are carried on, in this State, in which the plant is in continuous operation day and night, as in the manufacture of bleach (chlorinated lime), manufacture of trinitrotoluol, extraction of coloring matter from logwood chips, sugar refining, distilling and refining of oils, etc. These require artificial means to light the interior of the plant during the hours of darkness, and, while the light intensity need not be as great as in the textile industry and needle trades — trades where constant and close use of the eyes is necessary, the necessity of sufficient lamps to eliminate shadows, properly light passageways, tanks, vats, and machines is of great importance, it being necessary to supply at least one-quarter of a foot-candle of light at the floor level and a greater intensity at the machines according to the character of the work being done thereon.

Explosive dusts, which are found in sugar refineries, vapors or fumes in oil refineries, thinning rooms in varnish works, in the process of ether purification, and in the rectification of alcohol, may be ignited, when present in sufficient quantities, by contact with open lights, or contact with the glowing or heated filaments of electric light globes in the event of the accidental breaking of such globes.

In the course of the survey, two factories were found in which fan-tail gas lights were in use in a room adjoining one in which alcohol was being re-distilled to render it absolute. In another

factory open gas lights were used where drugs — annato, licorice, slippery elm, and cantharides — were being ground and large quantities of dust were escaping from the mills. In still another one, ordinary unprotected 40-watt incandescent electric light globes were in use where compound ethers were being made, and, in two instances, these electric light globes were seen to be lowered, through small openings, into closed tanks containing benzol, for observation of the amount of the liquid in them. The cause of one explosion, which severely burned five employees and set the factory on fire, was definitely determined to have been the ignition of benzine vapor which came into contact with the glowing filament of an electric light globe.

In one instance where large quantities of hydrogen gas were disengaged in a room, it was observed that the switch, used for throwing the lights on and off in the cell room, was located in the same room, and it cannot be too emphatically stated that no greater danger of plant destruction, than the existence of such conditions, presents itself. In this particular case, it was the idea of the superintendent that the gas thrown off was of such a specific gravity that it rose rapidly and escaped through the louvres in the monitor roof, but this idea did not take into consideration the effect of wind velocity and temperature of air outside of the louvre; cold air driven against a louvre, when the temperature of the air of the workroom is considerably higher than that of the outside air, is usually cast downward into the workroom where it can easily deflect a rising column of light gas toward such a switch and cause an explosion of great magnitude. Figure 1 shows safe location for such switches, outside of building.

It must also be remembered that gases may be exploded by heat as well as by flame, this fact being of particular importance in cases where it is necessary to use molten metal, or metal heated to redness, in making repairs in rooms where these gases may be present. Frequent tests should be made to determine the presence or absence of such explosive gases as well as other gases (carbon monoxide, carbon disulphide, or hydrogen sulphide) which may require the temporary suspension of all work in that room or building; the State Industrial Commission, with a well-equipped

laboratory, is always ready to assist the manufacturer in making such tests.

HEATING

During cold weather, the artificial heating of factories in which chemicals are manufactured or used is essential to prevent the freezing of liquids contained in the tanks, pipes, vats, and in all machines which are used in various processes, and to provide comfort for the employees who work within the buildings.



FIG. 1.—Safe position of electric switches for throwing on lights; also these plugs located on wall of building in yard, when inflammable liquids and gases are used inside of a factory.

While certain processes are accompanied by the generation of sufficient heat to keep the air of the factory at a comfortable temperature, the majority of factories must be heated by means of some of various types, by steam pipes or radiators, or by means of the indirect system of heating in which the circulation of warm air combines heating with ventilation of the factory.

In some factories there were found in use salamander stoves, using coal, coke, or charcoal as fuel, without any means being

provided to convey to the outer air the products of combustion from these devices, but in the majority of cases steam is used as the heating medium. As a rule, steam pipes and radiators are placed along the walls near windows, and on or close to the floor, but this is somewhat dangerous owing to the possibility of there coming into contact with these heated pipes volatile and inflammable liquids, dyes, or chemicals in which certain chemical reactions or changes may occur in the presence of heat.

It was not an uncommon occurrence to find rags, wood, and other refuse lodged between steam pipes or radiators and the walls of the buildings, in some cases this dirt and refuse being found baked into a hard mass under the radiators. In these cases, "out of sight, out of mind" would prove to be a costly adage if this refuse should contain oils or resins which would cause the mass to char at a much lower temperature than wood or fibre, as such mass may become ignited, by the action of the heat or by spontaneous combustion, and be the starting point of a costly fire.

Leaky valves or joints may also constitute a fire hazard in cases where the leaking fluid is liable to come into contact with acids, bronze powders, lime (calcium oxide), calcium carbide, or various metals; this leakage may also result in considerable property damage through the rotting of wooden floors and beams, and the erosion of metallic structures by the constant contact and action of the escaping water.

The use of screens or metal deflectors is a fairly effective means of keeping stored material from contact with steam pipes or radiators, but the best method is the elevation of the heating devices to a considerable distance above the floor, thus not only eliminating a possible fire hazard, but giving a greater floor area and preventing the accumulation of dirt under any of the devices.

As an economic measure which results in the saving of many tons of coal during a season, several factories use a system whereby the exhausted air from workrooms is freed of dust, gases, and fumes, and re-circulated in the same rooms, but such systems must always be viewed with misgiving unless the devices for screening and washing the spent air are frequently inspected to determine and maintain their efficient operation.

No single fixed standard of temperature and humidity can be

set to be maintained in all workrooms because certain conditions and processes will require a variation from this standard. This is well shown by the following: The packing of certain chemicals must be done in rooms where the temperature is high and the humidity low in order to avoid the deleterious action of moisture on the material handled; and certain classes of hard labor may be more advantageously and efficiently performed at lower temperatures than the usually advised standard which fixes a minimum temperature of 62° F. and a maximum temperature of 72° F. in rooms in which ordinary labor is performed (See Page 18, Welfare Work, Series No. 4, U. S. Government, July, 1918).

VENTILATION

One of the most important methods of eliminating fire and health hazards from any industry is the provision of a suitable and adequate system of ventilation to properly remove dust, gases, vapors, and fumes arising in the various processes used in the particular industry; this system may be local, general, or a combination of both.

Medical inspectors, connected with the investigation, definitely traced the cause of many cases of occupational poisoning to the lack of adequate ventilation of factory workrooms, the employees in such rooms being compelled to constantly inhale deleterious materials arising from machines, or mixing and packing processes; continued inhalation of dust, gases, vapors, and fumes which arise from such barrels, pipes, kettles, or pans results in a lowering of the vital resistance of the body with the production of many cases of illness, and some deaths. Two notable examples of death occurring from such causes are the following:

1. A firm engaged in the manufacture of alcohol from molasses has the molasses brought to its plant in barges from which it is pumped into tanks. A man working at a valve in the bottom of one of these barges was rendered unconscious and removed to a hospital where he died two hours later, the cause of death being given as "poisoning by gas of unknown character." Investigation of this case proved that the fermentation of the slight quantity of molasses adhering to the sides and bottom of the barge had resulted in the formation of a blanket of practically pure carbon

dioxide into which the man had fallen when he entered the barge to make the necessary repairs. Recommendation was made that all such barges be ventilated by the use of a heavy blast of compressed air before permitting workmen to enter them and has entirely eliminated this hazard.

2. A firm was engaged in the manufacture of metanitriline (MNA), khaki dye, by a reduction process which resulted in the formation of dinitrobenzol during the course of the operation. Two plumbers were at work in the plant when a leak developed in one of the tanks; one of the plumbers, absolutely ignorant of the dangerous nature of this material, was sent into the tank to make the necessary repairs. After working in the tank for a short time, he came out and complained of feeling badly, his lips and face being slightly blue (cyanosis), but recovered sufficiently to start for home on a trolley car; he became seriously ill on the car and was removed to a hospital where he died about six hours later, the cause of death being given as "traumatic pneumonia due to the effects of a gas of unknown nature." Investigation proved absolutely that death was due to dinitrobenzol poisoning. The firm ceased operation, consequently nothing could be done to prevent a recurrence of such accident.

Various sections of the Labor Law and rules of the Industrial Code of the State of New York are very complete and comprehensive in their requirements for ventilation in certain specific processes, but regardless of these sections and rules and the orders issued thereunder, proper systems and devices for ventilation have not always been provided to deal effectively with the matters in question; some manufacturers seem to think that any tinsmith can devise and install a suitable ventilating system, and that such system should be accepted as a full compliance with a specific order even when it has been demonstrated that such a system is worse than useless for the purpose sought to be attained.

Upward ventilation, by natural or artificial means, should be used for the removal of coal gas, ammonia, hydrocyanic acid, carbon monoxide, steam, fumes of methyl alcohol, nitric oxide, and hydrochloric acid, and the vapors which readily arise from vessels containing lead, arsenic, antimony, or zinc when same are heated to a certain degree, all of these materials being easily

handled by means of a suitable hood placed over the vessel containing them. When fumes or vapors of inflammable liquids, as methyl alcohol, amyl acetate, benzine, or ether, are to be removed by exhaust systems, belt-driven fans with copper or brass blades must be used; under no circumstances should there be used motor-driven fans in which the motor or wiring system is in the direct path of the material to be removed.

Chromate of lead, barium sulphate, Paris green, silica, hydrated carbonate of lead, and most pigments and salts which present a dust hazard are raised only with difficulty, but may be very effectively dealt with by means of an exhaust system having a downward suction, this method being especially applicable to box, keg, or barrel filling. Hoods over machines, mills, or parts of machines should not be of a rigid type, but should be so constructed as to be readily raised, lowered, or otherwise adjusted.

The necessity for the proper ventilation of pits, tunnels, and store-rooms, which are often overlooked because seldom used, is well illustrated by the following example: Three men were sent into a pit and tunnel to make repairs on a pipe-line and valve contained therein; after disconnecting the valve, which left the pipe-line open, they went out to their lunch. During their absence, the tunnel became partly filled with the fumes of benzol which escaped from the open pipe, this collection of fumes remaining in the tunnel because of the lack of suitable ventilation. Upon re-entering the tunnel, the men only worked for a brief period of time when two of them fell to the floor unconscious while the third one was barely able to get out of the tunnel and summon help; when this help arrived, the two men were dead, the third man owing his escape from a like fate to the fact that he had discovered the condition and had quickly reached the open air.

The piping of all volatile liquids from vats to pans, or other containers or machines, not only aids greatly in the elimination of a possible fire hazard, but results in a great saving of both time and material to the manufacturer. When filling barrels or tanks with volatile liquids, the escape into the workrooms of the fumes of such liquids, with the air which is displaced from the receptacle, may be readily prevented by providing a suitable relief pipe from the barrel or tank to the outer air; this will remove the

necessity for providing a general ventilating system which is usually costly especially in cold weather when fuel and power are important items of expense.

The proper repair of brick walls of furnaces, to prevent the escape of harmful gases into workrooms, is a more sensible and economical method of keeping the workroom air in a safe and desirable condition than the installation of a general ventilating system to modify the effects of such escaped gases by the dilution method.

Louvred monitors, or skylights provided with monitors, furnish a fairly effective means for the removal of smoke and heat from workrooms, but these devices can be rendered more effective by constructing them in such manner that the louvres can be readily opened and closed. During the cold months, when the outdoor temperature is low and wind pressure is high, the side against which the wind blows should be closed and the opposite side opened, thus making the force of the wind current serve as an aspirating medium to withdraw the heat and smoke from the building; if both sides are open, the wind pressure and cold air form a blanket which deflects and forces downward the naturally rising column of warm air, creates unpleasant drafts, and sweeps the smoke about the workrooms. The successful application of these devices has been demonstrated in a number of factories, particularly at Niagara Falls.

A very important matter which must be carefully considered is the provision of forced ventilation for drying ovens and drying rooms, this importance being due to the fact that the indrawn air must pass through a fan, then through a heater containing coils of pipe in which steam is circulating at various pressures, and, finally, into the drier or dry room. The temperature of the steam pipes in the heaters varies according to the steam pressure carried (228° F. for 5 lbs., 256° F. for 15 lbs., and 267° F. for 25 lbs. pressure). If the intake, or fan inlet, is so located that the air is drawn from a factory room, this air may contain dust which is quickly decomposed on contact with a certain degree of heat, and there will be created a hazard of fire and explosion, the latter of which may be of sufficient violence to destroy not only the drying device, but the entire building in which such device is contained.

Explosions of drying devices are known to have been produced by the ignition of organic colors, by friction or spark ignition in the piping system of such device.

These are but a few of the many actual conditions met with in ordinary practice; each factory, or process, presents its own individual problem which may be solved by careful study, and result in the saving of considerable material and the elimination, or at least the reduction, of risk to both the plant and the employee.

ACCIDENTS AND OCCUPATIONAL DISEASES

Employees in factories engaged in the manufacture or compounding of chemicals are subjected to the danger of accidents from the same general causes as the workmen in other classes of manufacturing, these including injuries due to contact with falling objects, wounds and contusions from the handling of sharp or heavy materials, falls from ladders, wounds inflicted by tools and machines, and falls on slippery or uneven floors. In addition to the above, owing to the nature of the material handled, they are subjected to the danger of burns from acids or molten metal, the corrosive effect on the body tissues of caustic alkalis, alkaline earths, and chromium salts, and the poisonous effects of the inhalation of certain dusts, gases, fumes, and vapors. The irritant effects of sulphurous oxide, formaldehyde, sublimed sulphur, and the vapors of both nitric and sulphuric acids are too well known, through experience, to require further description. The pleasant odor of some of the poisonous vapors, as hydrocyanic acid, nitrobenzol, and methyl alcohol, is misleading to many workmen who only associate danger with an unpleasant odor and a quickly irritant effect; carbon monoxide has no odor, but is extremely deadly in its action.

One important fact brought out by this investigation is the refutation of the statement made by many writers, both American and English, that the toxic effects of trinitrotoluol (TNT) are due solely to the absorption of the finished product through the skin, or to the inhalation of the material in dust form; careful investigation proved that the majority of cases of illness from this substance were due to the inhalation of the fumes generated through the nitration of the toluol, the fumes of the first nitra-

tion (mononitrotoluol) apparently being the most dangerous. In this same process, there was also discovered one case of pneumonia due to the inhalation of nitric acid fumes.



FIG. 1-A — Workmen engaged in breaking up tenacious material with sledge hammers. Each man is provided with goggles to protect his eyes from flying particles.

The breaking up, by means of crushers or sledge hammers, of hard, heavy, or tenacious material presents a serious eye hazard. All employees engaged in such work should be provided with, and compelled to wear, individual safety goggles fitted with lenses which will offer the greatest resistance to heavy blows, these goggles being so constructed as to be readily adjusted to fit the eyes of the user. In addition to this, the eyes of all employees should be examined by a competent oculist, defective vision corrected, and the safety goggles fitted with the necessary corrective lenses in order to remove the handicap of poor vision; these men, each having his own individual goggles, should be required to submit their goggles at periodic intervals for cleaning and sterilization, the former guaranteeing good vision by reason of clean lenses and the latter removing any danger of eye infection.

In places where caustic soda, metallic sodium, sodium peroxide, oxide of lime, ammonia, and chlorinated lime are handled or used, eye injuries, due to the accidental entrance into the eye of these substances, are somewhat common, and these injuries, being very painful, require prompt relief by the neutralization of the causative agent. In Niagara Falls, all factories, in which these materials are handled, provide every workroom with bottles containing a one-half per cent solution of acetic acid for use in the eye to neutralize the alkali in the event of an accident of this kind occurring, this being a safety provision which should be made mandatory in all factories in which caustic alkalis are used.



FIG. 2 — Employee of caustic soda factory provided with face mask to prevent material affecting eyes, neck and face.

In all factories in which acids are used, the necessity of providing "drowning tubs" (deep receptacles containing either plain water or a solution of sodium bicarbonate) to be used for the neutralization of any acid which may be spilled on the skin or clothing of the workmen, is emphatically urged. The following incident, which was actually observed in a factory during the course of the investigation, furnishes a good example of the necessity for these devices. Two men were carrying a carboy of nitric

acid when one of them stumbled over an object on the floor and caused the spilling of a considerable quantity of the acid on the trousers and shoes of both men, some of the acid finding its way inside of the shoes of both victims. The men ran about the room in search of water; one of them found a hose, turned on the water, and began frantically trying to force the stream of water first into one shoe and then into the other, but the other man remained in agony while his fellow-workmen burned their hands trying to unlace and remove his acid-soaked shoes. Six minutes elapsed before a tub was secured and filled with a solution, made with bicarbonate of soda obtained from the company laboratory, to neutralize the acid. This loss of time, which was inexcusable and unnecessary, was of less importance in this case because the injuring agent was nitric acid, which limits its own penetration, than it would have been in the case of sulphuric acid which rapidly penetrates and destroys all tissue with which it comes in contact.

Dermatitis (inflammation of the skin), especially of the hands and arms, is a common malady among the employees in color works, this being due to the direct irritant effect of the pigments on the skin; hence, it is essential that there be provided suitable clean working clothing, ample washing facilities — including hot water, soap, and individual towels — and vaseline, or other oily preparation, for application to the hands and arms. Some of the factories engaged in the manufacture of Paris green provide all workmen, who grind, dry, pack, or label the material, with head coverings, neck coverings, overalls, jumpers, Congress shoes, moleskin gloves, aprons, and respirators.

As an aid in the prevention of poisoning in all factories in which lead, arsenic, chromium, mercury, antimony, or copper is used or enters into the composition of the material handled, the provision of lockers, locker rooms, or other suitable contrivances to separate the street clothing from that worn during working hours, is essential and should be a mandatory provision of law.

There was reported and investigated a case of fatal occupational disease in which the cause of death was given as "antimony poisoning." This man, previously a miner, was employed in a

factory which manufactured antimony sulphide, used as a pigment in the manufacture of paint; he was uncleanly in his habits, chewed a great deal of tobacco while at work, and absolutely disregarded the ordinary rules of personal hygiene, his fellow workmen stating that he was rarely known to even wash his hands. He was provided with a suitable locker which he used alternately for street clothing and working garments, but this was kept in such a filthy condition that the floor was covered to a depth of one-sixteenth of an inch with dust which chemical analysis showed to contain twenty-two per cent of antimony sulphide. The fatal poisoning in this case was undoubtedly largely due to the man's own uncleanly habits.

In a factory engaged in the manufacture of colors, one man was found to have suffered from five attacks of dinitrobenzol poisoning, each attack necessitating his removal to a hospital where a diagnosis of "carbon monoxide poisoning" was made, the error being due to the similarity of the symptoms produced by the two poisons. Investigation of this case proved that the man, never having been informed, was totally unaware of the poisonous nature of the material which he was handling and was not only exposed to the fumes in the usual way, but even wiped his hands, soiled with dinitrobenzol, on his clothing and thus presented for evaporation a large surface from which he inhaled the fumes at close range.

Investigation of the cause of severe ulcers found on the arms of workmen employed in a factory manufacturing paranitraniline, developed the fact that proper washing facilities were not provided because the factory had been hastily constructed and the necessary basins and other plumbing fixtures had not been delivered although ordered in ample time. No similar cases have occurred in this factory since the firm installed suitable washing facilities (with hot water and shower baths), secured competent medical service, and provided all employees with suitable working apparel, including socks, underwear, shirts, overalls, jumpers, gloves, respirators, and caps; each week a clean outfit is issued and the soiled outfit taken up for proper washing and renovation.

An additional occupational disease hazard is found in some

factories manufacturing colors and pigments because the antiquated nature of the process compels the men to carry trays of material into driers or dry-rooms where the temperature ranges from 90° F. to 120° F.; droppings from these trays become dry very quickly, are soon reduced to powder by the feet of the workers, and, as this powder is constantly stirred up, some of it passes into the respiratory tracts of the workers. This hazard is further increased by the fact that these trays of material, previous to being emptied of their contents by open dumping, are stacked in the open room where every draft from the doors and windows blows some of the finer material about the room where it settles on ledges, floors, window sills, and on the clothing of the workers while more or less of it is carried into the lungs of the workmen. Drying ovens, through which warm air is circulated, would eliminate the discomfort and danger of entering these hot rooms, while enclosed automatic dumping devices would remove the danger from stacking and dumping the trays in the open room. Where these antiquated methods are in use, the loss of material is considerable, chemical tests in one instance showing an average daily loss of thirty pounds of material valued at fifteen cents per pound.

In the ordinary factory, especially where the building was erected some years ago, it is often found that the floors are of such construction that they are saturated with colors, acids, and salts of both insoluble and soluble nature; these floors cannot be flushed with water and must be swept, the old-fashioned broom, but seldom a vacuum sweeper, being used. Sweeping of these floors should only be performed after working hours, this being done daily, and the man performing this work should be provided with a suitable respirator, especially when the material on the floor contains lead, arsenic, mercury, barium, chromium, or drugs, acids, or salts of a deleterious nature. A cheap form of respirator, which costs only a few cents and is absolutely effective in the prevention of dust inhalation, is fully described in Bulletin No. 90, issued by the New York State Industrial Commission.

Serious accidents may occur to workmen while certain repairs are being made, this being particularly true in the repairing of

acid pipe lines where the men may be severely burned by acid left in the pipes of such lines. Before such repairs are made, all pipes, pipe lines, and tanks or vats connected therewith should be inspected to determine that all pressure is removed and that both tanks and pipes are empty.



FIG. 3 — Safe method of pouring acids into a tank preventing splashing by the use of a pipe extension which can be lowered and raised at will.

Another important consideration in accident prevention is the location of emergency valves which, though infrequently used.

must be operated hastily when an emergency arises; in many instances these valves were found improperly located, some near moving belts and some in such position that the workmen had to reach a considerable distance to operate them. The investigation of one fatal accident disclosed the fact that a workman trying to



FIG. 3-A — The result of a mistake of having removed the wrong valve (cap) from a tank car which contained mixed acid. The air valve should have been first removed instead of the acid valve which was removed. A slight pressure within the tank car forced some of the acid out of the tank into the face of the man, blinding and burning him. Note burned flesh of arms.

open a globe valve, connected with a steam line to supply steam to an open vat, was compelled to reach some distance for the valve and in so doing fell into a vat containing a mixture of water and sulphuric acid heated to 140° F.; although he was pulled out of the vat at once, he died three days later, the cause of death being given as "shock."



FIG. 3-B — The result of a mistake of having removed the wrong valve (cap) from a tank car which contained mixed acid. The air valve should have been first removed instead of the acid valve which was removed. A slight pressure within the tank car forced some of the acid out of the tank into the face of the man, blinding and burning him.

All valves not in daily use should be tagged for identification and all valves which control the filling of tanks or vats should be provided with locks and danger signs which should be used when men are required to enter such tanks or vats. The compulsory use of goggles for the protection of the eyes of all workmen engaged in this pipe work is as essential as it is in all other processes where the eyes are endangered by flying particles of material; after use, these goggles should be thoroughly washed to free them from any acid or other material of an irritant or corrosive nature.

In order to prevent accidents and occupational diseases in factories, it is essential that all the provisions of those sections of the Labor Law relating to sanitation be rigidly observed. These include an adequate supply of good drinking water furnished through drinking fountains; an ample supply of hot water, soap, and individual towels; suitable place, separated from the work-rooms, in which meals may be eaten; clean windows, floors, walls, ceilings, and unoccupied spaces; covered receptacles for wastes; efficient ventilating systems for the proper removal of heat, dust, fumes, vapors, and gases; respirators and goggles when necessary; provision of adequate light in accordance with the Industrial Code Rules; and the provision of an efficient means, either by the vacuum or other suitable system, to properly sweep floors daily without creating dust.

Full compliance with all of the above by the manufacturer will not entirely overcome the troublesome conditions unless the workmen in chemical plants do their share by observing and complying with the ordinary rules of personal hygiene; a man cannot expect to be one hundred per cent efficient and healthy if he indulges in excesses, neglects to take advantage of the facilities offered for frequent and thorough bathing, fails to thoroughly wash his face, hands, and mustache before partaking of food, fails to wear the respirator and goggles furnished to him, or fails to frequently change both outer and underclothing to prevent irritant or poisonous materials coming into, or remaining in, contact with his skin.

Many a man, through a mistaken idea of personal pride in his own strength and endurance, deludes himself with the idea that

he is immune to the influences and conditions which harmfully affect the ordinary man, continuing under this delusion until his health is impaired to such an extent that he is compelled to seek medical aid and probably be transferred to another department of the same factory where dangerous or harmful conditions exist to lesser extent. In the larger plants which employ industrial



FIG. 3-D — Attendants of electric furnace, both provided with goggles to resist ultra-violet rays from the arc of the furnace.

physicians, these physicians, by constant effort, have succeeded to a great extent in eliminating this false pride with its disinclination to admit ill-health, while in the smaller plants, which do not employ physician or nurse, the same object has been largely attained by means of safety posters and educational literature: this change in view point has resulted in great benefit to both the employer and the employee.

An analysis of the accidents during the period of one year in three different factories manufacturing different lines of chemicals gave the following results:

FACTORY No. 1

Employs 2,100 men and women. Had 3,593 accidents of which 241 were accompanied by loss of time, 195 required surgical treatment, and 21 required hospital treatment. These various injuries were distributed as follows:

Lacerations	2, 113
Contusions	324
Eye injuries	704
Burns	169
Infections	118
Sprains	72
Strains	37
Punctures	37
Amputations	6
Hernia	1
Miscellaneous	4
Fractures	18
Total	3, 593

Lacerations gave the highest figure with eye injuries next, due to a special hazard created by the breaking up, with sledges, of very hard material.

FACTORY No. 2

Engaged in the refining of metals with an average yearly force of 1,250 employees. Had 3,143 accidents with a loss of time amounting to 2,355 working days, 14 of these accidents requiring surgical treatment. Accidents classified as follows:

Burns, first degree	505
Burns, second degree	267
Burns, third degree	1
Infections	52
Lacerations	471
Fractures	6
Abrasions	714
Foreign body, eyes	450
Sprains	56
Strains	41
Contusions	471
Miscellaneous	109
Total	3, 143

High number of burns was due to men picking up pigs of metal before they cooled; eye accidents were due largely to sparks and the fact that the floor was of dirt to avoid fires; abrasions were due to the handling of rough pigs of heavy metal, principally copper. The special hazards here were those usually found in any factory where metals are refined or otherwise handled in a molten state.

FACTORY No. 3

Average number of employees 257. Reported 403 accidents, of which only 37 caused loss of time; these were 12 eye burns, 1 foreign body in eye, 5 flesh burns (second and third degree), 2 hernias and 17 miscellaneous—cuts, breaks, contusions, etc. The accidents were divided as follows:

Head:

Cuts	3
Contusions	8
Burns, first degree	5

Eyes:

Foreign bodies	49
Burns, first degree	25
Burns, second degree	15
Burns, third degree	2

Arms:

Cuts	2
Contusions	2
Burns, first degree	22

Hands:

Cuts, minor	118
Cuts, major	4
Contusions, minor	35
Burns, first degree	40
Burns, second degree	15
Burns, third degree	3
Infections	1

Legs:

Cuts	5
Contusions	9
Burns, first degree	10
Burns, second degree	1

Feet:

Cuts	5
Contusions	4
Burns, first degree	8
Burns, second degree	2
Burns, third degree	1

Body:

Chest, contusions	1
Abdomen, hernia	2

Overcome:

By heat, minor	1
By heat, major	3
By gas, minor	1
By gas, major	1

Total	403
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To illustrate the importance with which accident prevention as an adjunct to good business methods is regarded by some of the large firms, the plans of the safety organizations in two factories are given herewith, these methods having resulted in a great reduction of accidents in these two establishments.

FACTORY NO. 1

Factory engaged in the manufacture of electro-chemical products.

Safety Committee.

The safety committee of this plant consists of seven men, its personnel at the present time including the superintendent, timekeeper (who has charge of all welfare work), and prominent works foremen. At regular intervals two men are dropped from the committee and two others added.

The duties of the safety committee are to devise ways and means whereby the firm may decrease the number of accidents to a minimum. Questions of policy, standardization of guards, of danger signs, of educational campaigns, etc., are discussed and passed upon by this committee at its weekly meeting. Particular attention is given to the best method of reaching the men and teaching them how to avoid accidents.

Subject to the approval of the superintendent, all decisions and findings of the safety committee are final. All bulletins, etc., with reference to accident prevention are signed "Safety Committee."

Auxiliary Safety Committee

The auxiliary safety committee consists of twenty men chosen from the various departments and is appointed monthly. These men meet one hour weekly for four weeks. At the end of that period, these men withdraw and another set of twenty men succeeds them. The purpose of this auxiliary safety committee and its meetings is to instill a lively interest in safety work in as many men as possible.

At each weekly meeting, the superintendent or some other member of the safety committee gives a talk on safety work, explaining the purpose of the auxiliary committee. The men are asked to make themselves a committee of one to do everything possible to prevent accidents, not only to themselves but to fellow employees. The last half hour of the meeting is devoted to receiving suggestions from the men as to any ideas which they may have for accident prevention.

The meeting of the safety committee is held directly after the meeting of the auxiliary safety committee. At this safety committee meeting the suggestions received at the auxiliary safety committee's meeting are discussed, ordered investigated, etc., and at the next meeting of the auxiliary safety committee the reports are made to them of the action which was decided upon for each recommendation. In addition to talking to the men of the auxiliary safety committee on accident prevention, a talk is given to them about the company physician and works hospital, it being pointed out that they are here for the benefit of the men; the general features of the

Workmen's Compensation Law and any other allied subjects which it is to their advantage to know about are explained to them.

Accident Investigation Committee

A permanent accident investigation committee consisting of the company physician, three prominent works foremen, and the shift plant foreman who may be on duty is appointed. It is the duty of this committee to investigate every accident which results in a loss of time to an employee. This committee has a right to subpoena other foremen and all workmen who may have been involved in the accident, the purpose of the investigation being to learn the exact cause of the accident and determine what steps can be taken to prevent its recurrence. This committee will also make it a point to bring home, wherever possible, the responsibility of fellow employees who may have been involved in the accident, either as witnesses or otherwise. The company physician looks up the record of the injured employee and determines whether the physical condition of said employee could in any way have been either a direct or a contributing cause of the accident.

Company Physician

The firm employs the exclusive services of a physician who is on duty daily in his office adjoining the works hospital, and is subject to call at all other times. In the case of major injuries, the physician will render both first aid and give subsequent treatment to the injured. A more important part of the physician's duty than the treatment of injuries is the prevention of accidents which cause them.

The physician will give treatment to any employee who becomes ill or feels indisposed while at work.

A physical examination of every employee in the office and works has been completed. All new employees must be examined by the company physician within forty-eight hours after beginning work. Rigid standards of physical requirements have been established, and in times when labor is plentiful, all employees not meeting these standards are discharged. Old employees who are found to have physical defects are advised how to remedy these defects and are re-examined at frequent intervals to note their progress. Men with ruptures or weak abdominal rings are provided with trusses at cost while arrangements have been made to provide suitable glasses at a nominal cost for all men with poor eyesight.

In addition to the company physician, the firm retains the services of two of the most prominent physicians of Niagara Falls, the services of these physicians being utilized in all cases of serious injury to render certain that every injured employee has the best possible medical attention.

Works Hospital

A works hospital where first aid is given the injured is maintained with three works hospital attendants, each working an eight hours shift, giving a continuous twenty-four hours service. These attendants are highly skilled and experienced in rendering first aid to the injured.

The works hospital is completely equipped with all necessary apparatus and supplies, this equipment including a pulmotor, various surgical instruments, operating table, bed, bandages and dressings, ointments and all necessary medicines. Stretchers are kept in the works hospital and in prominent locations throughout the works.

Memorial Hospital

The firm helps to maintain the Memorial Hospital in which beds for their employees are available at all times. Whenever an injury is such that home treatment would be inadequate, the injured man is sent direct from the works hospital to the memorial hospital.

Accident and Fire Dangers Inspector

The company employs and has present in the works ten hours daily an accident and fire dangers inspector whose sole duties relate to the prevention of accidents and fires. His particular duties are to oversee the installation and maintenance of proper guards, require the installation of suitable guards on all new work, and to see that all apparatus, the deterioration of which would lead to accidents, is maintained in good condition and renewed when necessary. This means that he constantly inspects ladders, ropes, steel cables, elevators, etc., reports any weaknesses detected therein, and sees that proper steps are taken to remedy the defect. He warns all employees found working in a dangerous place, or in such manner as to endanger themselves or others. All orders for guards and mechanical protection devices are turned over to this inspector to see that they are properly complied with.

The inspector is also charged with the duty of seeing that the fire-alarm and fire-fighting apparatus is maintained in good working order, as well as to constantly search for fire hazards and remove same when found.

Bulletin Boards and Safety Literature

Fifteen bulletin boards, used exclusively for the posting of safety bulletins, are located in various parts of the plant. Various bulletins on safety work and accident prevention are constantly kept posted on these boards. The company has recently adopted a red disc as a danger sign, and, to familiarize all employees with this sign, it is the intention to place on the bulletin boards beside this sign a bulletin reading "STOP — LOOK — LISTEN — WHEREVER YOU SEE THE ACCOMPANYING DANGER SIGN IT IS FOR YOUR PROTECTION — HEED IT — USE IT."

Bulletins directing the use of overhead runways instead of grade crossings, giving the personnel of the safety committee, etc., have been posted.

Slips containing safety advice, printed in English, Italian, and Polish, are placed in the employee's pay envelope at frequent intervals. The first slip reads as follows:

No, this is not money, but the slips in your pay envelopes during the coming weeks will be worth money to you. They will tell you about accidents and how to prevent them. Watch for these slips.

Other alips which have been issued read as follows:

Haste makes waste and may cause an accident.

Always take care instead of taking chances.

Whatever you do, always do it the safe way.

Acquire the safety habit — it is the habit that will never injure you.

The safe way may seem longer, but it is really the shortest way in the long run.

Monthly Inspections

For some time the company has been carrying on a monthly inspection of the entire plant with reference to accident and fire prevention, and house-keeping conditions, this inspection being made by the superintendent, assistant superintendent, and the foremen of all departments; the entire crew of inspectors is divided into two sections, one section taking the plant and the other section all the remainder. When this inspection, which requires some three or four hours, is completed a conference is held and the various criticisms and suggestions thoroughly discussed; the result of this inspection and conference is to keep all the departments in first class shape.

Book of Rules

A booklet, known as "Book of Rules," which contains all the rules which the employees should know for the prevention of accidents, is shortly to be issued and a copy of it placed in the hands of every employee who can read English.

Fire Protection

The company has a definite organization to care for and use the extensive and complete fire-alarm and fire-fighting apparatus which it has provided. There is also a board of fire commissioners consisting of the superintendent, assistant superintendents, chief engineer, mechanical engineer, and works engineer.

The superintendent is the active fire commissioner, his duties being to maintain general supervision over the fire department, see that the designated men are familiar with the fire-fighting apparatus, provide for the holding of regular fire drills, and see that the entire apparatus is maintained in good condition and ready for effective use at all times.

FACTORY NO. 2

Factory engaged in the manufacture of an electro-chemical product.

The following notices are posted in various parts of the factory:

To Avoid Danger Observe the Following Cautions

1. All employees, except the authorized elevator hands, are cautioned against riding on any elevator or touching it in any way.
2. All employees are cautioned against repairing any machine or machinery, or cleaning same, while it is in motion. Shafting and pulleys may be cleaned only by means of long-handled brushes or brooms, or hooks or clamps, in the manner prescribed by an overseer or foreman.
3. All employees are cautioned against touching any machine or machinery which they have not been ordered to operate or work upon by an overseer or foreman.

4. Cleaning or touching cogwheels, or cleaning any part of a machine while in motion, either with the hands, or brushes, or otherwise, or playing with any part of a machine which is in motion, is positively forbidden.

5. All employees are cautioned against being in any part of the plant where their work, or necessity, does not require them to be.

6. All employees are cautioned against racing at work, running, wrestling, scuffling, or indulging in any kind of play in any part of the plant.

7. All employees while working at or near any machine or machinery which is in motion are cautioned against talking with any person except an overseer or foreman.

General Notice to Foremen

During the last couple of months our accidents have increased alarmingly. They are principally of a minor nature, but it is simply due to good luck that a number of them have not been serious. Most of the accidents can be blamed on nothing but the carelessness of the men themselves and the company can do nothing to prevent them without the co-operation of the men. Please bear in mind, and instill into the men working under you, that the company values the lives and limbs of its employees far more than the extra work they can turn out by undue haste and consequent carelessness.

Do not "take a chance." Many serious accidents are caused by the men taking unnecessary and uncalled for chances. You may think that there is only one chance in a hundred of an accident happening, but you have no means of knowing whether the next chance will be the one to cause the accident. Spend an hour in your department watching for the taking of unnecessary risks, and prevent all you can.

If any guards are needed, if any machine is in a dangerous condition, or if any other factor is causing danger and it is beyond your own power to remedy it, let the proper persons know of it at once and this work will receive immediate attention to the exclusion of all other work. The company holds you personally responsible for the safety of all the men under you.

There is more or less horse-play and fooling going on around machinery, hot furnaces, and in the wheeling of barrows and trucks from one building to another, and, while this is innocent in itself, it may cause a serious accident. Stop this, not because it is childish and interferes with the work, but because it endangers the lives and limbs of fellow workmen.

We do not wish to turn out the products of this factory at the expense of men's lives and limbs, and it is up to the men to co-operate with the Company in safeguarding themselves. The Company will do its part by providing safeguards and not requiring the performance of any work which entails special hazards, but the men must do their part by exercising a reasonable amount of care.

Let us try to make the coming year a record one in freedom from accidents as well as in the manufacture of our products.

Cranes

Do you realize all the dangers to life and limb connected with the operation of cranes in this plant? They may be divided into three classes:—danger from the load being carried, electrical dangers, and danger caused by moving the crane up and down the room.

Nobody knows when the hoist cable on a crane is going to break; they all break sometime, but that time cannot be predicted. Therefore, do not stand where the crane will pass over your head; the chances that it will break just as it gets over you are extremely small, but why take the chance at all. Instruct all your men to step out from under the load when they see it coming, and, what is more important, instruct the crane operator to so carry the load that it will interfere with the work of the fewest possible men. By glancing about the room, the crane operator should be able to so adjust the load that it will skip most of the men. Besides a cable breaking, a load may slip and drop by the loosening of its fastening. This is more reason for keeping from under the load, and also shows the necessity of being sure that the fastenings are secure before the crane operator is given the signal to lift. No one will begrudge the extra quarter of a minute a man will take in making sure that the fastening is secure.

When a safe is being lifted to one of the upper stories of an office building, the sidewalk below is roped off and people are not permitted to walk under the safe, yet it is certain that fewer safes are dropped to the sidewalk in the course of a year, in this state, than loads are dropped from our cranes in this plant.

The crane operator must be instructed to watch that portion of the room directly under the load, and stop the crane if he sees a man is not going to get out from under the load; he must also, by ringing the gong, give ample warning of the approach of the crane. If a man habitually fails to get out from under the load, discharge him.

The electrical dangers are due to the voltage used on the motor circuit, 220 volts, and to the height of the crane from the ground. To come into contact with a 220 volt circuit is not necessarily fatal, but when it is liable to knock you off the crane and on to a brick floor or the top of a hot furnace, too much care cannot be used. This danger is particularly prominent in climbing into and out of the crane carriages in Furnace Rooms No. 2 and No. 3, where, owing to the cramped position of the man, he may come into contact with the trolley wires, or the switch, and be thrown to the floor by the shock. If repair work is to be done on any part of the crane, the man doing this work must see that the switch controlling the electric circuit to that part is open. Do not take anybody's word that it is open, see for yourself. Be suspicious of all electrical equipment on the crane and do not come into contact with it, intentionally or accidentally, unless you know it is dead. Do not forget that a drop to the floor usually follows the shock.

A few months ago a man was killed at one of the plants in town because he was working on the crane track and the crane operator did not know he was there. Remember that the crane operator cannot see the tracks from his cage. He is perfectly justified in assuming that these tracks are clear at all times. Do not work on the crane tracks or on any part of the building where you are liable to be struck by a moving crane without first taking the necessary steps to protect yourself. Either pull out the control switch of the crane and hang a danger signal on it or, if this unnecessarily ties up the crane, place a signal between you and the crane in such a manner as to effectively notify the crane operator that he must stop. The top of the transformer room is about as dangerous a place as the crane tracks. Do not get

up there unless it is absolutely necessary, and then only after taking the precautions noted above. It may seem to be an innocent locality, but if you are ever knocked down by a crane coming behind you, and crushed between the bridge of the crane and the roof of the transformer room you will appreciate the danger. Remember that you cannot depend on the operator as he is busy watching the floor.

If the above instructions are followed, this year should be absolutely free from accidents due in any measure to the cranes, and there is absolutely no excuse for not following the instructions.

Bulletin No. 91 of the New York State Industrial Commission, issued January, 1919, is a 32-page booklet containing a complete description of a plan for shop safety, sanitation, and health organization, this plan being based on a complete field investigation of the subject.

PHARMACEUTICAL PLANTS

The art or practice of preparing, preserving, and compounding medicinal substances of mineral, animal, and vegetable origin, was formerly carried on entirely by individual apothecaries. Occasional fires which occurred were mostly due to careless handling of materials, containing volatile substances, which resulted in inflammable vapors coming into contact with naked gas flames (now largely replaced by electric lights), storing such materials in unventilated closets, and the rubbing together of substances which would create an explosive or inflammable mixture — sulphur and potassium chlorate, etc.

The growth of population created a demand for standard official preparations in large quantities and this was responsible for the establishment, in various parts of the State, of large factories devoted entirely to the manufacture of these preparations as well as research work to create and develop new ones. In Long Island City, Brooklyn, Buffalo, Albany, Norwich, and other cities there are many factories engaged in the manufacture of thousands of different preparations, including soaps, perfumes, cosmetics, powders, triturates, pills, ointments, tinctures, salts, and patent and proprietary remedies. In this branch of the chemical industry, investigations were made of the following factories:

Twenty-three engaged in the manufacture of standard phar-

macellaneous preparations including pills, tablets (trituated and compressed) for internal and external use, glandular tablets, lozenges, elixirs, syrups, tinctures, ointments, oils, liniments, disinfectants, soaps, tooth and face powders, perfumes, and various proprietary preparations; 13 engaged exclusively in the manufacture of one or more proprietary preparations; 6 engaged in the manufacture of disinfectants; 4 engaged in the manufacture of cosmetics and toilet preparations; 3 engaged in the manufacture of inks and mucilage; 2 engaged in the manufacture of paints, oils, and varnishes; 1 engaged in the manufacture of bicarbonate of soda and sal soda; 1 engaged in the manufacture of essential oils; 1 engaged in the manufacture of matches; and 1 engaged in the manufacture of starch.

Accurate knowledge regarding the hazards of this branch of the industry was obtained by direct information given by the managers and superintendents of the plants; by inspection of the records of the various plants; and by making physical examinations of the employees.

In the factories engaged in the manufacture of pharmaceutical preparations, the chief hazards were:

Fires which occurred occasionally in the drying boxes; cuts and lacerations of the hands of employees from the breakage of bottles; skin lesions due to handling alkalis without adequate protection; irritation of the eyes and respiratory passages from dust created in the grinding of different drugs; and mercurial poisoning in the manufacture of bichloride of mercury tablets.

In the factories engaged in the manufacture of inks the hazard was poisoning from the careless handling of anilines.

In factories engaged in the manufacture of paints, oils, and varnishes, the hazards were:

Fires which occurred when mixing dry colors; and poisoning from handling, without adequate precaution, paints containing lead, arsenic, or anilines.

In factories engaged in manufacturing bicarbonate of soda and sal soda, the hazard was irritation of the skin of the neck, hands, and arms by reason of inadequate protection of these parts.

In the factory engaged in the manufacture of matches, the hazard was fire due to carelessness.

In all other factories, mentioned above, the only hazards were cuts and lacerations of the hands due to breakage of bottles in the course of filling, corking, labeling, and packing same.

The women and children employed in all of these factories were engaged almost exclusively in filling (hand and machine), corking, labeling (hand and machine), wrapping (hand and machine), packing, feeding automatic pill and tablet machines, and preparing various animal glands for drying and trituration. They were not engaged in compounding or handling drugs, except in two factories where women were employed in making hypodermic and other tablets by hand; in one of these, a woman was engaged in making bichloride of mercury tablets. The adoption of radical changes in the method, which were recommended, here resulted in the elimination of all possibility of mercurial poisoning.

Particular credit and praise must be given to the pharmaceutical houses for the careful method adopted by them for the manufacture and handling of tablets containing habit-forming drugs, these including opium and its derivatives (morphine, heroin, codeine, etc.), and cocaine. The women engaged in this work occupy rooms isolated from all other workrooms, their work being carefully supervised and frequent inspections made; all stock is carefully counted and checked up to prevent the possibility of any of these dangerous drugs being purloined. During the noon hour, when the employees are absent, and when the day's work is ended, the doors of all of these rooms are locked. By the use of these careful procedures and precautions, there is absolutely eliminated all danger of the development of any drug habit, such a habit being far more dangerous and injurious to the health and morals of the human race than any other which could be acquired, and constituting a hazard which is more dangerous than that due to fire, poisoning, or unguarded machinery.

CARBOYS

Many chemical factories use large quantities of acids in the preparation of their specific products, the acids usually used being hydrochloric, nitric, sulphuric, and acetic. These acids are usually contained in receptacles known as carboys, these con-

sisting of large glass bottles, with a capacity of about twelve gallons each, encased in a wooden box with the space between the bottle and the box wall filled with dried grass, shavings, or sawdust; the neck of the bottle projects several inches above the box and is protected in shipping by the placing over it of two small pieces of wood. While the employees handling these carboys use a great deal of care, carrying them about on wheeled carriers or by means of sticks fastened to the under side of the cleats with iron bands to support the bottom of the box, the storage of these carboys leaves much to be desired.

During the investigation, many of these carboys were found uncorked, thus permitting the fumes of the residual acids to escape into the workrooms; some filled carboys were found closely stacked on top of each other; and some were found standing near steam pipes, or in the direct rays of the sun, either of which conditions could increase the pressure within the carboy to such a degree that it would either be cracked or explode and spill its contents upon the floor. To eliminate accidents from the handling of carboys containing acids, it is suggested that the following information in the form of a poster, prepared by the New York State Industrial Commission for free distribution, be displayed conspicuously throughout the entire plant:

Permit no rubbish or rags near carboys.

Always use a tilting apparatus, commonly known as a carboy inclinator, or a siphon to empty carboys.

When carrying a carboy, see that the pathway is clear so that you will not stumble.

Do not carry a full carboy which is uncorked.

During warm weather, always remove part of the contents from full carboys.

When carboys are received, loosen the stoppers in order to relieve pressure.

Do not pile carboys on top of each other.

Do not place carboys near steam pipes, or near windows through which the direct rays of the sun may fall upon them.

When storing filled carboys, elevate them on strips of wood, or on gratings.

Do not place too many carboys in one place.

Do not permit empty, or partly empty, carboys to remain uncorked

Do not store carboys containing sulphuric or nitric acid in wooden buildings if it is at all possible to place them elsewhere.

In every room where carboys are handled, keep a tub filled with water, and a bottle of solution of bicarbonate of soda for emergency use in the event of acid being spilled on a workman.

Examine all carboys occasionally to determine if the box is sufficiently strong to stand the strain of the weight of the carboy and its contents.



FIG. 4 — A safe method of lifting acid from a carboy by the use of a glass tube to which is attached a rubber hose and small pump. A slight pressure forces the acid out of the carboy into the receptacle. (Photograph furnished by Kalbfleisch Corporation, New York City.)



FIG. 5 — Man exhibiting apparatus with which acid may be ejected from a carboy. The attached rubber cone is placed inside the glass bottle and the pump operated which forces the acid out of the glass tube. very little pressure required. (Photograph furnished by Kalbfleisch Corporation, New York City.)



FIG. 6 — Improper way of obtaining acid from a carboy. Operator may lose control of carboy, may knock over jug, or the acid when being poured, may spill or splash in eyes or on hands, clothing or feet of person tilting the carboy.

FIRES AND FIRE HAZARDS

All materials except brick, stone, and metals are susceptible to change by fire, and in these materials, which are ordinarily considered incombustible, both physical and chemical changes may take place if the temperature is raised to a sufficient degree.



FIG. 7 — Proper method of conveying a carboy filled with acid by the use of a "bicycle." Note broken carboy at left with carrying sticks for conveying the carboy about. The old wooden box does not seem sufficiently strong to hold the glass bottle. The bottom dropped out of the carboy containing the acid, which was broken, and contents spilled on the ground.

Combustion of material, which is always accompanied by heat and light and results in chemical change, may be caused by direct ignition with flaming material or glowing substances, spontaneous heating, spontaneous combustion, friction, chemical reaction, the action of light, shock, or static sparks. It must not be understood that all exhibitions of heat and light are necessarily instances of combustion, an example of this being the heating of platinum wire to incandescence without any chemical change taking place.

This subject is a large one and covers a wide range; hence only a few of the danger points will be cited, viz.: Direct igni-

tion with flaming material does not usually occur with inorganic substances, but there is a large list of organic substances which are easily ignited when present in a state of fine division (dust) and in sufficient quantity; an example of ignition by a glowing or highly heated, not flaming, substance is the flaming of carbon disulphide by contact with a glass rod heated to 120° C.

Spontaneous heating has been found to occur in dye woods, slag heaps, lampblack, charcoal, oily steel borings, and burnt limestone.

Chemical reaction, changes which take place when certain substances are brought together, furnishes a long list of materials which may produce fire; among these are sulphuretted hydrogen with bronze powder or nitric acid, and sodium peroxide with any organic substance or with furnace gases.

Friction, if the temperature of the substances brought together be raised sufficiently high, can easily cause certain materials to take fire, examples of this being the grinding together of sulphur and potassium chlorate, and instances of the ignition of alcohol vapor by the heat generated by the attrition of metals; i. e.—sparks produced by grinding a metal substance on an emery wheel in close proximity to the alcohol.

Shock will cause fire and explosion of fulminates on the very slightest provocation; none of this material is manufactured in the State of New York, but some of it is handled in the manufacture of primers and blasting caps. Where explosives are carried from one building to another, as for instance from magazines to workrooms, the employees carrying such explosives should not be permitted to follow each other closely, but should allow an interval of at least one minute in time, or one hundred feet in distance.

Static sparks, caused by the operation of belts in cold weather, etc., will ignite the vapors of many volatile liquids when these vapors are present in the air in sufficient quantity and proportion; among such liquids met with in industry in this State are benzol, benzene, ether, alcohol, and chloroform.

The carrying of matches or other flame producing devices, by employees for their personal use, may be the cause of fires and explosions in such places as have previously been described; this

may be due to a match being accidentally pulled from the pocket and falling to the floor where it is stepped on and ignited. In all plants in which explosives, volatile liquids, or inflammable substances are made or used, the clothing of all employees should be searched for matches, by authorized persons, at least twice a week, such search being made at irregular hours in order to prevent any warning being given. As the guilty person will usually deny his guilt, the causation of fires by smoking, carrying of matches or cigar lighters, or the possession of lenses, cannot always be definitely proved; hence, many firms which handle black powder, nitrostarch, trinitrotoluol, etc., seek to eliminate this danger by exercising the right to immediately discharge any employee detected with any of these articles in his possession. This discharging of employees for these violations should be made a mandatory rule of the Industrial Code because it was found that fires and explosions had occurred in various factories from the ignition of benzine vapor, flashlight powder, methyl alcohol, and ethyl alcohol by such agencies as static sparks, electric fuse sparks, sparking motors, and sparks due to the nails in workmen's shoes striking on concrete floors, and it is reasonable to believe that the careless handling of matches, lenses, etc., could easily produce like results. To determine the extent of violations of the rules against carrying matches in plants where serious fire hazards were present (plants manufacturing wood alcohol, colors, etc.), the investigators would casually ask a workman here and there for a match, and, in many instances, the matches were immediately handed out, thus showing the little attention given to prohibitory notices regarding them.

All buildings in which such explosives as fulminate of mercury and trinitrotoluol are made or handled, should receive careful attention as to location, construction, and equipment; these buildings should be at least two hundred and fifty feet from each other, constructed of fire-resisting material, equipped with the necessary number of doors opening outward, and provided with floors covered with lead in such manner that there are no crevices.

In addition to the above, all buildings in which trinitrotoluol is handled or used should be equipped with sprinkler systems in

which an extinguishing agent is used, as well as with patent fire extinguishers, and the necessary water connections for fire hose. In all buildings in which the material handled or made presents a possible fire hazard from sparking of motors, fuses, electric bells, and electric switches, all these electrical devices must be placed outside of any room in which such hazard may be present.

Considerable heat is generated by the passing of sunlight through glass and it is believed that many barn fires, which are usually charged to tramps smoking in hay lofts, are really due to the action of the sun's rays passing through the window glass, or, through glass bottles or other glass receptacles placed on shelves or ledges, such glass acting as a lens. While the danger of fire from this source may seem remote, the State of New Jersey has recognized its possibility and prohibits the carrying of lenses by employees or others into any building in which dynamite, nitrocellulose, or trinitrotoluol is made or used.

In one instance in which a fire occurred in a factory in New York State engaged in the manufacture of dyes, it was found that the finished product, in the form of fine powder, was placed in open barrels along a wall and near the windows; the path of the fire was traced directly from these barrels to the other parts of the factory building and, as no reasonable cause could be found which would indicate contact with sparks or flame, it is within reason to believe that this fire may have been started by the action of the rays of the sun, passing through the window glass, on the powdered dye in the barrels.

Spontaneous combustion, or ignition, has been given as the cause of many fires in factories principally because no other reasonable cause could be found, and in most instances this conclusion has been perfectly correct.

When one considers the long list of substances which, by heat, friction, chemical combination of gases, action of light, or pressure, can be ignited, or cause other substances near them to burst into flame, it becomes apparent that not only men having a chemical training, but every factory proprietor, mercantile owner, superintendent, and foreman should have a full knowledge of the physical properties of and be fully acquainted with the list of

substances which should not be stored in the same room or closet, or near heated pipes, or in direct sunlight.

The oily rag, or piece of oily waste, usually found on the floor, shelves, or other places in engine rooms, which is used to wipe oil



FIG. 8-- The victim of a color flash. It may have been a vapor explosion, dust explosion or spontaneous ignition, the cause being questionable.

and dirt from machinery constitutes a fire hazard in any factory, but particularly in factories where there may be, either present or generated, hydrogen or carbon monoxide gases, or vapors of

ether, benzine, alcohol, benzol, chloroform, acetone, amyl alcohol, or amyl acetate. Investigators found instances in which two pieces of oil soaked waste lying close together on the floors of factories, but entirely away from fire, were smoldering; it is a well known fact that cotton waste moistened with oil and permitted to remain covered in a warm place for a time will have its temperature raised sufficiently to ignite it, and that a focused ray of sunlight passing through a window and reaching oily waste will readily generate sufficient heat to raise such oily waste to its kindling point.

Sodium peroxide, which is manufactured in two factories in the State of New York, must never be permitted to come into contact with any organic materials owing to its high oxidizing properties; during its manufacture it must be guarded against contact with furnace gases, through leaks in retorts, etc., because this will result in a chemical combination which can cause an explosion. Metallic sodium will decompose water with the generation of sufficient heat to ignite the liberated hydrogen gas and thereby produce an explosion.

In the manufacture of Prussian blue, the drying process is a danger point due to the possibility of overheating the drying device; instances of the drying material being aglow, from this cause, when the drier was opened were found during the investigation. Antimony and chlorine gas, brought into contact with each other, will ignite and produce a fire of their own accord. Dust, and vapors of alcohol, benzine, benzol, ether, and turpentine may readily be ignited by static sparks created by rapidly revolving belts, especially in dry cold weather, and result in both fire and explosion. Nitric or sulphuric acid, escaping from breakage or upsetting of carboys, coming in contact with excelsior, cotton rags, or wool will readily ignite these substances. The spontaneous ignition of coal stored under certain conditions is such a familiar subject that nothing more need be said about it in this bulletin. Ammonia in contact with chlorine gas, alcohol in contact with permanganic acid, and the sudden warming of impure guncotton to a temperature of 186 C. will all produce spontaneous explosions.

. Many other conditions, in which spontaneous combustion and explosions may take place, could be named, but an attempt has been made to confine this Bulletin to those substances which are actually manufactured or handled in the State of New York, and constitute common hazards; some substances are as dangerous, if not more so, than those mentioned, but as they are rarely, or never, used here, they need not be considered.

Spontaneous combustion is usually of a hidden and mysterious nature, occurring in places where men seldom enter or work; hence, the application of knowledge of chemical reactions produced or taking place when certain materials are brought together, this reaction sometimes being slow and sometimes sudden, is essential in every branch of the chemical industry.

According to Schwartz (Fire and Explosion Risks, pp. 70-71), in order to aid in the prevention of fires, the following materials should not be stored together indiscriminately:

Organic substances with nitric acid, carriers of oxygen, ozone, peracids, picrates, chlorates, liquid air, fulminates, fats, or oils.

Lampblack or carbonaceous substances with fats, oils, sulphur, metallic sulphides, or carriers of oxygen.

Metals in powder, as bronzes, with damp substances, water, dusty materials, mineral acids, oil of turpentine, peracids, or flowers of sulphur.

Resins, turpentine, or ethereal oils with iodine, chlorine, mineral acids, carriers of oxygen, or dangerous liquids, probably the most dangerous of these being nitric and sulphuric acids.

Peracids with organic substances, sulphur, metallic powders, bronzes, carbon, or dangerous liquids (liquids, the vapors of which are inflammable and form explosive mixtures with air).

Carriers of oxygen, liquefied oxygen, or ozone with fulminates, chlorates, organic substances (coal, sugar, starch), picrates, bronzes, metallic powders, dangerous liquids (ether, acetone, or carbon disulphide), lampblack, resins, phosphorus, sulphur, nitric acid, hydrogen sulphide, or dusty substances (fibrous waste).

Dangerous liquids (ether, acetone, benzol) with carriers of oxygen, ozone, liquefied oxygen, oil of turpentine, ethereal oils, or peracids.

Carbides and *quicklime* with water, damp substances, or acids of any kind.

Strong nitric acid with oil of turpentine, hydriodic acid, organic substances (cotton, flax, hemp, etc.), sulphuretted hydrogen, carriers of oxygen, ozone, carbides, metallic powders, strong sulphuric acid, fulminates, picrates, or chlorates.

Carbon disulphide with carriers of oxygen, or liquefied oxygen.

Fulminates, picrates, or chlorates with mineral acids, organic substances (starch, sugar, or coal), sulphur, carriers of oxygen, ozone, or liquefied oxygen.

Dusty materials (fibrous waste, flour, lampblack) with bronzes, metallic powders, carriers of oxygen, ozone, or liquefied oxygen.

Sulphur or metallic sulphides with carbon, lampblack, fats, oils, chlorates, or phosphates.

Water (solutions) or *damp substances* with quicklime, carbides, metallic powders, bronzes, or light metals.

Phosphorus with chlorates, carriers of oxygen, ozone, or sulphur.

Nitrates or *substances impregnated with saltpetre* with sulphuric acid.

Fats or *oils* with organic substances, lampblack, carbon, metallic sulphides, or pyrites.

OTHER HAZARDS AND DANGERS

Varnish making, oil refining, soap making, lime burning, bone burning, illuminating gas manufacture, fat rendering, and glass making are really all chemical processes and can be included in the chemical industry because in them a new substance, or series of products, is produced from something else. Lack of space renders it impossible, in this bulletin, to treat all such processes under one heading because each process possesses some particular hazard while all are surrounded by various hazards.

The manufacture of varnish is accompanied by various hazards to employer and employee. In the process of boiling, the employee is subjected to the danger of splashes of boiling varnish and must be protected by means of special clothing including masks, gloves, aprons, shoes, and leggings; the latter must be of such type as to

be readily removed and must be without straps or other devices in which the material could lodge. Thinning rooms must be well ventilated and all fire precautions mentioned under explosives must be rigidly observed.

The dangers in oil refining are principally the possibility of fire and explosion from gases accumulating near stills and retorts, and leaks from stills. Empty barrels, which previously contained the oils, are a fire hazard when stored in quantities indoors. All precautions mentioned under sparking must be rigidly observed. Tanks, stills, and condensers are usually protected by widely separating them, surrounding them by moats, or building fire walls around them. Wooden buildings used as box factories, can factories, and filling sheds are rapidly being replaced by buildings of fireproof construction, thus aiding greatly in the elimination of an exceedingly great fire hazard from one industry in this State. The elimination of danger to the men employed in the cleaning of stills is a problem which has been solved by the oil refiners, and such men are now surrounded by all the precautions which experience has shown to be necessary.

The principal danger in soap making is from the possible boiling over of the material and this necessitates placing of tanks in such a manner as to prevent the trapping of the workmen in the event of such a contingency arising. The storage of raw material is also attended by some dangers, but this has previously been discussed.

Lime burning is principally dangerous from the irritation produced in the eyes, noses, and throats of the workmen, and from the fire hazard existing in the freshly calcined material.

Workers in plants manufacturing illuminating gas occasionally suffer from carbon monoxide poisoning, but practical experience has demonstrated that the precautions observed in this industry render it a very safe one.

Fat rendering is accompanied by the danger of burns from the rendered material as well as infection of the workmen by the material used.

Glass making, in addition to the danger of the inhalation of dust during the mixing process, carries discomfort from the great

heat, the danger of burns, and serious eye hazards from the high light which emanates from the molten glass and the tuyeres of the furnaces.

EXPLOSIONS AND EXPLOSIVE SUBSTANCES

Explosions are by no means confined to any one particular industry, and while serious ones have occurred in the chemical industry in the past, when we consider the character and quantity of material used, these are comparatively few as compared with other industries.

We occasionally hear of the explosion of household stoves, oil heaters, gas stoves, lime kilns, steam boilers, steam pipes, motors, grindstones, tanks, golf balls, and polishing wheels, but the great majority of these are due to carelessness or improper use and handling rather than to any inherent defect.

Explosions, accompanied by property damage and loss of life, have occurred in flour mills and cement works (dust explosions), silos, and in the handling of crucibles containing molten metals, but none of these can be called a chemical factory.

In various parts of New York State, explosions have occurred in varnish works, factories making carbon disulphide, wood alcohol plants, color works, nitro-powder factories, in various branches of the electro-chemical industry, and in factories in which the products are manufactured under processes never before tried out, the actual composition of the intermediate product not being definitely known. Something has always been learned from these accidents, because the information which has been secured regarding the cause of same has been universally distributed to aid other manufacturers in avoiding the occurrence of similar disasters.

From the foregoing, it is shown to be essential that all employees who are in any way connected with the processes of manufacture, or the handling of materials, which are accompanied by fire and explosion risks and hazards should be thoroughly instructed, either verbally or by means of posters, as to the nature of the product under their care, this dissemination of information being a long stride toward the prevention of injury to life and limb, and the elimination of property damage.

There is published a large amount of information regarding the definite conditions under which certain chemicals will spontaneously ignite or explode, or enter into combination with other materials to produce a dangerous mixture or compound, or be dangerously acted upon by sunlight, but no general rule can be given to prevent fires and explosions in the manufacture or preparation of all substances as the processes vary and require various safeguards. In the manufacture of bleach and caustic soda, chlorine gas is generated and a vigilant watch must be kept on all pipes conveying the materials in order to detect the first sign of a leak of this gas. In the nitration of toluol and benzol, great care must be exercised to insure that all apparatus is perfect as the breaking of a belt, or the stoppage of a machine, may be accompanied by the generation of sufficient heat to ignite the mass and thereby cause explosion of the nitrator. As circulation of cold water in a jacket surrounding the nitrator is an important factor in preventing the sudden generation of sufficient heat to explode the nitrator, sight glasses, through which this circulation of water may be observed and watched, are essential on all nitrators.

In a factory using methyl alcohol and aniline, considerable property damage was caused by a fire which originated from the ignition of vapors by a sparking motor.

One serious fire, which resulted in the complete destruction of the plant, was caused by the ignition, by static electricity, of the volatile product of a lacquer.

An explosion, which resulted in partial wrecking of the building and such serious injury to twelve employees as to necessitate their removal to a hospital, occurred in a benzol plant. This building was of brick construction and contained on the ground floor, among other devices, furnaces, and large closed steel tanks for holding benzol, these tanks being so located that the upper portions, provided with manholes for entrance when necessary, were reached only by means of a mezzanine gallery. While one of these tanks was being filled, the manhole was left uncovered and as the liquid benzol rose, the air within and the benzol vapor, produced by evaporation of the liquid, was forced out of the tank.

This vapor-laden air, being of a higher specific gravity than ordinary air, slowly sank to the ground, was caught by a current of air which carried it into the furnace, became ignited, and the explosion was produced. Benzol vapor was found flaming at the manhole opening and the path of the fire was easily traced, by the charred woodwork, from the furnace to the top of the tank. To prevent a recurrence of this kind, tanks containing such inflammable material should not be stored in the same room or building with a furnace unless they are separated therefrom by means of a firewall, without openings, extending from the floor to the ceiling, communication between the parts so separated being had by means of an outside balcony entrance with entrance to the tanks through double, vestibuled, self-closing doors.

An explosion and fire, which killed five employees and completely destroyed all of the buildings of which the plant was composed, occurred in a factory engaged in the manufacture of trinitrotoluol. The building which was of fireproof construction, equipped with fire-fighting apparatus consisting of several lines of 1½-inch hose and two lines of standard 2½-inch hose, contained four grainers (metal tanks in which the partly finished product is converted from the liquid to the crystalline state by mechanically stirring it for seven or eight hours), and one nitration tank properly equipped with stirring device and a water jacket for the circulation of cold water to keep down the temperature of the mass within the tank; this building was located at least seventy-five feet from all other buildings used in connection with the manufacture of the product (trinitrotoluol).

Fire, of unknown causation, started in one of the grainers and was quickly communicated to the other three. The employees in this building immediately turned all available streams of water on the fire, but were soon driven from the building into the yard where, reinforced by other employees with hose attached to fire hydrants in the yard, they continued fighting the fire until the nitrator, which had been charged with toluol and nitrate acid immediately preceding the fire, exploded with such force as to force the roof upward and the walls outward killing and burying five of the men in the debris; the fire then quickly spread to the other buildings of the plant.

When ignited, trinitrotoluol burns fiercely and the action of streams of water from small diameter hose seems to be of little avail against the burning mass; hence, in the State of Pennsylvania where several plants were engaged in the manufacture of large quantities of this material during the present war, the plants were required to be equipped with sprinkler systems with sprinkler head located directly above the grainers, but such provision could not be required in the State of New York under the present law because these buildings were only one story high.

It is a question whether ordinary water discharged from a sprinkler head located directly above a grainer would effectively quench a fire in trinitrotoluol, but we do know that sprinkler systems using water and carbonic acid gas, or carbon tetrachloride, some of which are now installed in cleaning and dyeing establishments, would prove effective in quenching such fire in its incipient stage.

In one plant in New York State, engaged in the manufacture of this same product (trinitrotoluol), electric switches, motors, and fuses are located in safe places outside of the buildings, but the buildings, which are very close together, are constructed of non-fire-resisting materials, are not provided with lead covered floors, have no sprinkler systems (because it is not mandatory under the present law), are heated by unprotected heating pipes and devices, and are lighted by incandescent lamps which are not provided with vapor-proof globes. In the absence of mandatory rules covering these points which are in force in other states, there is always present here a serious hazard of fire and explosion.

A fire and explosion occurred in a plant, in this state, engaged in the manufacture of aniline colors and the production of chemically pure materials required in the color production, the principal one of the latter class being absolute alcohol. The information obtained from an employee revealed the fact that the receiver of the distilling apparatus, which had been filled with alcohol, was overflowing and the liquid running on the floor; he immediately tried to replace this one with an empty container, but while so engaged there was a flash of flame and a terrific explosion which destroyed the condenser and building, but left the still unharmed. The exact cause of the ignition of the alcohol

was not determined, but, owing to the volatile and inflammable nature of the liquids being handled, the following conditions which were found constituted fire hazards, viz.: In an adjoin-



FIG. 9 — Devices for fire prevention and fire extinction provided in a factory where inflammable liquids are used. Note sprinkler system, vapor-proof electric light globes, sliding fire-proof door, extinguishing apparatus, asbestos blanket and telephone to report fire.

ing room, fan-tail gas lights were burning although in other parts of the building these had been replaced with incandescent electric lamps following out a scheme to replace all gas lights with elec-

tricity; although the floors were of concrete, the employees were not furnished with rubber-soled shoes or powder shoes to eliminate the danger of the creation of sparks; and belts and shafting were not electrically grounded.

In one factory, also engaged in the manufacture of aniline colors, there occurred a fire which caused considerable property damage, but did not injure any of the seventeen employees at work in the building in which the fire started. In this building there were placed, near windows through which the sun was shining upon the contained material, a number of barrels containing the sodium salt of picramic acid (azo-metaphenylenediamine) a substance which could readily be ignited by a spark, or by friction during the process of grinding it, and which, for greater safety, is always changed from the powder form to a paste before shipment. The only information obtainable was to the effect that a blaze suddenly appeared in one of the barrels, and, while any opinion as to the cause of this blaze would be mere speculation, it is not improbable that it was due to spontaneous heating of the material through the action of the sunlight.

In a New York City factory, engaged in the blending and standardizing of colors, there occurred an explosion which partly wrecked the five-story non-fireproof building and severely injured several of the employees. On this particular morning, several men were engaged in the process of mixing, in angle mills or drums, "batches" of color and had placed in one drum three hundred pounds of alizarin brown and eighty pounds of common salt; in addition to the color and salt, there were placed in the mill iron balls for the purpose of pulverizing and mixing the mass by their rolling motion while the drum was being revolved. After revolving this mill for about ten minutes, the contained material was seen to be on fire and one of the men attempted to adjust a cover thereto, but was driven back by the intense heat from the now fiercely burning mass. The men started to run from the building, but before they reached the sidewalk, the drum exploded and set the building on fire.

The material itself may have become overheated, or a particle of metal, detached from one of the balls during its revolutions, may have become heated to a sufficient degree to ignite the mass:

similar operations had been performed many times without mishap, and it was believed that the use of these metal balls in the revolving drums was perfectly safe. The replacing of the metal balls by others of hard wood would undoubtedly diminish this hazard in any color which may be ignited by sparking.

DUST EXPLOSIONS

In any trade or process, the formation of dust creates a serious fire and explosion hazard, this being particularly true when the material is of an organic nature as coal, charcoal, powdered drugs, aniline colors and starch, or metallic as iron, aluminum, antimony, and certain alloys. These materials form a cloud of an inflammable nature which may readily be ignited by contact with an open flame or even with a spark, and take fire with the formation of gases which will support combustion and, in turn, be ignited by the flame of the burning dust particles. Hence, it is an accepted fact that every dust explosion really consists of two explosions, the first from the ignition of the dust itself, and the second from the ignition of the combustible gases formed; the lapse of time between the two explosions is so extremely small that they may be said to occur simultaneously. In all descriptions of fires preceded by explosions, it will usually be noticed that there is a statement to the effect that two explosions were heard, the second following the first after an extremely slight interval of time.

Accumulated dust on rafters, ledges, beams, and walls, which is always in a state of extremely fine division and usually highly desiccated, may be shaken from its resting place by the first shock or blast of air, and, being thrown into the flame of the combustion gases, bring about a prolonged burning through which the myriads of particles are ignited and the flame extended to every part of the room, or place, where the dust exists. This burning dust and gas has such a tremendously explosive force that the roof is easily blown off, windows blown out, and walls forced outward after which the fire usually completes the destruction begun by the explosion. The explosion of dusts, usually by sparking, during the grinding and pulverizing of organic materials has already been referred to.

The danger of such explosions can be minimized by keeping all ledges, walls, trusses, ceilings, window sills, floors, and machines free from accumulation of dust either by frequent removal of the dust or the use of a vacuum system of collecting same, and observance of all other precautions mentioned herein and specified in the New York State Industrial Code.

UNSAFE PRACTICES

It can be said, without any fear of contradiction, that unsafe methods and practices (which include carelessness, chance taking, disregard of established rules, and lack of knowledge or judgment), cause more accidents with injury to limb and body, loss of life, and damage to material and property, than the accidents which are classed as unavoidable because their occurrence cannot be foreseen. In one chemical plant, employing about five thousand men, there occurred, during a period of six years, one thousand two hundred and seventy accidents of which ninety-two were due to some of the above.

Many firms furnish their employees with safe devices which include safety ladders provided with non-slip bases, standard respirators, perfect hand-tools which are periodically inspected, clean goggles, special leggings, shoes, gloves, etc., but, if the employee places his ladder near an open vat in such manner that he may slip from it, or with it, and fall into the vat which may contain a dangerous liquid, fails to properly care for and use his special clothing, continues to use and work with a tool which is broken or defective, applies a hoisting sling in such manner that it may slip or be cut and permit the load to fall, objects to wearing goggles or respirators, disregards the rules regarding the placing of material or opening of doors, etc., serious accidents may, and only too often, do occur, purely and solely through this carelessness and neglect. No matter where we may be — at home, on the street, on trains, or in factories, — we are at every hour of the day beset by chances of injury, but in the manufacture of chemicals, the workers are exposed not alone to the hazards met with in ordinary manufacturing lines, but to the additional ones created by the handling of acids, poisonous materials.

and hot liquids, and here above all other places short cuts and the game of chance (the unsafe way) usually fail.

Herewith are enumerated some of the unsafe practices which are commonly met with on the part of the employee and his employer, viz: —

The employee may

Neglect to use and keep clean his respirator, goggles, leggings, or gloves.

Wipe his hands on his handkerchief or clothing instead of properly washing them with soap and water.

Eat and drink in the workroom contrary to the posted notice prohibiting it.

Disregard the advice to wash his hands, face, and hair, and take regular baths.

Allow surplus material, carted or carried to fall and remain on the floors or stairs.

Neglect to change his regular clothing even though suitable and adequate articles are provided for this purpose.

Throw tools in aisles or passageways.

Carry matches or cigar lighters into, or smoke in, places in which inflammable liquids or gases are present.

Continue to wear leaky or defective shoes when he is aware that they no longer serve the purpose for which they were intended — protection of his feet.

Neglect to seek first aid for apparent slight illness, eye injuries, cuts, bruises, or burns.

Stack material, while transporting or storing same, in such manner that the entire load may fall.

Place ladders near open vats which are filled with liquids of a dangerous or poisonous nature.

Throw oily rags and other refuse near steam pipes.

Enter a tank without knowing whether it contains fumes or vapors of a dangerous nature; or, fail to provide himself with a life line held by an assistant outside of the tank.

Lower a candle, or an electric light globe which is not furnished with a safety vapor-proof globe, into a tank in order to observe conditions therein.

Sweep floors, walls, or machines during working hours.

Place explosive material, acids, or volatile liquids near steam pipes.

Leave his station without permission when he is supposed to constantly watch a tank or device which may explode by the generation of unusual heat if the cooling device fails to work.

Blow a stream of compressed air into an acid carboy in order to force out the acid content.

Allow salts or liquids of a dangerous or deleterious nature to remain on the floor when accidentally dropped.

Neglect to clean tools which have been in contact with poisonous or explosive materials.

Without permission, try to melt, burn, or otherwise destroy containers or utensils in which certain dangerous or explosive materials have been stored.

Fail to properly use the locks and chain provided for the purpose of locking control valves to tanks when men are at work therein.



FIG. 10 — Showing the proper and improper methods of piling material. Slipping of certain separate units of the pile may cause the entire pile to fall which may injure the feet and legs of workmen passing or working near the pile.

The employer is charged with the duty of providing all the reasonable and necessary safeguards which experience has shown to be effective to prevent accident and illness; strictly observe all the provisions of the Labor Law; and utilize recommendations such as are made at the end of this report, which tend to increase the safety and efficiency of his employees.

Few branches of industry deal generally with material in solution as does the chemical industry in which the numerous and varied processes require many types, sizes, and shapes of tanks, autoclaves, nitrators, sulphonators, condensers, kettles, stills, and retorts. With the exception of steam boilers, which are regu-

larly inspected by city and state authorities, and insurance companies, little attention is given officially to the inspection of these other devices to determine their capacity for withstanding certain strains and pressures. This subject involves such a mass of technical detail, particularly in the field of mechanical engineering, that it would require a special article, beyond the scope of this Bulletin, to properly deal with it; hence, there is dis-



FIG. 11 -- Man engaged in drawing a crucible from a furnace. He is provided with a face-mask consisting of a wooden form in which are inserted dark glasses for vision. This device is held in place by a mouth grip and when not in use hangs by a cord about his neck. Note also body and arm protection.

cussed here only one of the most important items — safety valves.

During the investigation, it was found that many of these tanks, carrying varying pressures, were not provided with any type of safety valve; two instances were found in which the absence of this safety device caused explosions, one resulting in loss of life while the other was accompanied by property damage. In another instance, a small three-quarter inch safety valve was provided on a tank in which the combination of a large mass of

two substances was accompanied by the generation of such a volume of steam that the safety valve was inadequate to properly relieve the increased pressure; hence, the tank exploded, wrecking the building and injuring one man. The tank was also provided with a cooling jacket with the necessary sight-glass, but it could not be determined whether the stirring device failed to work, or the circulation of water in the jacket was interfered with. In one case, the saving of a few hundred feet of round iron resulted in the faulty bracing of a rectangular tank with the natural consequence that the tank bursted and there was lost a large amount of its valuable liquid contents. There was reported, from one factory, the sudden bursting of a steam-bottom tank used for "cooking"; examination of this tank proved that the stay bolts, used for bracing the flat surface, were not sufficient in number and were improperly spaced to withstand the pressure carried on the steam bottom.

A safe practice to observe in drawing up specifications for the construction and installation of these devices, previously named and described, is a strict adherence to the rules relating to the construction, installation, inspection, and maintenance of steam boilers as given in Bulletin No. 14 of the Industrial Code, published by the New York State Industrial Commission. All safety valves should be of sufficient area to discharge all of the steam, which can be generated in the tank or boiler, without permitting the pressure to rise more than six per cent above the maximum allowable working pressure, or more than six per cent above the highest pressure at which the safety valve is set (Kent, Mechanical Engineers' Handbook, 9th edition, pages 934-935; Bulletin No. 14, Industrial Code, New York State Industrial Commission, page 93 and sections relating to safety valves).

FIRST AID KITS

In the factories investigated, it was found that first-aid kits were provided, in accordance with Rule No. 178 of the Industrial Code, not only in all of those in which power-driven machinery was used and more than ten persons were employed, but in many where less than ten persons were employed. Owing to the handling of acids, alkalines, and other substances which

are irritant or injurious to the eyes, nose, and skin, the investigators are of the opinion that the provisions of Rule No. 178 should be extended to apply to all factories included in the general chemical industry regardless of the number of employees in a specific factory. To the articles now required to be carried in the first-aid kit, the following items should be added: acetic acid solution,— $\frac{1}{2}$ of 1% (for use in eye injuries from caustic alkalines); and bicarbonate of soda solution,—1% (for use in eye injuries from acids).

Hearty co-operation of the manufacturers and plant owners, in putting into effect rules and recommendations to better safeguard the health and lives of their employees was a pleasant feature of the entire investigation; wherever, in the opinion of the investigators, it was found that orders were necessary to correct unsatisfactory conditions, or dangerous conditions, in the various factories, such orders were issued under the present Labor Law and Industrial Code. Two hundred and one orders were issued and compliance therewith secured, and more than fifteen hundred physical examinations and medical inspections were made during the course of the investigation.

RECOMMENDATIONS

The conclusion reached by the investigators, as a result of this survey, is that the general conditions found show the necessity for the drafting of a number of rules by the New York State Industrial Commission, which shall be placed into effect as law to remedy the various conditions which are dangerous to employee and employer alike.

The recommendations for these rules are as follows:—

1. All tanks, digesters, autoclaves, sulphonators, nitrators, stills, or other like devices, in which a pressure is carried, or a pressure may be generated, shall be provided with one or more safety valves of sufficient size and capacity to relieve all of the pressure from the tank, digester, autoclave, sulphonator, nitrator, or other device without permitting the internal pressure to increase more than 6 per cent above the maximum allowable working pressure, or more than 6 per cent above the highest pressure at which the safety-valve is set. The seats of these valves, when necessary, shall be constructed of material which cannot be chemically acted upon by the material within the tank or other device, and the discharge point of such valves shall be so placed as to prevent the discharged material from entering or re-entering the rooms of the factory when such valve is in action (blowing off).

2. In all chemical works where inflammable gases, vapors, or dusts are present, or are likely to be present, and artificial illumination is necessary, the lighting system shall be of such type as to prevent ignition of any gas, vapor, or dust which is present or may be generated or produced. Switches, controllers, and fuses shall be so located as to insure that there shall be no means by which such gases, vapors, or dust may be ignited.

3. All shafting and belts shall be electrically grounded, and no motor of a sparking type shall be installed in any place in which there is, or may become, present any danger of the ignition of gases, vapors, or dusts.

4. The practice of lowering electric light globes into tanks, or other like devices, in which vapors, fumes, gases, or dusts are, or may be present, shall be absolutely prohibited unless such globes are of the vapor-proof type; even in these cases, it is desirable that the vapor-proof globes be surrounded by a protecting wire cage to insure against breakage of the globe.

5. The use of salamander stoves for artificial heating shall be prohibited unless adequate means is provided for conveying the products of combustion out of the factory, and shall be absolutely prohibited in all cases in which there is, or may be, danger of the ignition of gases, vapors, or dusts.

6. All future installations of radiators or steam pipes, used for artificial heating purposes, shall be so placed that a space of not less than two inches shall be left between the wall and the radiator or steam pipe. In all cases where explosive or inflammable materials are made or used (picric acid, trinitrotoluol, etc.), these heating devices shall also be protected by a wire screen.

7. When repairs are necessary on furnaces from which gases or fumes may escape, or be diffused, the repairs shall be made in such manner as to prevent the escape of such gases or fumes from the furnace.

8. In all drying ovens or drying rooms where there exists a danger of the setting on fire of dusts or gases, by sparking or by contact of the gases or dust with steam pipes, the air-intake of all fans used in connection with the drying system shall be so placed as to insure that the incoming air shall be absolutely free from contamination by such gases or dusts.

9. Suitable goggles, or other protecting devices, fitted with lenses which offer the greatest resistance to blows, shall be provided for all employees engaged in breaking, chipping, crushing, or grinding of hard, or tenacious material. When acids, alkalies, dangerous or poisonous chemicals, or other materials which present an eye hazard, are used, masks or goggles must be provided at all times. It shall be the duty of the employer to insure that these devices shall be worn by, and kept clean by, the employee.

10. Drowning tubs, containing plain water, or a solution of bicarbonate of soda, shall be kept available at all times in all places where acids are handled or used. Separate double lockers, or other suitable devices, shall be provided for each employee in all chemical works in which separate working clothing is required; these lockers must be kept clean at all times.

11. Where substances which have an irritant or corrosive effect upon the skin (aniline colors, Paris green, chromium compounds, paranitraniline naphthalene, acids, alkalies, etc.), are made, handled, or used, shower baths in the ratio of one for every twenty employees, shall be provided in connection with the ordinary washing facilities.

12. All valves connected with pipe lines, tanks, or vats shall be tagged, and so placed as to be within easy reach for safe and speedy operation when necessity for operation arises.

13. The State Industrial Commission shall prepare and furnish free to employers a poster detailing the safe method of handling and storing carboys which contain acids; sample of suitable poster is given in detail on page — of this report.

14. In all factories or plants manufacturing explosives, or handling same, where there is a possibility of spark generation by the attrition of metals, all employees shall be provided with powder shoes, or shoes with rubber soles, and with wooden shovels and sieves in which there are no protruding metal nails.

15. The carrying of matches, or other flame producing devices, into any factory where explosives, or oxidizing agents, or inflammable gases or liquids are made, handled, or used shall be absolutely prohibited.

16. In all buildings in which explosives, or inflammable gases or liquids, are handled, irrespective of the number of employees therein, all doors shall swing outward.

17. In all plants in which there are handled substances which are poisonous, or are dangerous to health or safety, it shall be mandatory for the employer to fully acquaint the employees with the nature and properties of the materials being handled. This shall be done by means of posters, printed in the English language, and by verbal instruction when necessary.

18. Explosives, or substances having powerful oxidizing qualities, or substances in which chemical combination may generate heat, flame, or gases shall not be stored in rooms or closets in such manner that they may fall or become combined and create a fire or explosion; these materials must be contained in kegs, cans, or other suitable containers. When volatile or inflammable liquids are stored in such rooms, or closets, the containers shall not be placed in direct sunlight, or near steam pipes, or in such manner as to permit freezing of the contents, and all such storage rooms, or closets, shall be suitably and properly ventilated by either natural or artificial means.

19. All tanks or vats, in which there is a possible danger from the sudden boiling over of the contained material, shall be so placed as to provide ample aisle-way in at least two directions to furnish safe exit for the attendants.

20. In all furnace processes of the electro-chemical industry in which the work requires the men to look into such furnaces, all employees so engaged shall be provided with suitable glasses or masks to properly protect their eyes from the glare of the arc of the furnace.

21. Fires or furnaces shall not be permitted within the same building with inflammable liquids unless such fires or furnaces are shut off by a suitable fire wall without openings, entrance to the different parts being provided from outside balconies through suitable doors.

22. Every pit, tunnel, vat, or tank, in which there is or may be a possible danger of fire, poisoning, or asphyxiation, which employees must enter shall be provided with suitable means, either natural or artificial, to properly ventilate it.

23. When, in the opinion of the Industrial Commission, it is necessary to

provide special clothing and devices to protect employees from inhalation of dusts, gases, or fumes, or prevent contact of their skin with irritant or poisonous dusts, gases, or fumes, the employer shall provide such articles of clothing and devices as may be designated by the Commission, and insure that such clothing and devices are used and kept clean. These articles shall include, as the necessity requires, respirators, protective devices for the head, neck, ankles, and feet; jumpers; overalls; aprons; shoes; gloves (ordinary or impervious); goggles, and masks.

24. In all plants engaged in the manufacture of trinitrotoluol, or other explosives designated by the Industrial Commission as requiring same, it shall be mandatory for the owner or proprietor to install suitable and effective sprinkler systems in all buildings in which such explosives are manufactured; these systems shall be so constructed as to locate sprinkler heads over all danger points.

25. When, in the opinion of the Industrial Commission, safety can be promoted by providing gauges on nitrators, or constructing and installing an impervious floor in such manner as to prevent the striking of sparks by contact of shoe nails with the floor, or by the fitting of stirring mechanisms with devices to warn the workmen if the agitator arms of the mechanism should suddenly stop, or by the change of the size of a pipe, or valve, to permit the regulation of the amount of acid delivered to a nitrator, or by the provision of a valve so arranged and installed as to require that the arms of the stirring mechanism on nitrators must be first in motion before any acid can be delivered to the nitrator through such valve, the same, or any of them, shall be provided as directed.

26. In the grinding of colors, or other materials, in which there is, or may be, a liability of ignition of the material by friction, hard wooden balls shall be substituted, whenever possible, for the metallic balls now used in this process.

27. All entrances to furnace rooms, cell rooms, and pot rooms of factories, when deemed necessary by the Industrial Commission, shall be so constructed and maintained as to minimize the creation of draughts and air currents. All windows shall be kept in proper repair at all times.

28. Wherever the filling of a receptacle, or receptacles, with volatile liquid, or liquids, detrimental to health, is performed, a suitable relief, to conduct the fumes or vapors to the outer air, shall be provided on such receptacle, or receptacles.

29. There shall be provided and maintained in good condition in all chemical plants, irrespective of the number of employees engaged therein, suitable and approved first-aid kits which shall contain, in addition to the list of contents now required by Rule No. 180 of the Industrial Code, solution of acetic acid, one-half of 1 per cent (for use in eye injuries due to alkalies), solution of bicarbonate of soda, 1 per cent (for use in eye injuries due to acids), and such lotions and medicaments as experience shows to be necessary to promptly relieve skin irritations due to contact with dyes, pigments, and other chemical substances. The list of articles and remedies required in these first-aid kits shall be revised from time to time, as the necessity requires, by the Industrial Commission.

30. Smoking and the carrying of matches, or other flame-producing devices (including lenses), shall be prohibited in any building, or on any premises connected therewith, in which explosives, or inflammable liquids or gases, are manufactured, handled, used, or stored.

31. When repairs are necessary on pipe lines, traps, machines, or other devices, which may contain substances of a nature detrimental to body, health, or life, such pipe lines, traps, machines, or other devices shall be thoroughly examined and properly cleaned before such repairs are made.

32. All pipes, valves, machines, vats, pans, or other container devices from which, or on which material may leak or remain, shall be frequently examined, repaired, cleaned, and otherwise kept free from such material.

33. Section 65 of the Labor Law should be amended to include all substances, materials, and agencies which are known, or may be found, to produce harmful effects on the human body. This list shall include aniline and its derivatives; phenol and its derivatives; benzol and its derivatives; toluol and its derivatives; all nitro and amido compounds; petroleum and its derivatives, particularly naphtha, benzine, gasoline, and kerosene; carbon monoxide; carbon dioxide; nitrous gases; amyl acetate; antimony compounds; carbon disulphide and tetrachloride; chromium compounds; acids; alkalies, and turpentine.

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Special Bulletins. In 1914 the quarterly Bulletin was superseded by the present series of special Bulletins on particular subjects. The list of these Special Bulletins is as follows:

Year 1914

- No. 57. Idleness of Organized Wage Earners on September 30, 1913 (7 pages). *Out of print.*
- No. 58. Idleness of Organized Wage Earners in 1913 (53 pages). *Out of print.*
- No. 59. Digest of the New York Workmen's Compensation Law (21 pages). *Out of print.*
- No. 59. (Revised). The Workmen's Compensation Law (47 pages). *Out of print.*
- No. 60. Statistics of Trade Unions in 1913 (145 pages).
- No. 61. Idleness of Organized Wage Earners in the First Half of 1914 (16 pages).
- No. 62. New York Labor Laws of 1914 (100 pages). *Out of print.*
- No. 63. Directory of Trade Unions, 1914 (104 pages). *Out of print.*
- No. 64. Changes in Union Wages and Hours in 1913 (116 pages).
- No. 65. Union Rates of Wages and Hours in 1913 (186 pages). *Out of print.*
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- No. 67. International Trade Union Statistics (24 pages).
- No. 68. Statistics of Industrial Accidents in 1912 and 1913 (175 pages). *Out of print.*

Year 1915

- No. 69. Idleness of Organized Wage Earners in 1914 (41 pages).
- No. 70. New York Court Decisions Concerning Labor Laws (118 pages).
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- No. 74. Statistics of Trade Unions in 1914 (146 pages).

Year 1916

- No. 75. Statistics of Industrial Accidents, 1914 (77 pages). *Out of print.*
- No. 76. European Regulations for Prevention of Occupational Diseases (77 pages). *Out of print.*
- No. 77. Industrial Accident Prevention (54 pages).
- No. 78. New York Labor Laws of 1916 (68 pages).
- No. 79. Anthrax (22 pages). *Out of print.*

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- No. 80. Fatal Accidents Due to Falls in Building Work (26 pages).
- No. 81. Court Decisions on Workmen's Compensation Law (406 pages).
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- No. 85. Course of Employment in New York State, 1904-1916 (50 pages).
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- No. 91. A Plan for Shop Safety, Sanitation and Health Organisation (32 pages).
- No. 92. Weekly Earnings of Women in Five Industries (21 pages).
- No. 93. The Industrial Replacement of Men by Women (69 pages).
- No. 94. New York Labor Laws Enacted in 1919 (72 pages).
- No. 95. Court Decisions on Workmen's Compensation Law (402 pages).
- No. 96. Health Hazards of the Chemical Industry (69 pages).

Monthly Bulletins. In October, 1915, was begun the publication of a monthly Bulletin as the official organ of the Industrial Commission which now administers the Department of Labor. The purpose of this Bulletin is to give current information concerning the work of the Department and the official acts of the Commission. The issues from October, 1915, to July, 1916, are out of print.

The Labor Market. In September, 1915, the publication of a monthly Labor Market Bulletin was begun, containing statistics as to employment, earnings and retail food prices with comparative figures back to June, 1914. The issues for October, 1915, to April, 1916, are out of print.

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